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TAYLOR *v.* BLACK MOTOR LINES, INC.

4-6676 160 S. W. 2d 859

Opinion delivered April 6, 1942.

Harry C. Robinson, for appellant.

B. F. Batts, Gaughan, McClellan & Gaughan and *P. A. Lasley,* for appellee.

McHANEY, J. Appellant seeks a license to operate a motor freight transportation line between El Dorado and Texarkana, Arkansas, over U. S. highway 82 and to serve all intermediate points. March 19, 1941, he filed his application for such license with the Arkansas Corporation Commission, in which he names appellees, Black Motor Lines, hereinafter called Black, and Southwestern

Transportation Company, hereinafter called Southwestern, as motor carriers operating over a part of the route, to-wit: Black, El Dorado to Magnolia, turn south on U. S. highway 79 to Shreveport, Louisiana; Southwestern, Texarkana to Magnolia, turn north on 79 to Camden and Little Rock. Appellees were duly notified, appeared and protested the granting of the license sought by appellant. The license was granted by the commission. Appellees appealed to the circuit court of Pulaski county, where, on a hearing by the court on the record made before the commission, the latter's order granting said license was canceled, set aside, annulled and held for naught. This appeal followed.

As will appear from the above statement, appellant seeks authority to operate a truck line between El Dorado and Texarkana through Magnolia, to serve all intermediate points, on highway 82, right through the heart of the oil fields of Arkansas. The territory he would serve is already being served by appellees. He testified he had about $2,500 in assets consisting in part of Packard 8 coupe of the value of $600, a one-half ton 1940 Ford pickup truck, worth $500, and real estate of $1,200 or $1,500 in value. He is now employed by the Southeast Arkansas Freight Lines, Inc., in the capacity of city agent at El Dorado, but that said company would have no financial interest in his permit, if granted. Act 367 of 1941 is the latest motor carrier act and § 9 (a) thereof provides the conditions under which a certificate shall be issued or denied. Among others it is provided that the applicant must be found to be "fit, willing and able properly to perform the service proposed," and another is that the proposed service "is or will be required by the present or future public convenience or necessity." If these things are found the certificate shall be granted; otherwise, denied; "and the burden of proof shall be upon the applicant." Section 9 (c) reads as follows: "In granting application for certificate, the Commission shall take into consideration the reliability and financial condition of the applicant and his sense of responsibility toward the public; the transportation service being maintained by any railroad, street railway or motor carrier;

the likelihood of the proposed service being permanent and continuous throughout twelve months of the year, and the effect which such proposed transportation service may have upon other forms of transportation service; and any other matters tending to show the necessity or want of necessity for granting said application."

Appeals to this court in cases of this kind, originating before the Corporation Commission, are tried here *de novo*. *Mo. Pac. R. R. Co.* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644. It was there held, to quote headnote No. 7, that "A certificate of convenience may not be granted where there is existing service in operation over the route applied for, unless the service is inadequate or additional service would benefit the public and the existing carrier has been given an opportunity to furnish such additional service and has failed to do so."

About the time, or perhaps a little after, appellant applied for a certificate, appellees rearranged their schedules of service so as to make deliveries of freight within an hour or so of the same time appellant would make them. So, the service appellant proposes to render would be an unnecessary duplication of the service already being rendered. Each of the appellees operates interstate and they interline at Magnolia. Appellant would operate only between El Dorado and Texarkana, through Magnolia. All the freight he could get out of Texas or Louisiana would be interlined at Texarkana. He could hope to get nothing from Southwestern at Texarkana as it interlines with Black at Magnolia. He could hope to get nothing out of Black at Magnolia for he goes to El Dorado. It appears to us, as it no doubt did to the trial court, that appellant, either for himself or as agent for the Southeast Arkansas Truck Lines, Inc., is attempting to "short haul" appellees and thereby skim the cream of the business in the oil fields of Arkansas, when there is no showing of a public convenience or necessity within the meaning of said act, even if it be conceded that appellant is "fit, willing and able properly to perform the service proposed," which is doubtful.

The fact that appellees have improved their service since the filing of appellant's application cannot change the situation, because appellees should have been given the opportunity to so improve their service before granting appellant's application. *Mo. Pac. R. R. Co.* v. *Williams, supra.* It is also said this improved service may be only temporary and not permanent, but both appellees say it is a permanent change.

Twenty-two witnesses testified for appellant, including himself and McNulty of the Southeast, but when informed of the improved service now rendered by appellees, a majority of them said the service now rendered was satisfactory. Twenty-nine witnesses, including Mr. Black and Mr. Smith of the Southwestern, testified for appellees, and all testified the service now rendered is adequate, ample and satisfactory. The witnesses on both sides are business men, shippers, both consignors and consignees of freight that moved over highway 82, to and from El Dorado and Texarkana, and it appears to us, both from the testimony and from the circumstances and physical conditions surrounding the situation, that the public convenience or necessity does not now nor in the immediate future require the additional service proposed by appellant.

The judgment is accordingly affirmed.

HENNEBERGER *v.* DUNCAN.

4-6678 161 S. W. 2d 380

Opinion delivered April 6, 1942.

Pickens & Pickens, for appellant.

Ben B. Williamson and *Hugh U. Williamson,* for appellee.

MEHAFFY, J. The appellant, on May 8, 1940, filed in the chancery court of Jackson county her complaint in which she claimed title to the following property: northeast quarter west of White River, section 9, township 11 north, range 3 west, containing 91.70 acres, more or less, and lots 8, 9 and 10 of block "G" of Chastain's Addition to the city of Newport and lots 7 and 9 of block "H" in Chastain's Addition to the city of Newport.

She alleged that said lands had forfeited for the nonpayment of taxes for the year 1934, but that said sale was void because the quorum court of Jackson county levied a tax of one-tenth of a mill for crippled children's commission, one-tenth of a mill for crippled children's home and five-tenths of a mill for the extension service of Jackson county, in addition to the levy of five mills for county general purposes, thereby exceeding the constitutional limit imposed on the county by the constitution of the state of Arkansas. The appellant further alleged that the appellee, W. M. Duncan, had obtained two deeds, dated April 19, 1940, from the State Land Commissioner of the state of Arkansas, and that said deeds constituted a cloud upon her title, and asked that they be canceled.

The appellee filed answer June 3, 1940, in which he admitted that the lands and lots described were sold for the nonpayment of taxes for the year 1934, but denied that said sale as made by the collector of Jackson county was illegal and void. He admitted that he purchased the land from the State Land Commissioner on the 19th day of April, 1938, and attached copies of his deeds. He further alleged that since he purchased said property it has been assessed on the tax books in his name, and that he had paid the taxes. He pleaded the statute of limitations as a bar to appellant's cause of action. He denied every material allegation of appellant's complaint.

Appellant then filed an affidavit of tender and certified check.

On April 10, 1941, appellee filed an amendment to his answer as follows: "Defendant, for further answer to the complaint of the plaintiff, states that just prior to the time of purchasing the lands and lots from the State Land Commissioner the plaintiff and her husband, not being able to redeem said lands and being indebted to the defendant in the sum of $445.62 for groceries and supplies, sold to and delivered to the plaintiffs by defendant, agreed that if the defendant would purchase said lands in his own name from the State Land Commissioner then they would in turn execute to him a quitclaim deed for their interest in said lands and lots in full satisfaction of their indebtedness to defendant as above mentioned.

"Pursuant to said agreement, J. W. Henneberger, the husband of plaintiff, Julia J. Henneberger, went with the defendant to the state land office, Little Rock, Arkansas, on the 19th day of April, 1938, for the purpose of defendant's purchasing the said lands and lots, at which time defendant did purchase the said lands and lots.

"That defendant prepared a quitclaim deed to be executed to him by the said J. W. Henneberger and Julia J. Henneberger and that they agreed to come to his store and execute the same and acknowledge the same before Garfield Rutledge, justice of the peace; that they promised to come on two or three different occasions, but failed to do so and never gave the defendant any reason for such failure until this suit was brought by the plaintiff to cancel defendant's deeds."

Said cause of action was submitted to the court on July 10, 1941, after the following stipulation had been introduced: "It is hereby stipulated and agreed by and between the plaintiff and defendant and by their respective attorneys that the following facts are hereby agreed:

"That Julia Henneberger was the owner of the lands in question prior to its forfeiture to the state of Arkansas in the year 1935 for the taxes of 1934; that said lands

were assessed for the year 1934, and that the real estate tax book of Jackson county, Arkansas, so reflect that assessment and further reflect that it was assessed in the name of Julia Henneberger and that the following taxes were levied against said lands for the year 1934:

"State	8.7 mills
County	5 "
Bond	2 "
School Districts	different amounts for different districts
Road	3 mills
Cities	5 "
Crippled Children's Comm.	1-10 "
Crippled Children's Home	1-10 "
Extension service	5-10 "

"That said above listed millages were extended on the tax books and that said lands were sold to the state of Arkansas for said above listed millage of taxes.

"It is further agreed that the title to said lands was confirmed in the state of Arkansas on May 24, 1938.

"It is further agreed that a copy of the deed from the state of Arkansas to W. M. Duncan may be attached to this transcript."

The appellee then introduced the following testimony: "J. W. Henneberger testified as follows: I live in Newport and am the husband of the appellant, Julia J. Henneberger, and know W. M. Duncan, the appellee, and that the land involved belonged to Julia J. Henneberger, my wife. I conveyed part of it to her several years ago. There were no judgments against me when I conveyed same. I was not with appellee the day he bought this land from the state, was not with him on April 19, 1938."

W. M. Duncan, appellee, testified: "I am the defendant in this suit and live in Newport and am in the grocery business and have been for ten years. I know Julia J. Henneberger and J. W. Henneberger. They had been trading at my store prior to April 19, 1938, and owed me at that time $445.62. I bought the lands in question from the state of Arkansas. J. W. Henneberger owed

me and claimed he couldn't pay me. He said he was about to lose some of the land on account of judgments against him, and that he rather let me have it than anyone else and that we could go to Little Rock and buy it in and that if he couldn't settle within thirty days what he owed me he would quitclaim it to me, and furthermore that his wife would be up and give me a warranty deed to the land. . . . He acted as her agent. We went to Little Rock in his car and he was with me. I prepared a quitclaim deed for them to sign, dated April, 1938, which I attached as exhibit 'A' to my testimony. I satisfied his account and have paid the taxes on the lands ever since, have made demand on Mr. and Mrs. Henneberger to execute deed and they have not done so."

It is stipulated that the taxes paid by the appellee were as follows: Receipt No. 4428, $54.60; receipt No. 2323, $14.94; receipt No. 4153, $65.99; receipt No. 826, $120.51; receipt No. 310, $129.84.

This was all the evidence introduced in the case, and the court took same under advisement. On August 5, 1941, the court handed down a decree in which it held that the plaintiff, Julia J. Henneberger, prior to November, 1935, was the owner of the above described land; that she failed to pay taxes assessed and due on said lots for the year 1934 and that thereafter the lots were sold to the state of Arkansas for said taxes in November, 1937, and were duly certified to the state of Arkansas by the clerk of Jackson county; that on May 24, 1938, the title to said lands and lots was confirmed in the state of Arkansas by the Jackson chancery court in an action brought for that purpose under the provisions of Act 119 of the Acts of 1935; that on April 19, 1939, by proper deed of conveyance, the State Land Commissioner sold and conveyed said lots and lands to W. M. Duncan, who has continuously paid the taxes assessed against said lots and lands from year to year since he purchased same; that this suit was brought by the plaintiff on May 8, 1940, to cancel the deeds executed to the defendant by the state of Arkansas and to set aside the tax sale and the decree of that court confirming the title to said lots and

land on May 24, 1938. The court held that Act 119 above referred to was amended by Act 423 of 1941, and the court found that Act 423 was an act to provide for procedure and is therefore retroactive and that plaintiff cannot maintain her suit to cancel the deed on the ground set forth in her complaint. The court dismissed the complaint of the plaintiff as without equity.

Appellant prayed and was granted an appeal to the Supreme Court, and the case is now here on appeal.

The appellee, in the amendment to his answer, alleged that just prior to the time of purchasing the land and lots from the State Land Commissioner, the appellant and her husband, not being able to redeem said lands and being indebted to appellee in the sum of $445.62 for groceries and supplies sold and delivered to plaintiff and her husband by defendant, agreed that if defendant would purchase said lands in his own name from the state, they would in turn execute to him a quitclaim deed for their interest, in full satisfaction of their indebtedness to him. The amendment alleged that pursuant to this agreement J. W. Henneberger went with defendant to the state land office and on April 19, 1938, for the purpose of purchasing the said lands and lots, at which time defendant did purchase same.

There was no response to this amendment filed by appellant, and she did not plead the statute of frauds. She did object to the testimony of appellee when he testified to the conveyance of the land, because she stated it was an oral agreement to convey land, and evidently meant by that that it was within the statute of frauds.

However, the undisputed evidence shows that this was an oral agreement; that the appellee paid the taxes and obtained deeds from the State Land Commissioner; paid the judgments against said land and satisfied the indebtedness of appellant and her husband of $445.62.

There is some suggestion that this was a debt of the husband and that appellant was the owner of the land. The undisputed evidence says that "they," meaning Henneberger and his wife, owed a bill at appellee's store.

The appellant certainly owed the taxes which appellee paid, and she did not deny that appellee had performed the contract fully, satisfying their indebtedness and thereafter continuing to pay the taxes, which she never offered to pay.

This court has many times held that part performance under an oral contract for the sale of land takes it out of the statute of frauds. In this instance, however, there is not only part performance, but there was a full and complete performance by the appellee.

In the case of *Phillips* v. *Jones,* 79 Ark. 100, 95 S. W. 164, 9 Ann. Cas. 131, this court quoted with approval from Pomeroy: "It is, therefore, now settled, after some expressions of doubt, and with a few conflicting decisions, that possession by a tenant after the expiration of his former term, and payment by him of an increased rate of rent, are together a part performance of a verbal contract for a renewal of the lease."

Again, this court said in the case of *Robinson* v. *Wynne,* 97 Ark. 366, 134 S. W. 319: "We must assume, in the absence of a showing in the abstract, that the writing was sufficient to satisfy the statute of frauds. But, if that be not so, the statute is satisfied by the delivery of the timber to Coates and the agreement of Bell to pay the price, which was charged on the mortgage debt."

In the case of *Sullivan* v. *Winters,* 91 Ark. 149, 120 S. W. 843, we said: "If that part of the contract relating to the sale of the land be held to be within the statute of frauds, it has been fully performed, and the only unperformed portion is that relating to the division of the proceeds."

In the case of *Coffin* v. *McIntosh,* 9 Utah 315, 34 Pac. 247, the court stated: "At the trial counsel for the defendant moved to strike out the testimony of the plaintiff on the ground that it was shown thereby that the transaction was in relation to a piece of real estate, and, not being in writing, was within the statute of frauds. . . . This court, in *Knauss* v. *Cahoon,* 7 Utah 182, 26 P. 295, held, under the circumstances similar to those

in this case, that the statute of frauds had no application. Especially is this so where, as in this case, the statute is not pleaded."

The fact that appellee, pursuant to this contract, satisfied the debt they owed him and continued to pay the taxes on the property, takes the case out of the statute of frauds. And these facts are not denied by the appellant. The undisputed evidence shows them to be true.

We are therefore of opinion that the contract having been fully performed by the appellee, with the knowledge and consent of appellant, is binding on the parties and for this reason the case must be affirmed.

Both parties, however, argue at length the question whether the confirmation suit in the chancery court was binding on appellant and that Act 423 of the Acts of 1941 was retroactive, but since we have reached the conclusion we have on the other proposition, it becomes unnecessary to discuss or decide this question.

It follows from what we have said that the decree of the chancery court must be affirmed.

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

4-6711 160 S. W. 2d 499

Opinion delivered April 6, 1942.

[redacted]

Henry Donham and *Richard M. Ryan,* for appellant.

H. B. Means, for appellee.

HOLT, J. July 12, 1940, appellees, Andrew Holman and Ed Henson, sued appellant railroad company, to recover damages alleged to have resulted from negligent acts of appellant in causing water to overflow their lands on February 27, 1938, and April 16, 1939. Appellant denied every material allegation in the complaint and in addition pleaded as a defense the three-year statute of limitation (§ 8928, Pope's Digest) as a bar to appellees' claims, and that appellees had filed a similar suit December, 1932, for damages to these same lands growing out of an overflow for the years 1931 and 1932; that these claims were referred to the Bankruptcy Court at St. Louis, Missouri, by agreement and appellees' claims denied. A jury awarded Andrew Holman $350 and Ed Henson $300. From the judgment on these verdicts comes this appeal.

The facts stated in their most favorable light to appellees, as we must do, are to the effect that sometime in 1928 appellant dug a number of "borrow pits" along its track and roadbed on its right-of-way opposite appellees' lands which adjoined appellant's right-of-way on the north. Appellant also constructed ditches and installed culverts and drain pipes at intervals under its track and roadbed to carry off overflow waters from these borrow pits.

According to the testimony of appellees, in February, 1938, and April, 1939, these borrow pits and ditches had grown up in bushes, weeds and other vegetation and the culverts and drain pipes had become filled and closed up with soil and other matter which caused the overflow waters to go upon and damage appellees' lands. Andrew Holman testified: "A. It is just grown up on the south side and those drain pipes that lay down there and the water can't go anywhere but shoot out in my field because the ditches are grown up so it can't go anywhere else," and on cross-examination: "A. Those ditches need cleaning out and that will keep the water off of my land. Q. What ditches? A. The railroad ditches, those ditches on the main line don't take care of the water."

Appellant earnestly argues that the construction in 1928 of the borrow pits, ditches, culverts and drain pipes, in question, was original and permanent in character and that any claim for damages resulting therefrom to appellees' lands, on account of overflow waters, would be barred within three years from the date of construction. Appellees, however, contended below, and contend here on appeal, that the injuries complained of and upon which the jury's verdicts were based, were of a recurring nature and resulted on account of the failure of appellant in 1938 and 1939 to keep its drain pipes, culverts and borrow pits properly drained.

Causes of this nature must be governed by the particular facts in each case. In *Chicago, R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S. W. 127, L. R. A. 1916E, 1962, the rule is stated in this language: "Upon consideration of the question as to the application of the statute of limitation to these overflow cases, the permanency of the structure or obstruction impeding the flow of water is not the controlling question. Indeed, the question cannot arise unless the obstruction is of a permanent nature, but its permanency does not of itself determine whether the damages, which result from its erection, are original or recurring. If it is of such a construction as that damage must necessarily result, and the certainty, nature and the extent of this damage may be

reasonably ascertained and estimated at the time of its construction, then the damage is original and there can be but a single recovery, and the statute of limitation against such cause of action is set in motion on the completion of the obstruction. If it is known merely that damage is probable, or, that even though some damage is certain, the nature and extent of that damage cannot be reasonably known and fairly estimated, but would be only speculative and conjectural, then the statute of limitation is not set in motion until the injury occurs, and there may be as many successive recoveries as there are injuries. There are many cases in our reports on this subject and their difficulty consists in the application of the law to the facts of each case. (Citing a large number of cases.)" See, also, *Daniels* v. *Batesville,* 189 Ark. 1127, 76 S. W. 2d 309, and the cases there cited.

It is our view in the instant case that there is sufficient evidence of a substantial nature to go to the jury which showed that the waters were caused to flow over and damage the lands of appellees on account of appellant's failure to keep the ditches, culverts and drain pipes open in 1938 and 1939 as alleged in their complaint, and that the damage was a recurring one. This suit having been filed July 12, 1940, is, therefore, not barred by the statute of limitation. Since the damages here are of a recurring nature any claims for damages to the lands in question by appellees in 1932 would be no bar to damages occurring in 1938 and 1939.

Finding no error, the judgment is affirmed.

BUTLER *v.* DEMOCRATIC STATE COMMITTEE.

4-6782 160 S. W. 2d 494

Opinion delivered April 6, 1942.

Coleman, Mann, McCulloch & Goodwin, for appellant.

Walter L. Pope and *Owens, Ehrman & McHaney,* for appellee.

Ross Mathis, for intervener.

SMITH, J. At the general election held in 1936, Amendment to the Constitution, now bearing the number 23, was adopted. It reads as follows:

"Section 1. A Board to be known as 'The Board of Apportionment,' consisting of the Governor (who shall be chairman), the Secretary of State and the Attorney General, is hereby created, and it shall be its imperative duty to make apportionment of representatives and senators in accordance with the provisions hereof; the action of a majority in each instance shall be deemed the action of said Board.

"Section 2. The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members 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.

"Section 3. The Senate shall consist of thirty-five members. Senatorial districts shall at all times consist of contiguous territory, and no county shall be divided in the formation of such districts. 'The Board of Apportionment' hereby created shall, from time to time, divide the state into convenient senatorial districts in such manner as that the Senate shall be based upon the inhabitants of the state, each senator representing, as nearly as practicable, an equal number thereof; each district shall have at least one senator.

"Section 4. The Board shall make the first apportionment hereunder within ninety days from January 1,

1937; thereafter, on or before February 1 immediately following each federal census, said Board shall reapportion the state for both representatives and senators, and in each instance said Board shall file its report with the Secretary of State, setting forth: (a) the basis of population adopted for representatives; (b) the basis for senators; (c) the number of representatives assigned to each county; (d) the counties comprising each senatorial district and the number of senators assigned to each, whereupon, after thirty days from such filing date, the apportionment thus made shall become effective unless proceedings for revision be instituted in the Supreme Court within said period.

"Section 5. Original jurisdiction (to be exercised on application of any citizen and taxpayer) is hereby vested in the Supreme Court of the state: (a) to compel by mandamus or otherwise the Board to perform its duties as here directed, and (b) to revise any arbitrary action of or abuse of discretion by the Board in making any such apportionment; provided, any such application for revision shall be filed with said court within thirty days after the filing of the report of apportionment by said Board with the Secretary of State; if revised by the court, a certified copy of its judgment shall be by the clerk thereof forthwith transmitted to the Secretary of State, and thereupon be and become a substitute for the apportionment made by the Board.

"Section 6. At the next general election for state and county officers ensuing after any such apportionment, senators and representatives shall be elected in accordance therewith and their respective terms of office shall begin on January 1 next following. At the first regular session succeeding any apportionment so made, the Senate shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years and the remaining seventeen for four years, after which all shall be elected for four years until the next reapportionment hereunder."

Appellant, Butler, filed in the Pulaski circuit court a suit against the members of the Democratic State

Committee in their collective capacity, which reads as follows:

"Petition for a Writ of Mandamus.

"The petitioner respectfully shows to the court that he is a member of the Democratic Party in the state of Arkansas and is a qualified elector of St. Francis county.

"On March 30, 1937, the Board of Apportionment of the state of Arkansas submitted its report to the Secretary of State in compliance with the requirements of Amendment No. 23 to the Constitution of Arkansas, a certified copy of which report is attached hereto as a part hereof.

"On January 4, 1941, the federal bureau of the census promulgated the final population figures of the 1940 census in Arkansas by counties.

"On January 21, 1941, the Board of Apportionment submitted its report to the Secretary of State in compliance with Amendment No. 23 based on the census of 1940, a certified copy of which is attached hereto as a part hereof.

"The petitioner is an elector in senatorial district No. 33 as described in the report of the Board of Apportionment of January 21, 1941.

"W. L. Ward was duly elected senator from the senatorial district composed of St. Francis and Lee counties at the general election held in November, 1940, and the defendants claim that he will be a member of the Senate in 1943 by virtue of such election.

"The first general election for state and county officers following the new apportionment will be held in November of this year. The Democratic Party will hold a primary election on the 28th day of July, 1942, to select party candidates to run in such general election. The petitioner proposes to run in the primary election as a candidate for the office of state senator, and to this end he tendered his party loyalty pledge to the Democratic State Committee in compliance with § 37 of the rules of the party. The committee wrongfully rejected

his pledge and refused to permit him to file it. The petitioner is without remedy except by mandamus.

"Wherefore the petitioner prays for a writ of mandamus directed to the Democratic State Committee commanding it to accept and file his party loyalty pledge as the rules of the Democratic Party require."

The relief prayed was denied, from which order and judgment is this appeal.

This suit is predicated upon the assumption and allegation that the Board of Apportionment, created by the amendment, performed the duties imposed upon it by the amendment, by making an apportionment of representation in both the House of Representatives and the Senate in 1937, but that the Board failed to discharge its duties in this behalf after the 1940 census had been taken.

An intervention has been filed by a citizen of Woodruff county, in which it was prayed that mandamus be granted compelling the Board of Apportionment to function and to perform the duties imposed upon it by the amendment by redistricting the state for senatorial representation.

Construction of the amendment is, of course, required to dispose of these contentions; and we proceed with its construction. The purpose of the amendment was, of course, to secure equal and fair representation in the General Assembly upon the basis of proportionate population. It was recognized that a census of the state's population would be taken by the federal government every ten years, and it was contemplated and required that the adjustment or apportionment of representation should be based upon this census, and it was made the imperative duty of the Board of Apportionment to make apportionment of representatives and senators after the taking of each federal census. No discretion was vested in the Board as to whether this duty should be performed. The duty is mandatory, and by § 5 of the amendment original jurisdiction was vested in the Supreme Court to compel, by mandamus or otherwise, the Board to perform this duty. It is further provided

by § 5 of the amendment that, if the Board, in the performance of the duties imposed by the amendment, should act arbitrarily, or abuse its discretion, application for a review of that action might be made to the Supreme Court within thirty days after the Board had filed its apportionment report with the Secretary of State.

In the discharge of these duties the Board made and filed a report of its proceedings with the Secretary of State under date of January 21, 1941. This report assigned one representative to each of certain named counties, two representatives to certain other counties, three representatives to each of four named counties, and seven representatives to one county. The report divided the state into thirty-four senatorial districts, and named the counties composing each district, and gave to each district one senator, except one district, which was given two senators. The report concludes with the statement that "The Board in submitting this reapportionment report, after giving the matter careful consideration, was of the opinion that the above was the most satisfactory solution and that it complies with the provisions of Amendment No. 23 to the Constitution of the state of Arkansas."

The result of this report is that it is identical with the apportionment of both representatives and senators made in 1937.

The recital of these facts disposes of the prayer of the intervention that the Board be required to make a reapportionment. It has done so. The report is based upon the finding that there had been no such change or shift in the population of the respective counties of the state as to require a redistribution of representation either in the House or Senate, and the apportionment made in 1937 was permitted to stand without change.

Suit was filed by citizens of certain counties, in which it was alleged that this report was arbitrary, in the apportionment of representation in the House of Representatives in that it failed to take account of the shifts in population shown by the 1940 census.

In the exercise of the original jurisdiction conferred on the Supreme Court by the amendment, these suits were heard and the finding was made that the report of the Board, as filed with the Secretary of State, was arbitrary, in that proper account had not been taken of the relatively greater increase of population in the counties of Mississippi and Poinsett, and each of those counties was awarded an additional representative, at the expense of Union and Lonoke counties, whose representation in the House, under the Board's report, was found to be relatively greater than it should have been. *Shaw* v. *Adkins, Governor,* 202 Ark. 856, 153 S. W. 2d 415.

After the Board of Apportionment had made its report on January 21, 1941, the presiding officer of the Senate announced that on February 13, 1941, he would divide the Senate into two groups, one to be composed of eighteen senators who would thereafter serve for two years, and another group of seventeen senators to serve for four years. Suit was brought to enjoin the presiding officer of the Senate from taking that action, and an injunction was granted, which decree was affirmed on the appeal to this court. *Bailey, Lieutenant Governor,* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176, 149 S. W. 2d 573.

We are convinced that holding is correct, and we reaffirm it; but, in so holding, it was inadvertently stated that there had been no reapportionment making division of senators into new groups necessary to determine their respective periods of service. There was a reapportionment, and a report thereof was filed with the Secretary of State, and a copy of this report, of which we take judicial knowledge, has been filed as an exhibit to appellant's petition for mandamus. It would have been more accurate in that opinion to have said, as, indeed, the fact is, that no change had been made in the previous apportionment. The old — the first — apportionment, made in 1937, was adopted as the reapportionment under the 1940 census, and this was what was intended when it was said that no new apportionment had been made.

But the fact is that the Board of Apportionment did make a reapportionment under the 1940 census.

This apportionment was found to be arbitrary, within the meaning of § 5 of the amendment, in so far as it related to the distribution of representation in the House of Representatives, and that action was reviewed and reversed as above stated. But no complaint was made as to the reapportionment of senatorial representation.

The insistence of appellant is that the very genius of Amendment No. 23 is that the senatorial body should be entirely reorganized on the basis of a new apportionment of senatorial districts following each federal census, and that no member of the old Senate, by virtue of such membership, would be a member of the reorganized Senate, even though the term of office for which he was elected had not expired, and that a new senatorial body, which is to come into existence every ten years under the operation of Amendment No. 23, is to be recruited from new senatorial districts created by successive apportionments.

This would be true had it been found by the Board of Apportionment that shifts in population shown by the 1940 census required a new division of the state into senatorial districts to equalize representation in that body in proportion to the population of the various counties as shown by that census. But the amendment does not require a geographical change in the senatorial districts after each census. The amendment does require that this shall be done if shifting population makes that action necessary to afford just, equitable and equal representation. But the Board of Apportionment found that action was not required for that purpose, and that finding was not questioned except in the case of representation in the House of Representatives.

If any change in the geographical boundaries of any of the senatorial districts is made, an entirely new Senate must be elected, in which event the newly-elected senators would be divided by lot into two classes, one to serve for two years, the remainder for four years, as required by § 6 of the amendment. This geographical change in the boundaries of the senatorial districts must be made after each federal census, if it be found by the Board of

Apportionment, as an original proposition, or by this court on appeal from the action or inaction of that Board, that such rearrangement or reapportionment is necessary to afford the just and proportionate representation which the amendment contemplates and requires.

But if it be found, as the Board did find, that no geographical changes were necessary to equalize the representation, then no necessity existed under the amendment to make changes in the boundaries of the senatorial districts, in which event all senators would serve for the respective terms for which they had been elected. The length of these terms is fixed by § 3 of art. 5 of the Constitution, at four years, and this provision of the Constitution need not be ignored unless a change is required in the boundaries of senatorial districts to equalize representation so that an entirely new Senate must be elected. In other words, the amendment requires a reapportionment after each census, but to accomplish that result it is not required that the state be redivided, unless that action is found necessary to accord proportionate representation. If in making the reapportionment this redivision of the state into senatorial districts is found necessary, an entirely new Senate must be elected, whose members shall, upon convening, divide themselves into two classes as required by § 6 of the amendment.

These new districts might continue indefinitely, and would so continue unless population shifts require geographical changes to afford proportionate representation to the various counties. Now, the amendment requires the Board of Apportionment to ascertain this fact after each census, and if population shifts require a rearrangement geographically to afford proportionate representation, such changes must be made. But if population shifts do not require this rearrangement or reapportionment to afford ratable and just representation, then no necessity exists to change geographical boundaries, and the districts would remain unchanged.

As has already been said, the Board of Apportionment, by its report of January 21, 1941, found that the necessity did not exist to make geographical changes to

afford the proportionate representation required by the amendment, and, therefore, none was made, and that is what is meant in the opinion in the case of *Bailey* v. *Abington, supra,* when it was said that no apportionment was made. An apportionment had been made, but no geographical changes in the boundaries of the various senatorial districts was made, and there was, therefore, no occasion for the senators to draw for length of terms of office.

It follows, from what has been said, that the judgment of the circuit court denying mandamus must be affirmed; and the intervention of the citizen from Woodruff county will be dismissed.

GRIFFIN SMITH, C. J., (dissenting). The view expressed March 3, 1941, in my concurring opinion in the Bailey-Abington case: that there had been reapportionment—is now accepted by the court. Therefore, for purposes of this dissent, it is unnecessary to go back of § 6 of amendment 23 where it is provided that at the next general election following an apportionment, senators and representatives shall be elected in accordance with such apportionment.

The majority opinion reads into the mandate a condition I have been unable to discover, the effect of which is that "senators *shall not be elected* unless the board, in making its report, rearranges a district."

The "next general election" following the apportionment now conceded to have been made January 21, 1941, will be held November 3, 1942; and, let it be repeated, the amendment says that at such election *"senators and representatives shall be elected."*

The drawing for long and short terms takes place *"at the first regular session succeeding any apportionment so made."*

Selection of eighteen members for two years, and seventeen for four years, is consummated "by lot."

I cannot see that art. 5, § 3, of the constitution, has anything to do with this controversy. The amendment expressly fixes the period of tenure. Under accepted

rules of construction, the last statutory or constitutional expression supersedes prior provisions. Judicial construction is necessary only where there is indefiniteness or ambiguity. Here there is nothing to construe: eighteen senators from thirty-five elected serve two years and seventeen serve four years, ". . . after which all shall be elected for four years until the next reapportionment hereunder."

We have the anomalous situation of reapportionment, express language directing election of senators "at the next general election," a command that at the session in 1943 division as to long and short terms be made, and a decision by the Supreme Court that the amendment means nothing of the kind because, *ergo,* the constitution of 1874 still controls. By *construction* terms of office may not expire in such manner as to permit § 6 to become operative.

Because all of my colleagues make the majority opinion I deplore the necessity of disavowing the result; yet, in spite of disinclination to become a conspicuous minority, my convictions are so deep-seated regarding the amendment's meaning that I would be false to official responsibility in yielding to the easier way and remaining noncommittal.

The majority's argument that in the absence of district changes there is no necessity for election of all senators, and that the people "did not so intend," is not without superficial plausibility. The fallacy occurs, however, in assuming an intent not expressed in the amendment and not implied: one which, upon consideration, conflicts with what may be termed the genius of the plan. The opinion assumes the amendment to have been adopted as a convenience to holdover senators and finds unjust the requirement that all stand for reëlection, or that they give way to other aspirants. But the fact cannot be blotted out that all senators serve by virtue of the popular will; and by amendment to the fundamental law the electorate has reserved the right to vote upon full membership at stated decennial periods. Whether this be wise or witless is not for us. Perhaps the public

business would be better served, legislatively, by having holdover senators who are familiar with procedure. The longer an acceptable officer serves, the more competent he or she becomes.

The issue here is not one of personal preference. It involves a design to relieve against an intolerable condition respecting apportionment. I fear the amendment has been emasculated.

PENNINGTON *v.* WOODS.

4-6707 161 S. W. 2d 16

Opinion delivered April 6, 1942.

Marvin B. Norfleet, for appellant.

Coleman, Mann, McCulloch & Goodwin, for appellee.

HUMPHREYS, J. On January 20, 1920, W. R. Alder sold and conveyed to Alex A. Pennington the following land in St. Francis county, Arkansas, to-wit: The south

half of the northwest quarter of section twenty, township six north, range six east, containing eighty acres, more or less.

The warranty deed thereto was filed for record on January 21, 1920, and duly recorded on the 22d day of January, 1920.

At the time of the purchase Alex A. Pennington, a widower, moved upon and occupied the farm which was improved and fenced on all sides. The fence on the north side was practically a new fence at that time. He married on December 27th or 28th, 1920, and several weeks thereafter W. R. Alder paid them a visit and walked with them all over the farm and pointed out the lines or fences enclosing the farm. W. R. Alder was showing them the lands and boundaries thereof which he had sold Alex A. Pennington in January, 1920. In looking over the land they started at the northeast corner of the tract and followed the fence to the northwest corner and then around the farm to each corner. The fence on the north line consisted of posts and three wires, the wire being nailed occasionally to a tree which was in line. Alex A. Pennington and Josie, his wife, resided upon the land together and reared two boys, Darien and Mabry. Alex A. Pennington cultivated a portion of the land and used a part of it for pasture up to the fence on the north side, beginning with his purchase thereof and until 1935 when he died, and after his death appellants cultivated and pastured the lands in the same way up to the north line fence. During his occupancy Alex A. Pennington constructed a small barn and tenant house on or near the north line fence, which was continuously used by him and appellants. At the time of his death in 1935, he was the owner of the eighty-acre tract and other lands in St. Francis county, Arkansas, and he left surviving him his wife, Josie Pennington, and two minor children by Josie and several children by his first wife. After his death, in a partition suit of all the lands he owned, the fee simple title to the eighty-acre tract was vested in the two minor children, Darien and Mabry, subject to the dower and homestead right of his widow, Josie Pennington. During the occupancy of the land by Alex A. Pennington and by

his widow and minor children, bushes and trees grew up along the north fence so that in referring to it it was spoken of as the old fence row. The fence in the old fence row was never changed save that new posts were set in the line or fence from time to time and on the east end for about 300 feet a new fence was built where it had been washed out by the flood of 1927, but the new fence was set in the same place that the old fence had occupied. The old fence has served as the division line between the eighty acres in question and the eighty acres to the north all these years, that is, since about 1915, and those who cultivated the land on each side cultivated it up to the old fence row.

After the death of Alex A. Pennington, Josie Pennington was duly appointed guardian by the probate court for the minors, Darien and Mabry. Thus the matter stood with no one questioning the ownership of the Penningtons to the land included or embraced within the fences around said eighty-acre tract until about four or five years after Alex A. Pennington died.

In 1936, Eugene Woods purchased the eighty-acre tract north of the Pennington eighty-acre tract and he did or said nothing about the old fence row not being the correct division line between the two eighty-acre tracts until he concluded that the old fence row was not straight enough to suit him. There was a slight zig-zag occasionally in the old fence row. He then employed Burton F. Williams, an engineer and surveyor, to run the division line between the two eighty-acre tracts according to the government calls in their respective deeds, but had no agreement with Mrs. Pennington and her minor sons to run such a survey and did not notify them that he was going to do so. The Williams survey varied from the old fence row some twenty or thirty feet on the east end and crossed the old fence row and ran two or three feet north of same. He established the east and west corners and the survey had the effect of depriving Mrs. Josie Pennington and the minor heirs of about one acre of land all together. After Williams made the survey, Eugene Woods employed a crew of men to build a new fence

conforming to said survey and when they entered upon the land to comply with his directions Mrs. Josie Pennington objected and asked them not to trespass upon her land. The crew had been told by Eugene Woods to build the fence "whether or no," unless stopped by a legal proceeding. When they continued work on the new fence over her protest, she interviewed the prosecuting attorney and had them arrested.

Just what became of the criminal proceeding does not appear in this record, but at the time they were arrested, on the same day, Mrs. Josie Pennington, in her own behalf and as guardian for the minors, brought suit in the chancery court of St. Francis county, Arkansas, to enjoin Eugene Woods or any one under his direction or authority from trespassing upon the strip of land between the old fence row and the Williams survey and to quiet the title in them to all the land south of the old fence row and for such actual damages which he and his crew had done and for punitive damages for trespassing upon the land south of the old fence row.

They alleged and predicated their right to have the title to the eighty-acre tract south of the old fence row quieted and confirmed in them up to and including the old fence row upon the ground that said eighty-acre tract of land was within the government calls of the deed from W. R. Alder to Alex A. Pennington or, if not, because W. R. Alder and Alex A. Pennington had acquired title thereto by seven years actual, open adverse and continuous possession thereof claiming title thereto up to and including the old fence row.

Appellee, Eugene Woods, filed an answer denying that the land up to the old fence row was within the government calls of the Pennington eighty-acre tract, or that Alex A. Pennington and his predecessor in title had acquired the title to same up to and including the old fence row by seven years adverse possession thereof. He also denied that he was liable for any damages, actual or punitive, for attempting to construct a new fence in accordance with the Williams survey.

The trial court found that the old line fence was not the correct division line between the two eighty-acre tracts according to the government calls contained in the respective deeds and that the Penningtons had not acquired title by adverse possession of the eighty acres claimed by them up to and including the old fence line and dismissed the complaint of appellants for want of equity, from which is this appeal.

At the time this litigation arose two surveys had been made for the purpose of locating the division line between the two eighty-acre tracts according to the government survey or government calls, one being the Williams survey and the other a survey made at the instance of W. R. Alder in 1915 by the then county surveyor of St. Francis county, who is referred to in the evidence as a Mr. Newsome. W. R. Alder had this survey made by the county surveyor several years before he sold the eighty-acre tract to Alex A. Pennington and W. R. Alder's son, D. B. Alder, built a wire fence along the line of the Newsome survey, which is now referred to as the old fence row, and the fence constructed by D. B. Alder is the fence which W. R. Alder pointed out to Alex A. Pennington as being the north line of his eighty-acre tract when he sold same to him.

There is no way of telling from the record made in this case which survey is the correct survey as to government calls. The county surveyor who made the first survey is not alive and, of course, could not testify in the case as to the correctness of the survey made by him. The fact is that he was county surveyor at the time he made the survey and had the advantage of more witness trees and more established corners than did the private surveyor, Williams, who was employed to make the survey for Eugene Woods; but, be that as it may, there is no material conflict in the testimony that the old fence row was recognized by every one as the correct division line between the two eighty-acre tracts until Eugene Woods had the new survey made and attempted to make a change in the old fence row.

Neither is there any material conflict in the testimony to the effect that both W. R. Alder and Alex A.

Pennington had actual, open, continuous, hostile and exclusive possession of said eighty-acre tract, claiming to be the owners thereof up to and including the old line fence for more than twenty years. There is no substantial evidence in this record tending to prove that W. R. Alder and Alex A. Pennington only intended to claim adversely to the real or true boundary line according to government calls, but, on the contrary, the decided weight of the testimony is that they held possession of said land up to and including the old fence row, claiming title thereto for more than twenty years, as stated above. This is our conclusion after carefully reading the very voluminous record in this case. The evidence introduced, when abstracted, covers over 150 closely typed pages and it would extend this opinion to an unreasonable length should the substance of the evidence of each witness be set out. We, therefore, content ourselves with registering in this opinion our conclusion based upon the whole testimony.

The actual damage occasioned by entering upon the land in question and attempting to change the old fence row was inconsequential and the proof does not warrant a finding that appellants were damaged more than $10 by reason of the unauthorized entry of Woods. We think there is no ground at all upon which to base a judgment for punitive damages.

The decree is, therefore, reversed and the cause remanded with directions to the trial court to quiet title in appellants to the eighty-acre tract involved up to and including the old fence row and to render judgment in favor of appellants for $10 damages. There can be no difficulty in arriving at the exact location of the old fence row. All the testimony reflects just where it is. In fact there appears in this record a survey of the old fence row made by Mr. Buford and his survey of the old fence row does not seem to be questioned. The Buford survey of the old fence row might be incorporated in the decree to be rendered so as to make the description of the old fence row definite and certain.

RUFTY *v.* BRANTLY.

4-6693 161 S. W. 2d 11

Opinion delivered April 6, 1942.

[redacted]

Buzbee, Harrison & Wright, for appellant.

Rose, Loughborough, Dobyns & House, for appellee.

SMITH, J. This litigation involves the construction of the last will and testament of Texanah Susan Gooch, who died August 9, 1935, at an advanced age. Two children were born to her first marriage, a son named Charles and a daughter named Mary. Upon the death of her first husband she married a second time, but no child was born of that union. She survived her second husband also.

Her son, Charles, died single and intestate November 3, 1940, and was survived by a son named Alfonso and a daughter named Edna. The mother of these children obtained a divorce from Charles, their father, and remarried before her husband knew a divorce had been granted.

The undisputed testimony is to the effect that Mrs. Gooch became estranged from these grandchildren, and that this estrangement continued for many years before her death, and it is indubitably shown, indeed, it is not disputed, that at the time of the execution of the will, and continuously thereafter until the time of her death, Mrs. Gooch was much embittered toward these grandchildren.

The will under review reads as follows: "I, Texanah Susan Gooch, of the city of Little Rock, Arkansas, do hereby make, publish and declare this my last will and testament in manner and form following:

"One: I direct that all my just debts and funeral expenses be paid as soon after my demise as can conveniently be done.

"Two: I give, devise and bequeath to my daughter, Mary Rufty Brantly, the following real estate: Street number 501 East Eighth and street number 809 Commerce.

"Three: I give, devise and bequeath to my daughter, Mary Rufty Brantly, all my personal property including moneys of which I may die seized and possessed.

"Four: I give, devise and bequeath to my daughter, Mary Rufty Brantly, house and lot numbered 811 Commerce street and house and lot numbered 415 East Eighth street to be held in trust for the use and benefit of my son, Chas. H. Rufty, during his entire life and he shall be entitled to receive all the rents and revenues derived from said property, he being entitled to have full and complete control and management of said property.

"Five: I give, devise and bequeath to my grandson, Alfonso Rufty, the sum of one dollar to be paid out of my estate after my decease.

"Six: I give, devise and bequeath to my granddaughter, Edna Rufty, the sum of one dollar to be paid out of my estate after my decease.

"Seventh: I hereby revoke all former wills and other testamentary disposition at any time heretofore made by me. In witness whereof I hereunto subscribe my name at 501 East Eighth street, Little Rock, Arkansas, this 1st day of May, 1931, in the presence of Minnie W. DePoyster, residing at 416 St. Louis avenue, Fort Worth, Texas, and John H. Martin, residing at 501 East Eighth street, Little Rock, Arkansas, whom I have requested to become attesting witnesses hereto.

"Texanah Susan Gooch."

After the will had been probated the daughter, Mary, brought this suit against the grandchildren to quiet her title to the real estate described in the will.

After hearing the undisputed testimony above summarized the court found that the said testatrix intended to, and did, devise to the plaintiff, Mary Rufty Brantly, in fee simple, the property described in said will as 811 Commerce street and 415 East Eighth street, Little Rock, Arkansas, subject to the life estate of her son, Charles Rufty. It was further decreed that the children of Charles had no right, title or interest whatever in said property, and from that decree is this appeal.

The only portion of the will in dispute is the fourth paragraph thereof, and it is the insistence of appellants that the effect of this paragraph is to give their father,

Charles, the absolute title upon the death of the testatrix to the lots described in this paragraph four.

This was certainly not the intention of the testatrix if we may consider and give any effect to the testimony showing the state of the testatrix's feelings to her son and daughter and her grandchildren; but appellants insist that we may not consider this testimony in construing the will, and that we may only consider and construe the language appearing in the will.

Such testimony is incompetent to show the testatrix's intention in the disposition of her property; but we think it is competent to show the state of her feelings toward the persons who claim to be the subjects of her bounty, and if there is ambiguity in the will, and there is uncertainty as to the meaning of the language employed, the court may place itself in the position of the testatrix at the time of the execution of the will and consider all the facts and circumstances known to her when the will was made in determining the meaning of the language which she employed.

In the case of *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, we quoted from the opinion of Chief Justice MARSHALL in the case of *Smith* v. *Bell,* 31 U. S. 68, 8 L. Ed. 322, as follows: "In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. . . . No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole."

For the reversal of the decree here appealed from it is insisted that by the terms of paragraph four there is no limitation over in favor of appellee, and that she is, at most, the nominal trustee in a passive trust, and that under the English Statute of Uses, which came to

us as a part of the common law, the trust is executed and the title conveyed to the trustee vests in the beneficiary of the trust.

The case of *Randolph* v. *Read,* 129 Ark. 485, 196 S. W. 133, sustains that contention. But even so, this rule does not vest in the beneficiary any other or greater interest than that conveyed to the trustee. On the contrary, when the Statute of Uses executes a passive trust, the beneficiary for life thereunder obtains a legal life estate and the beneficiaries of the remainder become legal remaindermen. Section 137, Patton on Titles, p. 454; § 67, Scott on Trusts, vol. 1, p. 410; *McAfee* v. *Green,* 143 N. C. 411, 55 S. E. 828; *Kirton* v. *Howard,* 137 S. C. 11, 134 S. E. 859.

Appellants insist that under paragraph four the testatrix's son, their father, took the title in fee simple upon the death of the testatrix, and in support of this contention they chiefly rely upon the following statement appearing in the opinion in the case of *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349: "In construing wills, the general rule is that a gift for life without a limitation over passes a fee in real estate and an absolute interest in personalty, even though words denoting a life estate was intended were used. However, a clear gift to one for life, without a limitation over, is held not enlarged to a fee by such omission, unless a declared purpose is shown to dispose of all the testator's estate by will instead of creating an intestacy as to the remainder. Thompson on Construction of Wills, § 428, p. 551; *Byrne* v. *Weller,* 61 Ark. 366, 33 S. W. 421."

This is, of course, a mere rule of construction, to be applied only in the circumstances stated, without the application of which the testator's intention may not be determined. It is a rule to be applied only in the case of conflicting clauses, which may not otherwise be reconciled, as was the fact in the case from which we quote. The rule is one of narrow and limited application. If the rule is not limited to the circumstances stated, but is to be applied to all cases, it follows that any devise of a life estate, without a limitation over, operates to

create a fee simple estate, and that holding would result in its application to situations which lack the conditions that call the rule into existence.

For reasons later to be enlarged upon, we think there was a clear devise to the son of a life estate only, and there was no limitation over, and there is no declared purpose to dispose of all the testatrix's estate. For these reasons this very limited rule has no application here.

All the cases are to the effect that the primary purpose of construing a will is to arrive at the testatrix's intention in making it, and the rule of construction applicable in all cases is that the will should be read in its entirety, from its four corners, as many cases express the thought.

When the will under consideration is thus read, what do we find? We know that the scrivener who prepared the will knew what language to employ to devise an estate in fee simple. Paragraph two of the will makes that fact certain. By it an estate in fee was devised to the daughter to the two lots there described. Now, if it was the testatrix's intention to devise her other two lots to her son in fee, why was not the same simple and unambiguous language employed as was used in paragraph two to devise an estate in fee to the daughter? Why the circumlocution of creating a passive trust to devise a fee simple estate?

Paragraph four of the will is ambiguous. Appellants insist, first, that paragraph four devised to their ancestor an estate in fee simple. They further insist that if the fee title was not devised to their ancestor, it was not devised to anyone, and that a partial intestacy results, in that, the remainder existing after the termination of the life estate was not disposed of by the will, in which event appellants, as heirs of their father, are entitled to a one-half interest in this remainder.

We do not agree. It is not necessary to resort to the presumption against partial intestacy to find that the testatrix disposed of her whole estate, including her personal property. Leaving out of consideration for the

present the testimony showing the state of the testatrix's feelings towards her grandchildren, we know that, as a practical matter, the usual and ordinary means of disinheriting one, who would otherwise be an heir, is to bequeath to that person a dollar or some other nominal sum of money. That bequest was made to each of the grandchildren, and we think the conclusion is inescapable that the testatrix did not intend her grandchildren to have any other or greater interest in her estate.

We think it certain also that the testatrix did not devise to her son the fee title to the property described in paragraph four, as it was her expressed intention that her son should have the use and benefit of this property during his entire life and be entitled to receive all the rents and revenues derived from said property, with the right to full and complete control and management of said property for his entire life. This is wholly inconsistent with the theory that she devised the fee to her son.

It will be observed that the opening clause of paragraph four is exactly the same as the opening clause of paragraph two, and it is certain and unquestioned that the purpose of this clause in paragraph two was to devise an estate in fee simple. Was not the same purpose intended by the use of the same language in paragraph four? Is this not more reasonable than to suppose that the same words were used in paragraph four as a mere introduction to the creation of a passive trust?

Paragraph four is susceptible of more than one construction. One is that the fee title was devised to the daughter, subject to a life estate in favor of the son. Another construction is that paragraph four devised only one estate, to-wit: An estate in fee in favor of the son, this being done by the unusual device of creating a passive trust. An estate in fee might be devised through the creation of a passive trust; but this method of accomplishing that result is so unusual as to be very highly improbable. Another construction is that a life estate was devised without disposition of the remainder. As to that construction it must be remembered that there

is a strong presumption against partial intestacy, and the will is to be so interpreted as to avoid even partial intestacy, unless the language of the will compels a different construction. *Barlow* v. *Cain,* 146 Ark. 160, 225 S. W. 228.

What then does the language employed in paragraph four mean? To answer that question, and to determine the meaning of the language employed we think it proper and necessary to take account of the relation of the testatrix to the persons who in the absence of a will would have inherited as heirs at law. This testimony is to the undisputed effect that for many years Mrs. Gooch had resided with her daughter; that her son was improvident and to some extent dissipated; that the son was the father of two children, who would be the heirs of their father if he were given an estate in fee, a result the testatrix did not intend, as indicated by the bequest of one dollar to each of these grandchildren, and as is conclusively shown if we may consider the testimony showing the attitude of the testatrix to her grandchildren.

Must we close our ears to testimony which, if heard, removes all ambiguity and doubt as to the meaning of paragraph four? In the recent case of *Murphy* v. *Morris,* 200 Ark. 932, 141 S. W. 2d 518, we quoted with approval the following statement from § 244 of the chapter on Wills, 28 R. C. L. 270: " 'While parol evidence is not admissible to show what a testator intended to write, it may be admitted in a proper case, where the effect of it is merely to explain or make certain what he has written. In ascertaining the testator's intent the words of the will are to be read in the light of the circumstances under which it was written, and the court may put itself in the place of the testator for the purpose of determining the objects of the testator's bounty or the subject of disposition. It is proper to take into consideration all the circumstances under which the will was executed, including the condition, nature and extent of the testator's property, and his relations to his family and to the beneficiaries named in the will. Even the motives which may reasonably be supposed to operate with him and influence him in the disposition of his property are

entitled to consideration in ascertaining the meaning of the testator. So evidence is admissible as to the circumstances surrounding the subject-matter of the gift. Accordingly the courts in construing a will have taken into consideration such matters as the financial condition of the beneficiary, when it appears that this was known to the testator. The relative amount of advancements and the differences in value of portions of land devised to different children are also proper subjects for consideration. The rule is, however, inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed, and when a will is not ambiguous in terms it is unnecessary to resort to testimony as to the surrounding circumstances in order to ascertain its meaning'." The cases of *Moore* v. *Avery,* 146 Ark. 193, 225 S. W. 599; *Piles* v. *Cline,* 197 Ark. 857, 125 S. W. 2d 129; *Ellsworth* v. *Ark. Nat'l Bank,* 194 Ark. 1032, 109 S. W. 2d 1258, are to the same effect.

"In the case of *Eagle* v. *Oldham, supra,* it was said: "We must look to the will to determine the testator's intention, but in getting this view we should place ourselves where he stood, and should consider the facts which were before him in deciding what he intended by the language which he employed. If the rule were otherwise, the making of wills would be so difficult that the very purpose of permitting this method of disposition of property would frequently be defeated."

The conviction abides that by paragraph four the testatrix intended to devise the fee title to the lots there described to her daughter, subject to a life estate in favor of her son.

This was the construction given the will by the court below, and the decree based upon that construction will be and is affirmed.

MARTIN *v.* ARKANSAS POWER & LIGHT COMPANY.

4-6680 161 S. W. 2d 383

Opinion delivered April 13, 1942.

E. W. Brockman, for appellant.

House, Moses & Holmes, for appellee.

MCHANEY, J. On and prior to May 29, 1940, appellant, Clifton Martin, and his brother, DeWitt Martin, were in the employ of E. L. Bruce Company and Jack Galloway as termite exterminators. On said date and also on May 27 and 28, they were engaged in such extermination work on the Bynum residence in Dermott, Arkansas. At about 9:30 a. m. of the 29th, while engaged in sawing a floor joist in two for the purpose of removing the damaged portion thereof, DeWitt Martin's arm came in contact with an electric house wire under the house

where they were working, from which he received a charge of electricity which caused his death. Clifton Martin attempted to extricate his brother and received injury in doing so. Thereafter separate suits were filed by appellants, Clifton Martin and Mrs. Bertha Martin, the latter as administratrix of her husband's estate, to recover damages for personal injuries received by Clifton and for the death of DeWitt, against their employers and appellee. Nonsuits were taken by appellants as to the employers. The negligence charged and relied on was that the primary and secondary wires of appellee were strung through the tops of trees between the transformer and the Bynum residence; that current was permitted to pass from the primary wires to the secondary because of limbs on said trees coming in contact with both which would render the transformer useless; that a certain ground wire on the third wire of the service lines was not properly grounded; and that the injury to Clifton Martin and the death of DeWitt Martin were caused directly by an overcharge of electricity passing over the wires leading to the Bynum residence. Appellee's answer was a general denial and pleas of contributory negligence and assumed risk. Trial to a jury resulted in verdicts and judgments for appellee. This appeal followed.

A number of errors are assigned and argued for a reversal of these judgments which become unimportant, for the reason that, in our judgment, the court should have directed a verdict for appellee on the undisputed evidence and the physical facts and circumstances connected with the accident. These alleged errors, therefore, will not be discussed.

As before stated, appellant, Clifton Martin, and his brother were not in the employ of appellee. The house wires in the Bynum residence, including the wire under the house on which DeWitt Martin was electrocuted, did not belong to and were not installed by appellee. The service or secondary wires leading from the transformer and serving the Bynum residence also served some twelve to fifteen other residences in that vicinity, all of which received or had available exactly the same amount

of current at all times as the Bynum residence. The primary or high tension wires carried 2,300 volts of electricity. The transformer stepped this current down to 110 volts for domestic service, and there is no testimony that the transformer was out of order or that it was not properly functioning. There is testimony that both the primary and secondary wires passed through the tops of two trees and were adjacent to and may have at times come in contact with some of the branches of these trees which were between the transformer and the Bynum residence, and it is appellants' theory that the current from the high tension line was shorted or diverted to the service line by reason of contact with these limbs, causing an excess voltage on the service lines which killed DeWitt Martin and injured Clifton. Their expert witness said that it was possible for the current to be so diverted and that, in his opinion, that is what caused the injury. He said that a green tree limb was not a good conductor, but that, in his opinion, it was good enough to divert sufficient current to cause injury and death. This appears to be appellants' whole case, except some reliance is placed on an alleged defective ground wire on the third wire of the service circuit. We think the evidence given by the expert is lacking in definiteness and certainty. It is more or less speculative and conjectural. His conclusions depend upon assumed facts, such as a limb being a conductor and that if it were, why would not the current be grounded by the tree itself; that the same limb would have to contact both the primary and secondary wires at the same time and the latter at a point not insulated; and that the tree would not ground the current. It is undisputed that the Martins were working in close quarters, the floor joists being about thirty inches above the ground; that they had been working about two hours before the accident; that they were both wet with perspiration, indicating a hot day; that their clothes were wet and muddy; that while the ground under the house was dry, their wet clothes had contacted the dirt; that DeWitt Martin was sawing the floor joist when his right arm came in contact with the house wire, he sitting on his heels with his knees and toes on the

ground. Whether his arm came in contact with an uninsulated portion or bare spot on the house wire is in dispute. According to several reputable citizens, Clifton Martin stated in their presence, shortly after he had gotten his brother out from under the house, that his brother's arm contacted a bare portion of the wire after he had warned him of its bare condition just before the accident. But Clifton denied that he made any such statement. Whether he did or not is unimportant here, for, as we view it, there is no substantial evidence that an excess voltage came over the service wires, but that the accident was caused by the ordinary and usual voltage. It is undisputed that none of the electrical equipment in the Bynum residence was disturbed. No fuses were blown, no lights were burned out, no motors were damaged—nothing happened. The same is true as to all the other residences serviced by the same secondary circuit, or at least there is no evidence that any such equipment was damaged. It was shown, and we know it to be a fact, that if there is a greatly excess current coming in over house wires, all lights that are turned on will be burned out and the fuses blown. Appellants virtually admit, at least they do not deny, that the light globe on an extension cord used by them under the house, was still burning after the accident, thus conclusively showing there was no excess current sufficient to burn out the lights on the circuit.

It is well recognized that 110 volt current or even less will, under similar conditions as here shown to exist, cause death. It was so recognized and the authorities cited and quoted from in *Oklahoma Gas & Elec. Co.* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550, where we reversed the judgment and dismissed the cause on an allegation of excessive current because of a defective transformer. There the deceased was working under the house on wet or moist ground, while here the deceased and his clothes were wet to the extent that the dirt clung to them and appeared to be muddy. Thus the body was a good conductor in either case, and when contact was made with the live wire, it caused a short circuit through his body causing death. In that case tests were made to deter-

mine whether excess voltage was passing through the secondary wires and it was found there was not. Here, while no similar test was made, the fact that there was no excess current is shown by the fact that no lights were burned out, not even the one they were using, no fuses blown, no electrical appliances injured, and no interruption of service in any home so served. In the Frisbie case a screwdriver held in the hand of deceased was fused by the force of the current of 110 volts. As we there said: "To say that appellee's intestate came to his death by reason of appellant's negligence would require speculation not only as to the amount of current which proved fatal, but also as to the method by which such alleged excess charge entered the house. Neither allegation is established by any direct testimony, and *res ipsa loquitur* cannot be applied as a rule of law in a case where it is shown that the result—in this case death—might have been brought about by one of two or more speculative theories, neither of which is included or excluded by any affirmative evidence."

In *Arkansas-Missouri Power Corporation* v. *Powell,* 200 Ark. 309, 139 S. W. 2d 383, in reviewing the holding in the Frisbie case, we said: "In *Oklahoma Gas & Electric Company* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550, recovery was denied under the *res ipsa loquitur* doctrine where appellee's intestate was killed while working under a building. He came into contact with electricity of sufficient voltage and amperage to produce death within a very short period of time. As in the case at bar, the primary wires leading to the transformer through which electricity was supplied to the house under which Frisbie was working carried 2,300 volts. Frisbie was lying on his back on wet or moist ground and accidentally made contact with exposed wires while attempting to use a screwdriver. The tool was burned, and there was testimony that not less than 1,000 volts would have been required to produce the fused condition.

"The defendant showed that other residences and the administration building of the public school system were served from the transformer and there was no interruption of service.

"In the instant case it is shown that the 'Y' hut continued on the transformer; that there were no repairs, and that the voltage when tested shortly after accident was 112.

"In the Frisbie case, Herzog's Medical Jurisprudence is quoted as asserting that from 55 to 110 volts alternating current have frequently produced death, and may be regarded as dangerous."

We are, therefore, of the opinion that this case is ruled adversely to appellants by both the Frisbie and the Powell cases, and that the court should have directed a verdict for appellee at its request. Not having done so, and the jury having returned verdicts for appellee, the judgment in its favor so entered, must be affirmed. It is so ordered.

MEHAFFY, J., dissenting. I cannot agree with the majority in the statement that: "A number of errors are assigned and argued for a reversal of these judgments which become unimportant, for the reason that, in our judgment, the court should have directed a verdict for appellee on the undisputed evidence and the physical facts and circumstances connected with the accident."

The majority opinion, however, says that the errors alleged are not considered because the court should have directed a verdict for the appellee on the undisputed evidence and the physical facts and circumstances connected with the accident. All this court knows about the physical facts and circumstances is what was told by the witnesses, and the jury may or may not have believed them.

The appellant and his brother were engaged in a lawful business, work that had to be done, and the appellee knew this.

Lile Bynum testified that he was under the house about three weeks before Martin was killed, and that at that time the ground was particularly dry and dusty.

Clifton Martin, the appellant, testified that he and his brother had worked for the Bruce Company for the

past ten months; it was witness' duty to replace damaged material when the Terminix Company treated buildings for termites; that witness and his brother, DeWitt Martin, were directed to go to Dermott and do the necessary work for removing defective timbers; that his brother was killed by coming in contact with an electric wire near where he was working; that deceased had taken a hand saw and started to draw back in a backward stroke, and as he drew his right arm back, the electric wire came in contact with the outside of his arm below his shoulder.

But the majority say there was no substantial evidence that an excess voltage came over the service wire, but that the accident was caused by the ordinary and usual voltage. The opinion also says: "It was shown, and we know it to be a fact, that if there is a greatly excess current coming in over house wires, all lights that are turned on will be burned out and the fuses blown. Appellants virtually admit, at least they do not deny, that the light globe on an extension cord used by them under the house, was still burning after the accident, thus conclusively showing there was no excess current sufficient to burn out the lights on the circuit.

"It is well recognized that 110 volt current or even less will, under similar conditions as here shown to exist, cause death. It was so recognized and the authorities cited and quoted from in *Oklahoma Gas & Elec. Co.* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550, where we reversed the judgment and dismissed the cause on an allegation of excessive current because of a defective transformer."

The majority opinion says that the light globe used by appellant and his brother was still burning, thus conclusively showing there was no excess current sufficient to burn out the lights.

This court did not hold, as I understand the language, in the case of *Oklahoma Gas & Elec. Co.* v. *Frisbie, supra,* that 110 volts would cause death. It was said by the court in that case that death has frequently occurred in consequence of persons coming in contact with ex-

posed wiring, generally by forming a short circuit, either by standing on a wet floor and touching the wire or leaking electric fixture with one or both wet hands.

We have had evidence in this court from experts in which it was shown that 110 volts will not cause any serious damage and will not cause death. Of course, if there is a defective transformer, or if the conditions existed as testified to by Martin, the voltage would be very much in excess of 110. The opinion then says quoting from the Frisbie case, *supra,* that tests were made in that case to determine whether excess voltage was passing through the secondary wires, and it was found that it was not. The majority admit, however, that no similar test was made in this case.

I do not agree with the court in the statement that to say that Martin came to his death by reason of appellant's negligence would require speculation, not only as to the amount of current which proved fatal, but also as to the method by which such alleged excess charge entered the house.

That Martin was killed by coming in contact with the wire is not disputed, and whether it had excessive voltage was a question for the jury and not for this court.

The Idaho Supreme Court said in the case of *Staab* v. *Rocky Mountain Bell Tel. Co.,* 23 Idaho 314, 129 P. 1078: "As to whether or not the proper care and precaution had been taken by the light company to insulate these wires to guard them against employes and innocent persons, who might be working about them, was one of the facts on which there was a conflict of evidence, and this was submitted to the jury, and has been passed upon by them. The appellant was engaged in the business of generating, transmitting, and distributing the most dangerous and least understood article known to the business or commercial world, namely, electrical energy—unseen foe—and it was chargeable with the legal duty of so handling it as to protect the public, and especially those who might be called upon to come near or in contact with its wires, from dangers they could not see, and which they might readily overlook."

The evidence is conflicting and numbers of witnesses introduced by appellee to testify as to their lights in their residences said that they did not know whether the lights were burning out or not.

In the case of *Ark. P. & L. Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. 2d 846, this court said: "A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have a right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not excuse the company for failure to keep their wires perfectly insulated." *Ark. Gen. Utilities Co.* v. *Shipman,* 188 Ark. 580, 67 S. W. 2d 178.

While the company is not required to insulate its wires, it must either do this or employ other sufficient safety methods to prevent contact with wires conveying the current at such places as danger of contact may reasonably be anticipated. *Ark. P. & L. Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. 2d 464.

It was contended that appellant was guilty of contributory negligence. We recently said in the case of *Southwestern Gas & Elec. Co.* v. *Murdock,* 183 Ark. 565, 37 S. W. 2d 100: "Even if the injured party's act contributed to the injury, this would not bar recovery unless his act was negligent. It is not the contributory act that bars recovery, but contributory negligence."

There was ample evidence to authorize the jury to find for the appellant, and there was no speculation about appellee's negligence. Under our system, the court declares the law, and the jury is the judge of the facts, not only of the credibility of the witnesses, but of the weight to be given to their testimony. And I cannot understand how a member of this court can think that he knows

more about the credibility of a witness and the weight that should be given to his testimony than do the jurors who have seen the witnesses, heard them testify, and observed their manner on the witness stand. I think when a judge undertakes to do this, it is purely a matter of speculation.

I think this case should be reversed and remanded for a new trial and let the jury pass on the facts and the court pass on the law.

I respectfully dissent from the holding of the majority, and Mr. Justice HUMPHREYS agrees with me in this dissent.

LOUIS B. SIEGEL & COMPANY, INC. *v.* MOORE.

4-6637 161 S. W. 2d 387

Opinion delivered April 13, 1942.

Owens, Ehrman & McHaney, Downie & Downie and *Sam M. Levine,* for appellant.

Frank Pace, Jr., and *Henry E. Spitzberg,* for appellee.

GRIFFIN SMITH, C. J. The action was to compensate personal injuries sustained by appellee, a Siegel employe. A stationary block with blade formed one of two surfaces to which scrap metal was fed. Cutting occurred when a second blade, power-driven and operating scissors-like, contacted the object intended to be reduced. Brittle particles were frequently broken from metal. These would sometimes be projected with considerable force in an uncontrolled manner.

While "feeding" the machine May 21, 1940, a steel sliver struck appellee, entering the right forearm and inflicting permanent injury. Of sixteen errors alleged in the motion for a new trial, six are urged: (1) Appellant assumed the risk. (2) Judgment *non obstante veredicto* should have been rendered. (3) Instruction No. 1 omits the defense of assumed risk, and (4) is otherwise erroneous, as (5) is also plaintiff's instruction No. 8. (6) Defendant's instruction No. 8 should have been given.

The day of injury both cutting edges of the machine were dull. Appellee alleged this caused particles to break from the metal. When blades were sharp, slivers would seldom be impelled unless hard steel was cut.

The morning of May 21 appellee asked Cooper Harris, his foreman, to change blades, explaining that those

in use were dull, and he was afraid to use them in that condition. Harris said time was not then available. He directed appellee to finish cutting a certain quantity of steel, and promised, thereafter, to make substitutions. Appellee testified he relied on the promise, but was injured during the afternoon while cutting a bumper that came from a very old automobile. At the hospital a general anaesthetic was administered and the sliver removed. Part of the flesh sloughed off. A physician testified that while appellee still had partial use of the arm, amputation would probably be necessary. The judgment for $10,000 is not alleged to be excessive.

The foreman denied having promised to replace blades, but admitted appellee complained of their condition the morning of May 21. Sharp blades, he said, "sliver" certain kinds of metal, and particles are apt to strike an operator at any time.

First.—It is insisted that because appellee was 47 years of age, and had been using the machine several years, his information regarding it, and knowledge of attendant dangers, were equal to information and knowledge of the foreman. Appellee's statement that slivers from hard steel were sometimes thrown from sharp blades is, it is argued, an admission that the danger was obvious; therefore, a promise to repair and failure to do so were not proximate causes of injury; and this, it is said, is certainly true in view of appellee's testimony that hard steel of the kind he was converting "would shatter like a piece of glass."

An experienced employe assumes all ordinary risks incident to his employment. *McEachin* v. *Yarborough,* 189 Ark. 434, 74 S. W. 2d 228; *Southwestern Telephone Company* v. *Woughter,* 56 Ark. 206, 19 S. W. 575. The McEachin decision is cited by appellant, and its rule is sought to be invoked. Distinction is that a promise on behalf of McEachin to repair was not involved, while here appellee says he relied absolutely upon the foreman's assurance. In this respect the case is dissimilar to *M. E. Gillioz, Inc.* v. *Lancaster,* 195 Ark. 688, 113 S. W. 2d 709. It is more like *Texarkana Telephone Company*

v. *Pemberton,* 86 Ark. 329, 111 S. W. 257, where we said that when a master has promised to repair, the employe does not assume interim risks if the period is reasonable and circumstances do not preclude normal expectation the promise will be kept.

Notice given an employer, and the employer's promise to repair, were bases upon which cases cited here by appellant were distinguished in *Roach* v. *Haynes,* 189 Ark. 399, 72 S. W. 2d 532. Mr. Justice BUTLER expressed the court's view that although the employe be skilled in operation of the appliance being handled, and knew of defects, and had an appreciation of danger incident to vices, the master's promise to repair created a new relationship, effect of which was to remove the assumption of risk, within the limitations drawn. The rule in reverse was expressed in *St. Louis, I. M. & S. Ry. Co.* v. *Holman,* 90 Ark. 555, 120 S. W. 146. Mr. Justice WOOD there said that a promise by the master to repair, and the servant's continuance in service in reliance upon the assurance "[creates] a new stipulation whereby the master assumes the risk impendent during the time specified for the repairs to be made." See *Reader Railroad* v. *Sanders,* 192 Ark. 28, 90 S. W. 2d 762.

Second.—Harris, the foreman, was sued jointly with the Siegel company. Judgment was neither for nor against him, no verdict having been signed except the one finding against appellant. The new relationship grew out of the foreman's instructions; but, necessarily, appellee's work had to be done with a machine he thought was dangerous. Harris' position and his authority were, in law, such as to justify appellee in remaining at his post unless the danger was so apparent no reasonable person would have done so. This was not the case; nor do we think there is want of substantial evidence to sustain the presumption that Harris had authority to direct appellee.

In *Mississippi River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255, there was a finding in favor of the appellee, an injured employe. The act of negligence causing injury was by Hudgins, a fellow-servant, whom

the jury found blameless. In the opinion (as to which there were dissents by Mr. Justice FRANK G. SMITH and Mr. Justice McHANEY) it was held that the verdict in favor of Hudgins was not inharmonious with a finding against the fuel corporation: this because the appellee might recover from the corporation notwithstanding his own contributory negligence, but could not prevail against the fellow-servant, ". . . no matter how guilty [the fellow-servant] might have been of negligence, if the injured party was guilty of contributory negligence." By this decision the comparative negligence doctrine (applicable to a corporation as distinguished from an individual) permits recovery against the artificial entity in circumstances where no claim could be sustained against a natural person. See *Dierks Lumber & Coal Co.* v. *Noles,* 201 Ark. 1088, 148 S. W. 2d 650.

Third.—Was assumption of risk as a defense submitted to the jury? By instruction No. 1 there was direction to find for the plaintiff (1) if the blades had become dull; (2) if that fact, being known to appellee, was by him brought to the foreman's attention, coupled with a request for replacements; (3) if Harris promised to repair and requested appellee to continue work; (4) if by reason of such defects appellee sustained the injury complained of ". . . within a short period of time after Harris had promised to repair the defects, if any," and if the hurt occurred while appellee was exercising due care and was properly performing his duty. Final condition was that the injury must have been ". . . directly caused by the dull condition of the cutting blades." *Long Bell Lumber Co.* v. *Tarver,* 196 Ark. 275, 118 S. W. 2d 282, and cases cited in these reports. Instruction No. 1 was "binding." *Missouri Pacific Railroad Co.* v. *Dalby,* 199 Ark. 49, 132 S. W. 2d 646. A "binding" instruction, if inherently wrong, is not cured by a correct instruction.

To repeat, the only negligence relied on is that the blades were dull. No contributory negligence is testified to other than appellee's act in continuing to work after he had requested repairs. The foreman's directions, as

in *Railway* v. *Holman,* created a new relationship. The instruction, therefore, was not erroneous.

Fourth.—Instruction No. 7 told the jury appellee did not assume risks arising from negligence the defendant may have been guilty of, ". . . unless he knew of and appreciated the dangers arising therefrom." Insistence is that there is absence of evidence that appellee did not understand the dangers. Again, the answer is that with creation of the new relationship, risks due to dull blades during the reasonable period operations continued were, in a sense, underwritten by appellant.

If it be conceded appellee knew of and appreciated gravity of the danger, reply is that he told Harris the machine was unsafe. From then until the so-called reasonable period expired, appellee acted in reliance upon the foreman's implied assurance, and any injury resulting from dull blades became appellant's liability while the work was being done as usual. Since there is no testimony appellee altered his conduct or varied his methods after promise, objection to the instruction cannot be sustained.

Fifth.—What has been said in respect of the law's presumption that a new relationship arises when there is complaint of defects and promise to repair, is applicable to plaintiff's instruction No. 8. It told the jury that if Siegel's foreman asked appellee to continue work, ". . . the defendant assumed the risk of injury during the time specified for making repairs." There was the added admonition: ". . . unless you further find . . . that the dangers were so open, obvious, and apparent, that no ordinarily prudent person would have continued [at work], notwithstanding the assurance of his foreman."

Sixth.—Defendant's instruction No. 8 (refused) would have told the jury appellant was only required to use ordinary care to prevent injury; that the foreman ". . . should have foreseen an injury would be the natural and probable result or consequence of the alleged negligence."

Appellee's instruction No. 4 declared the law to be that plaintiff's burden was to prove the defendants were guilty of negligence when Harris directed continuance of work, if it should be found as a matter of fact that the blades were dull. We think it was the jury's duty to determine whether Harris (after receiving the essential information from appellee) was negligent in directing continued use of the machine. The foreman's ability to foresee that an injury "would" be the result of failure to make repairs is not a correct statement. To have foreseen that an injury *would* occur is one thing; to have apprehended it *might* occur is another. Hence, it was not error to refuse defendant's instruction No. 8.

Affirmed.

HOSKINS *v.* MCLAUGHLIN, ADMINISTRATOR.

4-6714 161 S. W. 2d 395

Opinion delivered April 13, 1942.

John D. Hoskins, Lloyd E. Darnell and *James R. Campbell,* for appellant.

Richard M. Ryan, for appellee.

MEHAFFY, J. The appellant, John D. Hoskins, on May 14, 1941, filed in the probate court a statement of account against the estate of W. S. Jacobs, deceased. He alleged that in the purchase of the property from the appellant, shown by a quitclaim deed, an agreement was made and entered into that the purchase price should be held in trust for the appellant, payable to him on demand. It was further set out in the statement filed that certain improvement taxes, attorney claims and other matters have been paid in the sum of $1,494, and that after properly crediting the purchase price with these credits, there was due a trust fund of $2,651 to appellant.

The administrator filed a motion to dismiss alleging that the claim has been disapproved by the administrator, and that the probate court was not the proper forum in which to file said claim, and that the probate court had no power to declare a trust as against the estate of W. S. Jacobs.

When the case came on for trial, the court permitted the appellant to strike out of the claim the statement that the purchase price should be held in trust for appellant, and permitted appellant to file his demand as a claim against the estate.

It was alleged in appellant's statement that the deed is predicated upon an oral agreement between appellant and W. S. Jacobs before the latter's death to the effect that W. S. Jacobs would pay the improvement district taxes, advance all costs in a case then about to be prosecuted in the United States Circuit Court of Appeals by the appellant, and pay the balance of the purchase money

to appellant when he returned from a Texas hospital which institution did not permit the patients to have any money in their possession. The claim was disallowed by the administrator, Leo P. McLaughlin, and the probate court, on October 31, 1941, handed down the decision disallowing the claim, and holding that the testimony was insufficient to sustain the claim. W. S. Jacobs paid the improvement district taxes and advanced practically all the court costs involved in the case before the United States Circuit Court of Appeals before his death.

From the judgment of the court disallowing the claim, appellant prosecutes appeal to this court, and the case is now here on appeal.

John D. Hoskins, the appellant, testified that he was the owner of certain lots in the city of Hot Springs; that he acquired the property by commissioner's deed in chancery court; that he had tried to sell the lots several times, but never asked less than $4,500 for the property; that he was in very poor health at the time the property was conveyed to W. S. Jacobs; he was in the hospital from June 18, 1940, until the 30th day of April, 1941, except for a few days; a reduction was realized on the street improvement district lien; Mr. Averill drove the appellant and Mr. Jacobs out to look at the property; Mr. Jacobs looked at it from the car; appellant and Jacobs had been friends for years, and in 1925 appellant deeded all of his property to Jacobs; he placed great trust in Mr. Jacobs.

Dr. W. H. Connell testified that the appellant approached him concerning a sale of the property in question sometime in 1940. Mr. Eisele testified to the same effect.

Mr. E. C. Ellsworth testified that he had been engaged in the real estate business in Hot Springs for thirty years; and that the property was worth about $30 per foot, and that there was a 150-foot frontage.

Jay Rowland testified that he was an attorney in the United States Circuit Court of Appeals case; John Morris, Mr. Jacobs' secretary, gave him a check for $35 and another one for $295 for costs incurred in the afore-

mentioned case; talked to Mr. Jacobs about this matter, once on the phone and once at the court house; Jacobs assured him that all costs would be paid.

Mr. Ray Smith testified that the improvement district lien taxes were satisfied.

Charles Averill, a Red Top taxi driver, testified that he drove Mr. Jacobs and Mr. Hoskins out to view the property in June, 1940; did not hear anything of the conversation, although there was no partition in the taxi.

Mr. Ed H. Coulter testified that he was an attorney of Little Rock; that he met with Mr. Jacobs and Mr. Hoskins at the latter's request in Hot Springs at the Southern Grill on June 16, 1940; Mr. Hoskins sought to employ him in the case about to be prosecuted in the United States Circuit Court of Appeals, but such employment was declined by witness until he could be assured that the necessary finances were forthcoming; at this meeting Jacobs assured witness that the money for the appeal was available; that Mr. Hoskins had sold him some lots for $4,500, and that he would advance the court costs and some other expenses; that Jacobs did pay all costs and expenses with the exception of the last check, at which time Jacobs was ill; Jacobs stated in witness' presence that the balance of the purchase money was to be paid to Mr. Hoskins when Hoskins returned from the Texas hospital; witness had never represented the appellant before, and declined this employment until the costs were assured; Mr. Jacobs told witness that Mr. Hoskins had made arrangements with him for the financing of the appeal; that Hoskins had deeded him his property; it was strictly a business proposition.

The deed from Hoskins to Jacobs was a quitclaim deed, and the consideration is named as $1 and "other good and valuable consideration."

There is no evidence in the record showing that Jacobs or his estate was indebted to Hoskins in any sum. There is this stipulation on page 33 of the transcript: "It is stipulated by the counsel for the estate and counsel for the claimant that there is recorded in book 235, page 329 of the Records of Deeds and Mort-

gages of Garland county a deed from John D. Hoskins to W. S. Jacobs, dated June 13, 1940, for the property in controversy here, and it is introduced here in evidence without setting the deed out at length.''

The deed mentioned is a quitclaim deed and the consideration named is $1 and other good and valuable considerations. There is no intimation in the deed anywhere that Jacobs owed Hoskins anything. Undoubtedly, if the consideration had been $4,500 or any other specific sum, it would have been mentioned in the deed.

We think it clearly appears from the evidence that all that the clause ''other good and valuable considerations'' can mean, was the payments of the costs in the federal court, and this was done. Certainly there is nothing in the evidence indicating that the clause meant additional money.

In the case of *Cal. Cons. Mining Co.* v. *Manley,* 10 Idaho 786, 81 P. 50, the Supreme Court of Idaho said: ''The recital of the money consideration of $1 explains itself, but the further recital as to 'other good and valuable consideration' means nothing, and would be given no weight in the absence of evidence explaining the nature and character of that consideration.''

It is not necessary, to constitute a sale, that the contract specifically state the price to be paid for the property. The price need not be definitely fixed if the agreement contains express or implied provisions by which it may be rendered certain. *Memphis Furn. Mfg. Co.* v. *Wemyss Furn. Co.,* 2 F. 2d 428; *Senter* v. *Senter, et al.,* 87 O. St. 377, 101 N. E. 272.

There is nothing in Mr. Coulter's testimony or in that of any other witness that shows that the estate of W. S. Jacobs is indebted in any sum whatever to Hoskins.

When appellant first filed his claim, his contention was that Mr. Jacobs had promised to pay him in trust, but he changed that, struck out that part of his statement, and filed simply a claim against the Jacobs' estate. It is said that the administrator recognized the indebtedness, and paid a claim. There is no evidence in the record

showing that the administrator ever recognized any indebtedness except Jacobs' promise to pay the costs in the federal court, and the claim that the administrator paid was presented to Jacobs before his death, but he was unable to sign this check for costs in the federal court.

As to whether the estate of Jacobs was indebted to the appellant in any sum was purely a question of fact, and the finding of the court is not against the preponderance of the evidence. In fact, as we have already said, there is no evidence of any indebtedness by the Jacobs' estate to Hoskins, and the judgment is therefore affirmed.

JONES *v.* STATE.

4251 161 S. W. 2d 173

Opinion delivered April 13, 1942.

Peter A. Deisch, for appellant.

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

SMITH, J. Appellant was tried under an indictment which charged that, with malice aforethought and after deliberation and premeditation, he had shot and killed one George Miller. The jury returned the following verdict: "We, the jury, find the defendant, A. T. Jones, guilty as charged in the indictment and fix his punishment at death in the electric chair." Upon this verdict appellant was sentenced to death, and from that judgment is this appeal.

For the reversal of this judgment it is strongly urged that the court erred in refusing to give appellant's counsel a reasonable opportunity to study and analyze the report made by the officials of the State Hospital for Nervous Diseases upon the question of appellant's sanity. As that time has now been afforded it will be unnecessary to decide that question; but as the report will, no

doubt or very probably, be used at the retrial of the cause we will discuss the objections made to it.

There was passed, on December 17, 1838, which was shortly after the admission of this state into the Union, an act, which has since been unchanged and which now appears as § 4041, Pope's Digest, reading as follows: "The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree of crime shall be found by the jury."

This act has been applied in many cases, four of which appear in the 26th Arkansas Report: *Thompson* v. *State,* 26 Ark. 323; *Allen* v. *State,* 26 Ark. 333; *Trammell* v. *State,* 26 Ark. 534; *Neville* v. *State,* 26 Ark. 614.

It was held in all these cases, and in all subsequent cases which have cited the section quoted, that its provisions are mandatory, and that the death sentence may not be imposed upon one convicted of murder unless the jury found that the accused was guilty of murder in the first degree. In addition to the cases above cited the following are to the same effect: *Simpson* v. *State,* 56 Ark. 8, 19 S. W. 99; *Porter* v. *State,* 57 Ark. 267, 21 S. W. 467; *Carpenter* v. *State,* 58 Ark. 233, 24 S. W. 247; *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900; *Lancaster* v. *State,* 71 Ark. 100, 71 S. W. 251; *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849; *Hembree* v. *State,* 68 Ark. 621, 58 S. W. 350.

In the case last cited, the Hembree case, this question, and no other, was discussed, and the question was regarded as so definitely settled that the case is not reported in the state reports, and appears only in the Southwestern Reporter.

Thus the law stood until the rendition of the opinion in the case of *Bettis* v. *State,* 164 Ark. 17, 261 S. W. 46, in which case it was said: "Here the jury in the Ruck case did not expressly name the degree of murder in its verdict of which it found Ruck guilty, but it found him guilty and fixed his punishment at death, thus showing that

they found and intended to find him guilty of murder in the first degree, for murder in the second degree is not punished by death."

The capital sentence imposed in that case was affirmed; but the opinion makes no reference to any of the earlier cases above cited. The opinion does recite that there was no bill of exceptions in the case, and for that reason as the opinion states the presumption was indulged that the jury had been properly instructed and the verdict returned no doubt conformed to the instructions of the court as to the form of verdict to be returned in the event that the defendant was found guilty of murder in the first degree.

Such instruction and direction as to the form of the verdict was given in the instant case. The charge as to the form of the verdict was as follows: "If, from all the evidence in the case, you find the defendant guilty of murder in the first degree, the form of your verdict should be: 'We, the jury, find the defendant, A. T. Jones, guilty of murder in the first degree, as charged in the indictment, and fix his punishment at death in the electric chair.' Or, if you exercise the option that is conferred by the law on you, you may make the penalty life imprisonment in the state penitentiary."

Notwithstanding this specific direction as to the form of verdict to be used in the event the defendant was found guilty of murder in the first degree, the jury did not find the degree of the homicide.

If it be said that the imposition of the death penalty shows what was intended, it may be answered that a capital sentence may not be imposed by intendment. The mandatory provision of the statute is that to impose that sentence there must be a finding that the defendant was guilty of murder in the first degree. However technical this may appear, it is nevertheless the requirement of the law. Human life is so tenderly regarded by the law that it may not be taken upon a conviction under an indictment charging the crime of murder unless, by the jury's verdict, the crime was found to be murder in the first degree.

The testimony shows, although the indictment does not allege, that the homicide was committed in the attempt to commit the crime of robbery, and the statute provides that a homicide so committed shall be murder in the first degree. But that statute (§ 2969, Pope's Dig.) does not make the provisions of § 4041, Pope's Digest, any the less mandatory.

Subsequent to the opinion in the Bettis case, *supra,* the opinion in the case of *Wells* v. *State,* 193 Ark. 1092, 104 S. W. 2d 451, was delivered. In that case the accused was indicted for murder in the first degree, alleged to have been committed by the administration of poison, and the accused entered a plea of guilty to the crime charged; notwithstanding that plea a jury was impaneled to find the degree of the homicide, as required by § 4041, Pope's Digest.

The court charged the jury in that case that "The defendant in this case has entered his plea of guilty to the charge against him in the indictment; that is, of murder in the first degree. The law provides in such cases that the jury shall be empaneled to assess his punishment." In holding this instruction error it was said: "While it is true that appellant was indicted for murder in the first degree by poisoning which, under the statute, is made murder in the first degree, § 2343, Crawford & Moses' Digest, still the instruction above set out was error under said § 3205, above quoted (4041, Pope's Digest), and the verdict of the jury was bad in that it failed to find the degree of the crime. By § 3205, 'But if the accused confess his guilt, the court shall empanel a jury and examine testimony, and the degree of crime shall be found by such jury,' the court's instruction would not leave it to the jury to find the degree of the crime. After telling the jury that the defendant had entered his plea of guilty to murder in the first degree, the court told the jury that it was 'empaneled to assess the punishment.' And again that the only question for them to determine was 'that of the punishment to be imposed.' And again he told the jury that it was their 'duty now to retire and fix the punishment.' The statute provides that 'the degree of crime shall be found by such jury,' not merely to

fix the punishment or assess the punishment. The instructions in effect told the jury that the defendant was guilty of murder in the first degree and that they could fix his punishment either at death by electrocution or life imprisonment. This was error. The verdict of the jury was defective in that it failed to find the degree of the crime."

That opinion cited a number of cases hereinabove cited, and quoted from the case of *Lancaster* v. *State, supra,* as follows: " 'This statute was no doubt overlooked by the circuit judge, for under it this court has several times decided that a verdict upon an indictment for murder which does not find the degree of murder is so defective that no judgment can be entered upon it.' "

In the case of *Porter* v. *State,* 57 Ark. 267, 21 S. W. 467, Chief Justice COCKRILL said: "The object of the statute was to make sure that the accused should not be subjected to capital punishment unless the jury specially find that he is guilty of the first degree of murder."

The opinion in the case of *Fagg* v. *State,* 50 Ark. 506, 8 S. W. 829, was written by the same learned judge. In that case the defendant was indicted and tried for murder, and the jury returned the following verdict: "We, the jury, find the defendant guilty of manslaughter, but cannot agree upon the punishment." Upon this verdict the court pronounced sentence for voluntary manslaughter, and that action was assigned as error, for the reason that the verdict did not declare whether the defendant had been found guilty of voluntary manslaughter or involuntary manslaughter. In affirming that action it was said that there was not a scintilla of evidence that the appellant, if guilty at all, was guilty of involuntary manslaughter. Indeed, the contention of the defendant was that the killing was either murder in the first degree or justifiable homicide, and that the jury could not legally return a verdict of manslaughter. But it was said that the accused had acquiesced in that part of the charge at a time when it seemed favorable to him, and that he could not be heard to complain now. No instruction on the question of involuntary manslaughter appears to have

been given. In affirming the action of the trial court in sentencing appellant for voluntary manslaughter the Chief Justice said: "But it is said the court erred in passing sentence on the defendant as for voluntary manslaughter. The verdict did not designate the degree of manslaughter, or assess the punishment. The duty of fixing the penalty devolved, therefore, upon the court. Mansf. Dig., § 2308. On conviction of murder the statute requires the degree of the offense to be found by the jury. Mansf. Dig., § 2284; *Thompson* v. *State,* 26 Ark. 323; *Ford* v. *State,* 34 Ark. 649. It is not so as to manslaughter—it is only necessary that the court should have a certain guide to the intention of the jury. Verdicts receive a reasonable construction in order to reach the jury's meaning, and when that is found, they are enforced as though the intention was express."

It is easily conceivable that a jury might find that, although an accused was not guilty of murder in the first degree, he should, nevertheless, be executed. A general finding that the defendant was guilty of murder as charged in the indictment would permit this to be done if the statute did not require a finding as to the degree of the homicide. Section 4041, Pope's Digest, was passed to deprive the jury of this power, and the law is that the death sentence may not be imposed unless, as Judge Cockrill said in the Porter case, *supra,* the jury "especially find" that the accused is guilty of murder in the first degree.

We may not ignore the statute (§ 4041, Pope's Digest) by saying that it is technical, or highly technical, nor may we ignore it in a particular case where we feel assured that the jury found the accused guilty of murder in the first degree, but did not reflect that finding in the verdict. This for the reason stated by Justice Hart in the case of *Banks* v. *State,* 143 Ark. 154, 219 S. W. 1015, that "The statute expressly requires the jury to ascertain the degree in all cases of murder. Its terms are imperative. The court has uniformly construed it to be mandatory, and, as before stated, it has become a fixed part of our criminal jurisprudence. It is the duty of courts to enforce legislative provisions when the legislature acts within

constitutional limits; and a departure by the courts from imperative rules established by the legislature for the protection of all in order to meet the exigencies of particular cases is an evil not to be thought of, let alone to be acted upon."

It follows, from what we have said, that the judgment must be reversed and the cause will be remanded for a new trial. *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900.

In view of the new trial we take occasion to discuss the report of the officials in charge of the State Hospital for Nervous Diseases, which, in all probability, will again be offered in evidence. Other questions raised in the brief are pretermitted, as they are not likely to again arise.

Anticipating that the defense of insanity would be interposed, appellant was sent to the State Hospital for Nervous Diseases for examination and report. The report made did not conform to the requirements of the statute providing for this examination, in that, while it covered the appellant's mental condition at the present time, it made no finding as to his probable mental condition at the time of the commission of the homicide. The statute provides: "A written report prepared by the physician or physicians employed by the State Hospital shall indicate separately the defendant's mental condition during the period of the examination, and his probable mental condition at the time of the alleged offense. This report shall be certified by the superintendent or supervising officer of the State Hospital under his seal, or by an affidavit duly subscribed and sworn to by him before a notary public who shall add his certificate and affix his seal thereto." Section 11 of Initiated Act No. 3, Acts 1937, p. 1384, appearing as § 3913, Pope's Digest.

However, as the report, although not sworn to as required by law, nor certified under the seal of the supervising officer of the hospital, was offered in evidence by appellant, he is in no position to complain that it did not conform to the provisions of the statute above quoted; but if the report is to be used at the retrial it should be made in conformity with the law.

The statute does not undertake to make the certificate independent evidence; nor could it do so, for the reason that § 10 of art. 2 of the constitution provides that the accused shall be "confronted with the witnesses against him," to the end that they may be cross-examined by him. Section 12 of Initiated Act No. 3, *supra* (§ 3914, Pope's Digest), provides that "The physician or physicians who prepared the report shall be summoned as witnesses at the trial at the order of the trial judge or at the request of either party, and if summoned shall be examined by the court and may be examined by either party, and a copy of the written report hereby required shall be given in evidence in every case in which the fact of sanity is an issue at the trial."

The purpose of this statute is to have the accused, whose sanity is questioned, examined in advance of his trial by competent and impartial and disinterested physicians, who shall make a report upon the sanity of the accused, subject to the right of either the prosecution or the defense to have the physicians who prepared the report summoned as witnesses at the trial for examination and cross-examination. *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527.

The trial court offered, in this case, to have process issued for the physician who made the report, and this must be done when objection to the use of the report is made, to comply with the provision of the constitution above quoted, that the defendant be "confronted with the witnesses against him." However, the report might be offered as original testimony when this is done by consent or without objection.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

Griffin Smith, C. J., (dissenting). Appellant is a Negro, and so is George Miller, whom he murdered. Miller operated a moving picture show at Helena and was shot in the back of the head while seated in a chair. Appellant's purpose in entering the theater was to rob his victim. This intent was admitted in a signed statement introduced at trial without objection.

The indictment charged murder committed "willfully, feloniously, with malice aforethought, and after deliberation and premeditation."

The jury found appellant ". . . guilty as charged in the indictment, and [we] fix his punishment at death in the electric chair."

We therefore have an express finding that the accused committed murder in the first degree, yet ". . . human life is so tenderly regarded by the law that it may not be taken upon a conviction under an indictment charging the crime of murder unless, by the jury's verdict, the crime was found to be murder in the first degree."

The law's tender solicitude for the so-called rights of this malicious murderer who acted with premeditation and deliberation must rise above the verdict. We must reach for that phantom called technicality and remand the cause to the trial court in order that another jury may add the words "first degree"; and this procedure is adopted notwithstanding the finding so definitely made in language clear and comprehensive—a verdict so explicit that nothing written or said can supplement the meaning or add dignity to the judicial process.

Certainly human life is dear. It is tenderly—even passionately—protected by the law's zealous pronouncements predicated upon the proposition that it is better to let ninety and nine who are guilty escape than that one be unjustly punished. No one challanges the soundness of this policy; nor does the public protest more than momentarily when juries resolve doubt in favor of freedom for malevolent characters against whom the evidence is not convincing beyond a reasonable doubt. These seemingly lucky individuals usually become second or third offenders, and not infrequently gratify their proclivities for bloody butchery as they range at will because of the law's "tender regard" for the crossing of every "t," the dotting of every "i."

William Bettis and Sugin Ruck were electrocuted, according to penitentiary records, June 27, 1924. The verdict condemning Rucks was: "We, the jury, find the

defendant guilty and fix his punishment at death." On appeal it was argued that the finding was defective; hence, no judgment could be rendered on it. In affirming the convictions April 14, 1924, this court said [164 Ark. 17, 261 S. W. 48]:

"Verdicts that are silent as to the degree [of homicide] are imperfect and void, because it is impossible for the court to determine from such a verdict what punishment the jury intended to inflict upon the accused, and therefore impossible for the court to pronounce such a judgment on such a verdict, because the punishment had not been fixed by the jury. *But such is not the case at all where the jury returns a verdict of guilty and fixes a punishment which as clearly indicates the degree of murder as if the degree had been expressly named in the verdict.* Here the jury in the Ruck case did not expressly name the degree of murder in its verdict of which it found Ruck guilty, but it found him guilty and fixed his punishment at death, thus showing that they found and intended to find him guilty of murder in the first degree, *for murder in the second degree* is not punishable by death."

In the Bettis case the jury did not recite a finding that Ruck was guilty as charged. In the instant case the jury, as stated, not only found that murder had been committed, but that nature of the act made it *murder in the first degree.* The indictment charged that offense, and stated how and with what intent the crime was consummated.

I am not convinced that capital punishment as a deterrent is preferable to other means of dealing with murder. But it is the system adopted in Arkansas, and the law is not judge-made. Our duty is to review for possible errors of trial courts, where business must be transacted in greater haste than is the case where time is available for research and reflection.

It seems to me that in sending Sugin Ruck to eternity in consequence of a verdict more indefinite than the one with which we are dealing, and in embracing a technicality in the case at bar and holding that the murderer of

George Miller may try his luck before another jury because express language was omitted from a verdict that by no conceivable construction nor stretch of any man's imagination could have meant anything but what a casual reading finds in it, the scales of justice are being needlessly tilted in a direction they should not incline.[1]

Mr. Justice HUMPHREYS joins in this dissent.

HELLER *v.* WILLIAMS.

4-6647 160 S. W. 2d 883

Opinion delivered April 13, 1942.

[1] On remand the defendant was tried and again found guilty of murder in the first degree, by express language. The judgment was carried out July 31, 1942.

J. F. Quillin, for appellant.

Bates, Poe & Bates, for appellee.

MEHAFFY, J. On June 17, 1938, Elbert Williams, a youth then 18 years old, broke his arm in cranking an automobile. This injury occurred in Scott county of which young Williams was a resident. He was taken to Mena in Polk county, and placed in charge of Dr. H. G. Heller for treatment. The treatment was not satisfactory and upon its termination J. E. Williams, also a resident of Scott county, as father and next friend of the boy, brought this suit against the doctor for damage, it being alleged that through the incompetency of the doctor an improper union of the bones had been made, which resulted in a deformity of the boy's arm. The father made himself a party to this suit, and sued for damages which he alleged he had personally sustained.

Objection was made to the venue of the suit of the father for his own benefit; but no such objection appears to have been made as to the suit by the father as next friend.

The jury returned the following verdict: "We, the jury, find in favor of the plaintiffs damages of $600." Neither the verdict nor the judgment pronounced thereon indicates how much of this recovery was for the father's personal benefit nor how much for the benefit of the son.

Numerous errors alleged to have been committed during the progress of the trial are assigned, and, among others, that the court was without jurisdiction to try the suit of the father. As we are of opinion that this assignment of error is well taken, we do not consider any other.

We are of opinion that the Scott circuit court had jurisdiction of the suit for the benefit of the son, notwithstanding the service of process having been had in Polk county.

We find it unnecessary to decide whether the lack of jurisdiction was a question which could be and has been waived, because this objection was made as to the suit of the father for his personal benefit and a single verdict was returned. If there could be and has been a waiver of this objection, so far as it relates to the suit for the benefit of the son, the fact remains that it was not waived in the suit of the father, as a single suit was filed and a single verdict returned.

We are all of the opinion that the suit brought by the father for his own benefit in Scott county, upon service of process had in Polk county, should have been dismissed for the want of jurisdiction; and a majority are also of the opinion that the Scott circuit court, under the circumstances stated, had jurisdiction to try the suit of the son.

The jurisdiction of the Scott circuit court is predicated upon Act 314 of the acts of 1939, p. 769, the relevant portion of which 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."

We have reached the conclusion that the malpractice of the doctor, arising out of his alleged incompetency, was, within the meaning of this act, a personal injury, to compensate which the injured party has, under the provisions of Act 314, the right to sue for compensation for his injury, either in the county in which he resided at the time of the injury or in the county where the injury occurred.

The word "accident" necessarily means the act causing the injury, and while the accident caused young Williams' arm to be broken, this is not what he is suing for;

he is suing for damages for the wrongful conduct of the doctor in setting his arm. The theory of the case is that, after the accident had occurred which caused the breaking of the arm, the doctor then gave the injured party unskillful treatment, in another county. In other words, this is a suit for damages for malpractice, and the act expressly provides that all actions for damages for personal injuries, etc., 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 the injury. The injury complained of by the son was not the breaking of his arm, but that alleged to have been caused by the wrongful conduct of the doctor in setting it. It is not contended that the doctor had any connection with the automobile accident when appellee's arm was broken, but it is contended that the doctor was guilty of wrongful conduct which injured or damaged the young man, and it is for the damages for this alleged wrongful conduct for which suit is brought.

The case of *Cortes, Admr.,* v. *Baltimore Insular Line, Inc.,* 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368, was a suit brought under a federal statute, which provides "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, . . ." Santiago, after shipping as a seaman, fell ill of pneumonia, and his administrator alleged that his intestate died through lack of attention. It was held that the failure to furnish attention to the seaman was a tort, resulting in personal injury, within the meaning of the statute, for the reason that once the voyage was begun, the seaman was cut off from care and cure unless provided by the officer and crew of the vessel. This failure to furnish care and cure was the proximate cause of the seaman's death.

Here, the proximate cause of the deformity to young Williams' arm was the injury sustained in Polk county. The effect flowing from this cause might have been averted had the injured party been given the skillful care due him from appellant as his physician and surgeon; and this failure was an accident within the meaning of Act 314. No question of venue was involved in the Cortes

case, *supra,* while here it is the only question now being considered.

Act 314 is a venue statute, and it localizes the venue of suits growing out of negligent accidents or occurrences. After the accident which caused the original injury had occurred in Scott county, young Williams was removed to Polk county where appellant's connection with the injury had its inception, and if any liability attaches to appellant through his incompetency or inattention, that liability arose, not in Scott county, but in Polk county.

The first case before us which involved the construction of Act 314 was that of *Coca-Cola Bottling Co.* v. *Kincannon, Judge,* 202 Ark. 235, 150 S. W. 2d 193, 134 A. L. R. 747, in which case the plaintiff alleged she had been sold a polluted bottle of *Coca-Cola,* which she had drunk, thereby sustaining the damages for the compensation of which the suit was brought. It was there insisted that the statute applied only to injuries of a traumatic nature. We held that the act was not thus limited, but covered wrongful acts from which personal injuries result. In so holding we defined the word "accident," appearing in the statute as follows: "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."

The incident which caused the injury complained of was the misconduct of the doctor, and this occurred in Polk county. The act, therefore, confers no authority for the father to sue the appellant doctor in Scott county upon service had on him in another county. The judgment must, therefore, be reversed and the cause remanded with directions to quash the summons and the service thereon as to the father's case, and the case of the young man is reversed and remanded for new trial.

Mr. Justice Greenhaw dissents from that part of the majority opinion which holds that the Scott circuit court had jurisdiction of the minor's cause of action, for the reason that under such holding a physician who treats patients from other counties in this state could be forced

to leave the county of his residence, where the treatment was administered, and defend malpractice suits filed against him by patients anywhere they reside in the state; and it is his opinion that actions for malpractice were not included in nor contemplated by Act 314 at the time of its passage, and that such actions against a physician must be brought against him in the county where he resides or is served with summons.

McHaney and Holt, JJ., concur in this dissent.

Castle *v.* Watts.

4-6710 160 S. W. 2d 886

Opinion delivered April 13, 1942.

W. F. Reeves, for appellant.

Shouse & Shouse, for appellee.

Smith, J. Appellee C. C. Watts filed a suit against C. E. Castle, which he denominated a "Petition to Quiet Title." The pleading did not contain allegations entitling plaintiff or petitioner to the relief prayed. The defendant, Castle, did not demur to this pleading, but filed an answer, averring that the pleading did not state facts

entitling the petitioner to the relief prayed or to any relief. A cross-complaint was filed by Castle, in which he prayed the cancellation of certain conveyances hereinafter referred to. Castle alleged that he had acquired title to the land in question under a decree foreclosing a mortgage executed to him by John I. Barnes. It does not appear what title Barnes had. The deed of the commissioner, based upon this foreclosure, was dated September 22, 1930.

An intervention was filed by W. T. Mills, which presents for decision the question decisive of this litigation.

Upon these pleadings testimony was heard, from which it appeared that, after obtaining the deed of the commissioner of the court upon the foreclosure of the mortgage above mentioned, Castle abandoned the land; but, if this be not true, he failed to pay the general taxes due thereon for the year 1932. The land was sold to the state. There were three parcels of the land, described as follows: Pt. NE¼ SW¼ section 3, T. 14 N., R. 15 W., 6.50 acres; Pt. SE¼ NW¼ section 3, T. 14 N., R. 15 W., 24 acres; Pt. NE¼ SW¼ section 3, T. 14 N., R. 15 W., 18 acres. The land was sold and certified to the state under these descriptions, and was purchased by and conveyed to T. F. Baxter by the State Land Commissioner under these descriptions.

A prospective purchaser sought Mills' assistance in acquiring the title to this land. This prospective purchaser abandoned his efforts to buy the land, but there began a voluminous correspondence between Mills and Castle which eventuated in a contract whereby Mills agreed to perfect the title to the land for one-half thereof, or for one-half of the proceeds of the land, if it were sold.

In the performance of this contract, Mills procured a quitclaim deed from O. M. Young and wife to himself to the land. What, if any, interest Young had in the land does not appear. In the further attempt to perform the contract, Mills filed suit against Baxter to cancel the deed that Baxter had obtained from the State Land Commissioner, but that litigation was compromised by the

execution to Mills of a quitclaim deed by Baxter to the land here in suit.

Mills and Castle corresponded about the sale of the land, more than one sale having been under consideration. Mills alleged in his intervention, and the court found the fact to be, that, with the consent of Castle, Mills sold the land to Watts for the consideration of $400, of which $100 was cash in hand paid, the balance of $300 to be paid in three equal installments of $100 each. The court found that in clearing the title to the land of the cloud of this tax sale Mills had paid $5 advance costs; that he had paid Baxter the sum of $54, and that he had paid taxes subsequently accruing amounting to $4.81.

In anticipation that the contract of sale to Watts would be performed, Mills and wife, on December 17, 1938, executed and delivered to Watts a warranty deed which correctly described the land in question by metes and bounds, and this litigation was begun by the filing of the "Petition to Quiet Title" by Watts referred to in the beginning of this opinion.

Mills alleged that he prepared for execution by Castle a quitclaim deed under date of November 15, 1938, by which Castle would convey to Mills the land in controversy, but Castle declined to execute the deed. Mills also alleged the tender to Castle of the proportion of the purchase money to which Castle was entitled under the contract whereby he had removed the cloud of the tax title and had negotiated the sale of the land.

The case is unusual, and the decree is not unambiguous; but as we understand and interpret it the court found, from the testimony and the correspondence between Mills and Castle, that Mills had acquired an agency coupled with an interest to sell the land, and had negotiated a sale pursuant to this authority, and had tendered to Castle the $200 to which, under the contract, Castle was entitled.

The parties were operating under what Mills calls a "50-50" contract, under which he was to sell the land after removing the cloud and pay Castle 50 per cent. of

the proceeds of the sale, so that Castle is entitled to $200 net, and this, as we understand the record, Mills had offered to pay Castle.

Upon this finding it was decreed "that title to the hereinbefore lands be quieted and confirmed in the plaintiff, C. C. Watts, upon his completing payment according to this decree; that tender has been made C. E. Castle by the intervener, Wm. T. Mills, and upon the defendant's (Castle's) failure to execute proper deed then his right, title and interest in said lands be and the same are canceled and barred." In other words, specific performance of the contract between Castle and Mills was decreed.

Authority for this decree is found in the opinion in the recent case of *Sebold* v. *Williamson,* 203 Ark. 741, 158 S. W. 2d 667, delivered February 9, 1942. In that case, as in this, the landowner authorized his agent to sell land under specified terms, and the agent procured a purchaser who accepted the terms, and the specific performance of the contract to sell was enforced in that case. The correspondence and writings between the parties prescribing the terms of sale met the requirements of the Statute of Frauds here, just as was the case there.

It is insisted that Castle did not authorize Mills to sell the land for $400, and that he should not be required to accept that price for the reason that the land is worth more money, and that Mills did not disclose its actual value, as he should have done, inasmuch as Castle had never seen the land. The chancellor did not so find; nor do we. The record discloses that Mills reported to Castle an offer to buy the land at the price of $100, which Castle agreed to accept provided he was paid $75 of the purchase money. Mills did not make this sale, but later sold the land for $400 to Watts who offers to perform and to complete his payment, one-half of which has already been made.

In the Sebold case, *supra,* after decreeing specific performance of the contract which Sebold's agent had negotiated, it was ordered that if Sebold did not convey, the clerk of the court be appointed commissioner to make

the conveyance and receive compensation for Sebold, the owner.

We think this a better practice than to cancel the owner's title, as was done in the decree here appealed from, and that decree will be modified to impose the same directions given in the Sebold case. The cause is remanded for that purpose.

If it be said that the record does not show that Castle is the owner of the land, it being shown only that he had a deed from the commissioner made pursuant to the decree foreclosing the mortgage from Barnes to Castle, and that no showing is made that Barnes had title to the land, it may be answered that the purchaser Mills procured proposes to accept Castle's title, whatever it may be, and the deed sent to Castle by Mills for execution, and which Mills, by his intervention, prays that Castle be required to execute, was a quitclaim deed. Castle may yet perform the decree by executing the deed. If he fails or refuses to do so, the commissioner will execute a deed, as directed in the Sebold case, upon the payment to the commissioner of $200 for the account of Castle.

The costs will be assessed against Castle, and if he refuses to execute the quitclaim deed which Mills presented to him for execution, the additional costs incident to the execution of the commissioner's deed will also be assessed against him.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* CHAMBERS, JUDGE.

4-6743 160 S. W. 2d 888

Opinion delivered April 13, 1942.

J. M. Smallwood, for petitioner.

Paul X. Williams, for respondent.

GREENHAW, J. Millie Shelton, wife and guardian of V. C. Shelton, an incompetent World War veteran, filed a petition in the southern district of the probate court of Logan county, asking that the court authorize her, as guardian, to purchase a home for the ward and his family, and pay for same out of the proceeds of the ward's estate.

The petition alleged that the guardian and their two minor children make their home with the incompetent, and depend upon him for their support and maintenance. The family has been living in rented houses and moving from place to place, which is detrimental to the ward's physical and mental health, and has caused the ward who is in a highly nervous condition to become dissatisfied and irritable. The children are now approaching school age, and they desire to have a permanent abode while these children are being educated.

It was further alleged that the guardian has an opportunity to purchase the property which they now occupy in Booneville, and in which the ward is perfectly contented, for $2,000, which is a reasonable price. Rental on this property during the children's education there would be, at the present rate, approximately $3,000. The ward's income from pension and insurance is $156 per month, and assets of his estate are more than $10,000.

The ward and his family desire to make this property their home, which would be for the best interests of the ward and his estate, and an economical and businesslike way in which to provide support and maintenance for the ward and his dependents.

The Veterans' Administration filed an entry of appearance, pursuant to act 283 of 1941, which provides that the Administrator of Veterans' Affairs shall be a party in interest in any guardianship proceeding involving an incompetent veteran or his estate. It stated there was no objection to an order authorizing a purchase of a home for the incompetent ward, provided the court found that the premises to be purchased are fairly valued at the proposed purchase price.

The United States Fidelity & Guaranty Co., surety on the guardian's bond, filed a response to the petition, in which it admitted the facts set forth in the petition, but alleged that the probate court was without jurisdiction to grant the relief prayed for.

The probate court entered an order holding that it had jurisdiction to try the cause and grant the relief asked in the guardian's petition, and dismissed the response of the surety company. Thereupon the company filed a petition in this court for a writ of prohibition against Hon. J. E. CHAMBERS, judge of the probate court, to prohibit him from trying this case, stating that respondent will grant the relief asked unless prevented by an order of this court, and contending that the probate court is without jurisdiction to authorize the expenditure of funds in the hands of the guardian to purchase a home for the incompetent ward.

The question to be decided, therefore, is whether the Logan probate court has jurisdiction to authorize the guardian of the incompetent ward to purchase a home for the benefit of the ward and his dependents. It is our opinion that the probate court has jurisdiction to grant the relief prayed for, and that prohibition should be denied herein.

Section 7543 of Pope's Digest provides: "Probate courts, within their respective counties, shall have power

and jurisdiction to appoint, and possess a superintending control over, guardians to take the care, custody and management of idiots, lunatics, habitual drunkards and persons of unsound mind who are incapable of conducting their own affairs and their estates, real and personal, and to provide for the safekeeping of such persons, the maintenance of themselves and their families, and the education of their children, in the manner hereinafter directed."

Section 7570 of Pope's Digest is: "Every probate court by which any insane person is committed to guardianship may make such orders for the restraint, support and safekeeping of such person; for the management of his estate and the support and maintenance of his family and education of his children out of the proceeds of his estate; to set apart and reserve for the use of such family any property, real or personal, not necessary to be sold for the payment of debts; and to let, sell or mortgage any part of such estate, real or personal, when necessary for the payment of debts, the maintenance of such insane person or his family, or the education of his children."

In the case of *Branch* v. *Veterans' Administration,* 189 Ark. 662, 74 S. W. 2d 800, this court differentiated between management of the estates of minors and insane persons, and, among other things, said:

"The sections which deal with the administration of an insane person's estate are §§ 5852 and 5853 of Crawford & Moses' Digest, which are §§ 43 and 19 of chapter 78 of the Revised Statutes. Section 5853 empowers the probate court, where an insane person is committed by it to guardianship, to make the necessary orders with respect to the person of the ward, and 'for the management of his estate and the support and maintenance of children out of the proceeds of his estate.' Section 5852 places in the court the control of the guardian in the management of the person and estate of the ward and the settlement of his accounts with power to enforce its orders in the same manner as a court of chancery.

"We are of the opinion that the authority given the court to make orders for the management of the estate of an insane person and to control the guardian of such in the management of the estate by necessary implication confers the authority to make all necessary orders affecting the surplus money of the ward which, in the judgment of the court, would be to the best interest of the ward and of his estate. Therefore, the court is authorized to order a guardian to lend the surplus money of his ward."

The ownership of the home sought to be purchased in this case would enable the ward and his dependents to be permanently located in the property they have occupied for some time, and which they desire to continue to occupy, thereby removing the uncertainty of occupancy which is always incident to rented property. The property, if purchased, would be an asset of the ward's estate, and would also save the rent which otherwise would have to be expended. We must and do recognize the fact that a dwelling place, whether owned, rented or donated, is a necessity for the ward and his dependents. The statutes above quoted specifically vest jurisdiction in the probate courts to make orders for the management of the estates of mentally incompetent persons, for the support and maintenance of their families and the education of their children from the proceeds of the ward's estate. We think these provisions are sufficiently broad to empower the probate court to authorize the guardian of the mentally incompetent person to purchase a home for the ward and his dependent family, suitable to their means and station in life.

Prohibition is, therefore, denied.

4-6712 160 S. W. 2d 890

Opinion delivered April 13, 1942.

[redacted]

Ralph W. Robinson, for appellant.

R. S. Wilson, for appellee.

HUMPHREYS, J. Mrs. Margaret Valentine, a practicing attorney in Van Buren, Arkansas, was appointed guardian by the probate court of Crawford county for Mrs. Annie McIlvaigh in March, 1941, on petition of some of her relatives in a proceeding to declare her incompetent to attend to her business affairs.

After qualifying as guardian, she made an effort to ascertain whether Mrs. Annie McIlvaigh had acquired building and loan stock from her brother, M. F. Winn, under his will and, if so, what disposition had been made of it. Her brother died testate in February, 1939. Her

investigation led her to believe that Mrs. Annie McIlvaigh had received under the will a building and loan certificate of stock for $1,000 in some building and loan association in Arkansas, but she could find no record showing that she had received such a certificate or what disposition had been made of it. Mrs. Annie McIlvaigh remembered nothing about getting the certificate or cashing it.

Miss Laura Haines nursed Mrs. McIlvaigh's brother in his last illness, and remained in the home quite a while after the brother died to look after the welfare of Mrs. McIlvaigh and to assist her in her business matters. Miss Haines refused to give Mrs. Valentine any information about the certificate of stock or the disposition which had been made of it.

So, also, did G. A. Suggs who had been partly reared by Mrs. McIlvaigh while in his father's home and who assisted Mrs. McIlvaigh in looking after her business affairs after her brother died.

Mrs. Margaret Valentine, guardian aforesaid, contacted and inquired of G. A. Suggs concerning the stock certificate and what disposition had been made of it and he denied any knowledge of the certificate or what had become of it.

Mrs. Margaret Valentine then communicated with several building and loan associations in Arkansas and the bank in Van Buren where she had transacted her business and discovered that the building and loan certificate had been issued by the Peoples Building & Loan Association of Little Rock, Arkansas, and that application had been made by Mrs. McIlvaigh on April 16, 1940, to cash said certificate and that the money for same was paid to her at the Peoples Bank & Trust Company in Van Buren, Arkansas, on May 17, 1940, in $20 bills and that on the same date G. A. Suggs had paid $975 in cash, balance of the purchase money, for a home he had theretofore contracted to buy.

Suit was then brought by the guardian in the chancery court of Crawford county against appellants alleging in substance that G. A. Suggs obtained the proceeds

of the building and loan certificate and an additional $100 which she had saved for burial expenses from Mrs. McIlvaigh through undue influence growing out of their close relationship at a time when she was sick in mind and body and not able to resist his entreaties, and that after wrongfully getting the money without any consideration whatever he used same to purchase and repair a home for himself and wife, Vera Suggs, in Crawford county, described as follows:

"The south half of the SW¼ of the SE¼ of section 13, in township nine north, range 32 west, except a tract sold to Addie L. O'Bryan and to the church, 75 by 115 feet, beginning at a point 30 feet north of the SW corner of said tract, thence east 225 feet, thence north 115 feet, thence west 75 feet, thence south 65 feet, thence west 150 feet, thence south 50 feet to the place of beginning.

"Also, part of the NW¼ of the NE¼ of section 24, in township 9 north, range 32 west, beginning at a corner rock at the NE corner of said school lot, thence east 15¾ poles, thence south 140 feet, thence west 15¾ poles, thence north 140 feet to place of beginning."

The prayer of the complaint was that a lien be declared on said lands for the amount thus wrongfully obtained from Mrs. Annie McIlvaigh without consideration and with which he purchased said lands and the sale thereof to satisfy said lien.

Appellants filed an answer denying each and every allegation of appellee's complaint.

The prayer of the answer was that appellee take nothing by reason of her complaint, and that appellants have judgment for their costs.

The cause was submitted to the court upon the pleadings, testimony and exhibits resulting in the finding of the issues for appellee and a decree adjudging a lien upon the real estate for $1,075 with interest thereon at the rate of six per cent. per annum from the 17th day of May, 1940, until paid and all costs laid out and expended

by appellee, and for an order of sale of said real estate to satisfy the lien, from which is this appeal.

The record reflects without dispute the facts detailed above leading up to the institution of the suit, and also that G. A. Suggs was present when Mrs. Annie McIlvaigh collected $1,000 in $20 bills on the building and loan certificate of stock, and that he witnessed her signature to the papers she was required to sign in order to collect the money, and, also, that he afterwards got $975 of the money and paid his vendor the balance of the purchase money for the lands involved in this suit, and that he afterwards got $100 from her to put a new roof on the residence located on the lands, which he and his wife, Vera Suggs, now occupy as their home; that he had paid $25 down when he contracted for the lands, and that the money he got from Mrs. Annie McIlvaigh was used to pay off the balance of the purchase money due thereon and that he afterwards used the additional $100 he got from her to put a new roof on the house. The record also reflects without dispute that Mrs. Annie McIlvaigh was appointed as executor of her brother's will and attempted to administer the estate with the aid of Miss Haines who remained with her after her brother died, and also with the assistance of G. A. Suggs. The record also reflects without dispute that Mrs. Annie McIlvaigh was feeble in mind and body and required much assistance in getting around from place to place on account of her physical ailments. The record also reflects that on account of her inability to properly look after her estate the probate court, upon application of some of her relatives, appointed Mrs. Margaret Valentine as her guardian.

The record also reflects that both Miss Haines and appellant, G. A. Suggs, denied any knowledge of the existence of the building and loan certificate or what disposition was made of it. The record reflects that G. A. Suggs admitted that he had denied any knowledge relative to the certificate of the stock, or the collection thereof, to Mrs. Margaret Valentine, but explained that his reason for his denial was that Mrs. Annie McIlvaigh had requested him to never tell that he had such knowl-

edge or that she had let him have any of the money collected on the certificate. He claimed that Mrs. McIlvaigh had made a present of the money to him with the inhibition never to tell any one that she had done so.

The record reflects that he admitted signing papers for her to collect the certificate of stock and using the money in the purchase of the lands in question.

The record also reflects that he had great influence over her having been reared by her from the age of seven years until he married.

After Miss Haines left and went to Oklahoma some question came up as to where Mrs. Annie McIlvaigh would live and G. A. Suggs suggested that she go to live with the Thurmans and when Mrs. Margaret Valentine told him that perhaps she would not be willing to live with the Thurmans he said to her that he could make Mrs. Annie McIlvaigh do anything he wanted to, and the result was that she did go to live with the Thurmans for a while.

Much evidence was introduced which conflicted as to the state of Mrs. Annie McIlvaigh's mind, but all admitted that she was very feeble in body and had to be assisted when she went from place to place. According to the record, Mrs. Annie McIlvaigh became weaker in both mind and body until her condition was such that the probate court appointed Mrs. Margaret Valentine as her guardian, on account of her incapacity to transact business.

The trial court, after hearing all the conflicting evidence as well as all the admitted facts, found that in April or May of 1940, Mrs. Annie McIlvaigh was so feeble in mind and body that she was incapable of making a present of the proceeds of the building and loan certificate to G. A. Suggs, and that he obtained the proceeds thereof, as well as the $100 she had saved to pay her funeral expenses, through his undue influence.

We are unable to say, after a very careful reading of all the testimony, that the court erred in so finding. In fact, we think the finding was in accordance with the great weight of the evidence.

This court said in the case of *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. 2d 282, that: "A. D. Cain seeks to reverse the decree setting aside the deeds to certain lands from his mother to himself which were executed in December, 1921. The law relating to transactions of this sort is well settled in this state. Mental weakness, although not to the extent of incapacity to execute a deed, may 'render a person more susceptible of fraud, duress, or undue influence, and, when coupled with any of them, or even with unfairness, such as great inadequacy of consideration, may make a contract voidable, when neither such weakness nor any of these other things alone would do so.' *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510, and cases cited; and *West* v. *Whittle,* 84 Ark. 490, 106 S. W. 955. See, also, *Phillips* v. *Phillips,* 173 Ark. 1, 291 S. W. 802; *Campbell* v. *Lux,* 146 Ark. 397, 225 S. W. 653. In the case last cited the court said that gross inadequacy of price, although not controlling, is a circumstance to be given much weight in deciding an issue of this kind."

Our interpretation of the record is that appellant, G. A. Suggs, procured through undue influence over Mrs. Annie McIlvaigh practically all the money she had at a time when she was in distress on account of the death of her brother and at a time when she was feeble in mind and body and at a time when she was incapable of protecting herself against his importunities and at a time when she did not even know or realize what she was doing. She had forgotten that she had the stock and that she ever collected anything for it. It is admitted by him that he had great influence over her and he also admitted that he kept the transaction a secret from her relatives and friends and that when approached or contacted concerning same he falsified to the extent of saying that he knew nothing about the stock or the disposition made of same, and vehemently denied that he had ever gotten any money from her. It is true that in the trial he retracted all these denials and admitted getting the money. He justified his denials only on the ground that she had exacted from him the promise that he would never tell anyone about the transaction. His conduct throughout

very clearly indicates that he imposed upon an old lady, past seventy years of age, feeble in mind and body, in getting practically all of her money without any consideration, leaving her to drift from place to place more or less a dependent upon the generosity of others.

Appellants also insist upon a reversal of the decree because they say a hypothetical question propounded to Dr. H. W. Savery assumed facts that were not in evidence and omitted therefrom essential and undisputed facts in evidence.

The hypothetical question did not reflect the evidence verbatim, but, after a careful reading thereof and the very lengthy hypothetical question, we think that it reflected substantially all the evidence in the case. The test laid down by this court as to the correctness of a hypothetical question is that it must fairly reflect the evidence. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405.

The decree is, therefore, in all things affirmed.

BROTHERTON *v.* WALDEN.

4-6703 161 S. W. 2d 391

Opinion delivered April 20, 1942.

W. R. Donham, for appellant.

Kenneth C. Coffelt and *Wm. J. Kirby*, for appellees.

SMITH, J. Appellee, who sued by her father as next friend, recovered a substantial judgment, which is not complained of as being excessive, against Mr. and Mrs. Brotherton, who are husband and wife, to compensate a serious injury which she sustained as the result of a collision with an automobile in which Mrs. Brotherton was driving alone.

The accident occurred about four o'clock in the afternoon of April 23, 1940. Appellee, who is 14 years old, was returning home from school with three other girls. All were walking north on a highway which leads to the railroad station, but which forks before reaching the station. The right-hand road turns east towards Little Rock, and the left-hand road runs northwest across the railroad tracks.

The testimony on appellee's behalf is to the effect that the girls were walking on the east side of the highway, and Mrs. Brotherton was driving on the same side of the road in the same direction the girls were walking. Appellee had to cross the highway to reach her home. When the girls came to the point where the road divided, appellee left the path on the right-hand side of the road, and walked to the west across the highway, and the tes-

timony is conflicting as to whether she ran or walked into the car or was struck by it. The collision occurred on the west or left-hand side of the road. Mrs. Brotherton was driving about 20 miles per hour. She testified that as she approached the girls she blew the horn of her car at a distance of about 100 feet, and that as appellee started across the road she again blew the horn at a distance of about 20 feet from appellee, and when appellee proceeded to cross the road she turned her car to the left to avoid striking appellee, but appellee walked into the car and was struck by the right rear fender. Mrs. Brotherton applied her brakes when the collision occurred and the car was stopped within 20 feet after the collision. Mrs. Brotherton picked appellee up and carried her to a hospital. There was nothing to prevent appellee from seeing the approaching car had she looked.

The testimony on appellee's behalf is to the further effect that the highway curves at the point where she started across, and that she glanced back down the road in the direction from which the car was approaching, but she did not see it. She walked diagonally or obliquely across the road, and was within a step or two of the opposite side when she was struck. No horn was blown.

Appellants insist, first, that in no event should a judgment have been rendered against Mr. Brotherton; and that contention is not questioned, and must be sustained. It was held in the case of *Bourland* v. *Baker,* 141 Ark. 280, 216 S. W. 707, 20 A. L. R. 525, (to quote a headnote) that "The common-law rule that the husband is liable for the wife's torts had been abrogated by the married woman's act (Acts 1915, p. 684)." See, also, *Johnson* v. *Newman,* 168 Ark. 836, 271 S. W. 705.

It is further insisted by appellants that under the above testimony, viewed, as it must be, in the light most favorable to appellee, it was error on the part of the court not to direct a verdict in appellants' favor, for the reasons (a) that no negligence on the part of Mrs. Brotherton was shown, and (b) that appellee was, as a matter of law, guilty of contributory negligence.

Whether the testimony sufficiently presented the question of Mrs. Brotherton's negligence as a fact which should have been submitted to the jury, presents but little difficulty. The jury might well have found, and, evidently did find, that Mrs. Brotherton should have relied more on the brakes of the car and have placed less reliance upon its horn, and that, although she was not driving at a rapid speed, she should have reduced the speed of the car; and she did not testify that its speed was reduced.

Whether appellee, as a matter of law, was guilty of contributory negligence, is a question of more difficulty.

Now, the testimony on appellee's behalf is to the effect that the horn was not blown, and that she glanced down the road as she walked obliquely across it at the point where the road began to curve, and that she had nearly crossed the road when she was struck.

Appellee is not of that immature age which, on that account, would relieve her of the charge of being guilty of contributory negligence; yet, as she is still a child that fact may be taken into account in determining whether she used proper care in crossing the road, and one of the instructions given was to that effect.

The introduction and use of the automobile as a means of conveyance and transportation has added greatly to the hazards of the highways, both to pedestrians and the drivers of cars, yet all have the right to use the highways. It was said in the case of *Murphy* v. *Clayton,* 179 Ark. 225, 15 S. W. 2d 391, that "Drivers of automobiles and pedestrians both have a right to the street, but the former must anticipate the presence of the latter, and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated. What is ordinary care is a relative term dependent upon the facts and circumstances of each particular case. The question of contributory negligence is one for the jury whether the pedestrian, in crossing the street at an established crossing, has exercised such care as a person of ordinary

prudence would exercise for its own safety under the circumstances. (Citing cases.)"

Notwithstanding the increased hazards of the highways, the courts have not gone to the extent of declaring that, as a matter of law, the pedestrian about to cross the highway must look and listen, and if necessary stop to look and listen as it is his duty to do when he approaches and crosses a railroad track. Whether any or all of these precautions should be taken by a pedestrian crossing a highway is a question of fact, dependent upon the circumstances of the particular case; and we think it was so in the instant case. Appellee testified that she was unaware of the approach of the car until it struck her, and that she glanced around without seeing it. Had the horn been blown she should have taken cognizance of that fact, and should have ascertained from whence the alarm proceeded before crossing the road. But, as has been said, the testimony presents the question of fact whether the horn was blown.

Upon the whole case we are of opinion that the question of appellee's contributory negligence was properly a question for the jury; and we are of opinion also that this question was properly submitted to the jury.

The judgment against Mr. Brotherton will, therefore, be reversed, and that cause of action dismissed; but the judgment against Mrs. Brotherton will be affirmed.

QUATTLEBAUM *v.* BUSBEA.

4-6631 162 S. W. 2d 44

Opinion delivered April 20, 1942.

Rowland H. Lindsey and *R. W. Robins,* for appellant.

Yingling & Yingling, for appellee.

GRIFFIN SMITH, C. J. Two teachers, one former teacher, three bus drivers, also directors of Floyd Special School District No. 37 of White county, and others, were sued by thirty-nine taxpayers. Charges were fraudulent diversions of school money.[1]

[1] In substance, appellees' abstract of charges is: ". . . said board of directors purchased in the name of the school district a school bus for one of the defendant bus drivers and issued the warrants of the district in payment thereof; that the defendant Cal Aclin, doing business as Searcy Truck and Tractor Company, who was agent of International Harvester Company, was a party to the fraudulent purchase by the district of said school bus; that warrants were issued to certain of the school directors for alleged services performed by them in violation of the law; that illegal warrants drawn by said board of directors were in possession of Security Bank, some of which had been paid and charged to the district; that certain warrants had been drawn payable to said bank purporting to be for services performed by the bank; that bus drivers were related within the prohibited degree to certain directors and had been employed illegally.

"Appellants made denial, after which they admitted certain allegations by affirmatively pleading that warrants were issued in payment of expenses incurred and services performed by designated directors, and that warrants had been issued to bus drivers and teachers, purporting to be for services rendered the district by them, but which were in fact to pay for a gymnasium, it being alleged the warrants were issued against the 'equalizing fund,' with respect to which they expressly pleaded that 'the directors contend that if they have violated the laws, the state board of education has jurisdiction over them, and taxpayers are without authority to sue, especially since the

Appellants, who were defendants below, stress the fact that those against whom judgments were rendered did not benefit personally by the transactions complained of. They say the district received value for all warrants issued, although process by which funds were withdrawn from the treasury was admittedly illegal. Limitation is pleaded.

When employed, each of the three bus drivers was related to one or more of the directors within the prohibited degree.[2] There was no satisfactory proof, it is argued, that two-thirds of the school patrons signed petitions requesting directors to employ teachers who were related to members of the board within the fourth degree. [But see Act 389, approved March 26, 1941.]

Employment of J. R. Lammers as janitor is an example of indirect methods to which recourse was had. Griffin, a teacher, was authorized by the directors to hire a janitor. He engaged Lammers. Payment was accomplished by adding Lammers' salary to Griffin's compensation. Effect was that school records did not disclose Lammers' dual status: janitor and member of the board.

O. T. Dulaney was chairman of the board. A bus was purchased in the district's name for O. L. Dulaney, who was O. T.'s brother. Sales tax was paid by the district.

During December, 1939, on a salary of $100 per month, O. L. Dulaney, as bus driver, drew more than $600. He admitted the bus was purchased as his personal property, although postdated school warrants issued in part payment August 1, 1938, were outstanding when suit was filed November 5, 1940.

While O. T. Dulaney was chairman, Thomas, a brother-in-law, operated a bus for the district under con-

matters they object to were paid out of equalizing funds and not local taxes or the state apportionment.' The answer made the further defense that the district had received benefit of all funds so expended."

[2] Section 97, Act 169, approved March 25, 1931; Pope's Digest, § 11535. Although other subdivisions of § 97 have been amended, subdivision "d" regulating employment of teachers was not affected prior to 1941.

tract. It belonged to Dulaney, who testified Thomas procured it by lease.

Significance attaches to the fact that payment of $250 by warrant was made to M. D. King, a teacher. This occurred, it is said, before the district contracted with him. King purchased real property from O. T. Dulaney (as appellees' counsel expresses it) ". . . about the same date, paying therefor $250. While King would not admit the warrant was issued to enable him to make the purchase, he did not deny it."

Copies of teacher and bus driver contracts were not filed, as provided by law.

O. T. Dulaney, while chairman, used his truck to transport lumber and other building materials for the district and was substantially compensated. He was paid in cash realized from excess amounts added to salaries of teachers and bus drivers.

There were many irregularities. The marginal tabulation [3] shows twenty-four items found by the court to have been fraudulent. O. L. Dulaney settled for the post-dated warrants. King also settled. Charges against C. A. Turpin, L. M. House, M. D. King and his wife, Cal Aclin, International Harvester Company, and Mrs. John V. Crockett, county treasurer, were dismissed. The tabulation is an itemization of judgments, all of which were joint and several, and amounted to $2,209.61. Security Bank paid $174.62 (the amount adjudged against it representing sums added to warrants payable to O. T. Dulaney and cashed by the bank). Net judgments, exclusive of interest, are $2,034.99.

Quoting from appellants' brief, "The greater part of the transactions complained of arose from the attempt of directors to complete a gymnasium building, also used for class rooms." The building was a National Youth Administration project. When nearly finished, but without a roof, NYA apportionment of funds ceased. The school directors claim they were advised it was legal to divert money from the transportation budget. The

[3] JOINT AND SEVERAL JUDGMENTS AGAINST TEN DEFENDANTS. TABLE SHOWS TWENTY-FOUR ITEMS ILLEGALLY PAID, AND THOSE WHO ARE LIABLE.

Items No.	Amount	O. L. Dulaney	O. T. Dulaney	J. W. Quattlebaum	S. I. Stroud	J. R. Lammers	J. H. Bradberry	Elbert Barnett	J. C. Griffin	A. L. Quattlebaum	Security Bank & Trust Co.
1	$ 118.25	$118.25	$ 118.25	$ 118.25	$ 118.25	$118.25	$ 118.25				
2	354.75	354.75	354.75	354.75	354.75	------	354.75	$ 354.75			
3	235.00	------	235.00	235.00	235.00	------	235.00	235.00		$235.00	
4	15.00	------	------	15.00	------	------	------	15.00		------	
5	101.00	------	101.00	101.00	101.00	101.00	101.00	------	$101.00	------	
6	25.00	------	25.00	25.00	------	------	------	------	------	------	
7	40.00	------	40.00	40.00	------	40.00	------	------	------	------	
8	90.00	------	90.00	90.00	------	90.00	------	------	------	------	
9	15.00	------	15.00	15.00	15.00	15.00	15.00	------	------	------	
10	170.00	------	170.00	170.00	170.00	170.00	170.00	------	------	------	
11	85.00	------	85.00	85.00	85.00	85.00	85.00	------	------	------	
12	6.00	------	6.00	6.00	6.00	6.00	6.00	------	------	------	
13	229.00	------	229.00	229.00	229.00	------	229.00	229.00	------	------	
14	15.00	------	15.00	15.00	15.00	------	15.00	15.00	------	------	
15	40.00	------	40.00	40.00	------	------	------	------	------	------	
16	30.00	------	30.00	30.00	30.00	30.00	30.00	------	------	------	
17	22.50	------	22.50	22.50	22.50	22.50	22.50	------	------	------	
18	10.00	------	10.00	10.00	10.00	10.00	10.00	------	------	------	
19	173.73	------	173.73	173.73	173.73	173.73	173.73	------	------	------	
20	16.80	------	16.80	16.80	16.80	16.80	16.80	------	------	------	
21	75.25	------	75.25	75.25	75.25	------	75.25	75.25	------	------	
22	20.96	------	20.96	20.96	20.96	------	20.96	20.96	------	------	
23	174.62	------	------	------	------	------	------	------	------	------	$174.62
24	146.75	------	146.75	146.75	146.75	------	146.75	146.75	------	------	------
	$2,209.61	$473.00	$2,019.99	$2,034.99	$1,824.99	$878.28	$1,824.99	$1,091.71	$101.00	$235.00	$174.62
	174.62*										
	$2,034.99										

* Paid by Bank.

credit thus tapped by padding strategy came to the district from the state equalizing fund.[4]

When money from the equalizing fund is paid to school districts, it becomes property of the payee, subject only to such control as the state has imposed. See § 142 and subsequent sections of Act 169 of 1931.[5] The state board of education is empowered to make such reasonable rules as may be necessary to administer the equalizing fund. A regulation is that failure to supply required information shall disqualify the delinquent district from right of allotment. The report must be available to the commissioner of education not later than June 30 of each year. Changes in rules have been made as necessity and as efficient administration required.

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[4] Floyd School District No. 37, beginning with 1935, received remittances from the equalizing fund as follows: 1935-36, $1,895.68; 1936-37, $1,839.90; 1937-38, $3,454.46; 1938-39, $3,106.60; 1939-40, $3,261.47; 1940-41, $4,176.06; 1941-42, $5,180.94. Expenditures reported (the first amount being for teachers' salaries, and the second sum representing transportation) were: 1933-34, $1,720; $210. 1934-35, $2,184. none. 1935-36, $2,205; $1,050. 1936-37, $2,600; $1,260. 1937-38, $2,800; $1,800. 1938-39, $3,240; $1,880. 1939-40, $2,964; $2,220. 1940-41, $4,360; $3,781. 1941-42, teachers' salaries as shown by contracts (actual payments not available), $3,870; transportation figures not available.

Beginning with the 1935-36 school year, reports made to the department of education show: Two buses operated on contract basis, one at $85 per month for seven months and one at $65 per month for the same period. 1936-37, three operated on contract basis presumably for eight months. Contract salaries were $75, $75, and $65 per month. This would show a total of $1,800 for the year, and does not correspond with $1,260 reported. For 1937-38 two buses were operated on contract basis. Original report shows each at $600 per year. A correction not shown by the report reflects $900. In 1938-39 three buses were utilized under contract. Payments of $520, $600, and $760 were reported. During 1939-40 operation of four buses was reported, with payments of $800, $600, $520, and $300: total, $2,220. [Oscar Dulaney, eight months at $100; Ira Stroud, eight months at $75; Arthur Quattlebaum, eight months at $65, and John Burkett, six months at $50]. For 1940-41, seven buses were operated, six under contract for payments of $600, $529, $860, $480, $480, and $390: total, $3,339. Driver of the district-owned bus was paid $200, and operating expenses were $242, a total of $442, giving a grand total of $3,781. [S. I. Stroud was paid $75 per month for eight months, O. Dulaney $100 for eight months, Arthur Quattlebaum $65 for eight months, and John Burkett $60 for eight months]. Contracts reported for 1941-42 are for $520, $640, $600, and $160 for eight months, $201.25 for one and three-fourths month, and $105 for one and three-fourths month.

[5] Pope's Digest, § 11584, *et seq.* [For source of additional funds, see Act 334, approved March 16, 1939; also see Act 345, approved March 16, 1939].

Appellants' first contention is that the money (found by the court, in effect, to have been siphoned from the treasury) was spent by the directors "in entire good faith." It would perhaps be more accurate to say there was no diversion for personal gain.

Faced by NYA's failure to complete the gymnasium, those who conceived this plan of financial triangulation for obtaining money, and those who lent themselves to the scheme, no doubt justified the expedient as the only available means to an end.

A judgment holding that a member of the Brinkley town council was liable for tiling he sold the municipality was reversed in *Frick* v. *Brinkley,* 61 Ark. 397, 33 S. W. 527. The opinion by Chief Justice BUNN held the transaction was illegal. But the town, he said, could not in good conscience retain benefits and recover the purchase price. The decision was that while the statute prohibited councilmen from being interested in profits of any contract or job for work or services to be performed for the corporation, Frick's sale of tile could not ". . . necessarily or even reasonably be considered a 'contract or job for work or services to be performed,' as is contemplated by the statute." The question, as stated by the chief justice, was: ". . . where the contract made is not void in the strict sense, but only voidable, and where it has been fully executed by both parties, and the object of the litigation is, in effect, to annul and rescind," what were the relative rights? The case turned on one proposition: the relief sought could only be granted on the principles of right and justice, ". . . and these [were] not with the plaintiff."

Attention is called to *Smith* v. *Dandridge,* 98 Ark. 38, 135 S. W. 800, 34 L. R. A., N. S., 129, Ann. Cas. 1912D, 1130, where it was held that even though a school director could not make a binding contract with the district to pay a director an agreed sum for services performed outside his official duties, yet if the district should accept benefits it ought to make just compensation. *Spearman* v. *Texarkana,* 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855, is cited in

the Dandridge case. Mr. Justice Frauenthal made comment, as shown below.[6]

Mr. Justice Wood, speaking for the court in *Hendrix* v. *Morris,* 134 Ark. 358, 203 S. W. 1008, said that in order to make school directors liable it was essential to allege that the wrongful act was wilfully and maliciously done.

These arguments are answered in the case at bar by the facts. However meritorious appellants may have thought the transactions were, to consummate them it became necessary to falsify records. By this departure from the law it was possible to draw money from the treasury for the masked purpose in view.

Because there was deceit and concealment, limitation as a plea is unavailing. Agreement between the actors constituted a conspiracy which became consummate when warrants showing upon their face that they were for a designated purpose were in fact issued for a wholly different end. While the fraudulent motive actuating execution of the warrants remained undisclosed there was concealment, and the statute did not begin to run. *Conditt* v. *Holden,* 92 Ark. 618, 123 S. W. 765, 135 Am. St. Rep. 206.

In rendering judgment, the chancellor correctly declared the law. Affirmed.

TEEL *v.* HARNDEN.

4-6716 161 S. W. 2d 1

Opinion delivered April 20, 1942.

[6] "A director is disabled from making a binding contract with the school district, not because the thing contracted for is itself illegal or tainted with moral turpitude, but because his personal relation to the district as its agent requires that he should have no self-interest antagonistic to that of the district in making a contract for it."

A. A. Robinson, George H. Steimel and *George M. Booth,* for appellant.

A. J. Cole and *W. J. Schoonover,* for appellee.

MEHAFFY, J. The appellants, Everett Teel and Gladys Teel Latham, brought suit in the Randolph chancery court against the appellee, Adeline Harnden, on January 29, 1941, alleging that on and prior to February 3, 1920, appellant, Everett Teel, was the owner of 160 acres of land in Randolph county, Arkansas, describing said lands in the complaint; that on February 3, 1920, appellant, Everett Teel, conveyed by warranty deed said lands to his wife, Anna Teel; Anna Teel died on May 1, 1920, leaving surviving her her husband, Everett Teel, and Gladys Teel, now Gladys Latham; that said Gladys Latham had and was entitled to a homestead right in and to her mother's real estate until she attained her majority, which would have been on March 4, 1937; on November 2, 1920, the appellant, Everett Teel, mortgaged said lands to Dr. S. G. Harnden; Everett Teel remarried on November 15, 1929; he, joined by his then wife, mortgaged the same land at a time when the deed record showed that Anna Teel died seized of said lands; said second mortgage was given to secure a certain promissory note of even date and due and payable five years later; that the mortgage purported to give the mortgagee a power of sale set out therein; that said power of sale was not followed in an attempt to foreclose said mortgage and was not substantially followed as contemplated by statute; said sale was not made by the

mortgagee nor an assignee and was therefore invalid; that the attempted foreclosure was before said note and mortgage were due and payable; said attempted sale was invalid for the further reason that proper notice, as required by law and set out in the mortgage, were not given and said foreclosure was and is invalid for the reason that no notice was ever served on Everett Teel, the appellant, as required by law; that all of the above proceedings are invalid for the following reasons:

"1. Said mortgage attempted to convey an estate not then owned nor subsequently acquired by the mortgagor.

"2. All of the above related proceedings were had and done or attempted to be had and done before Gladys Teel Latham had attained her majority and at a time when the homestead right in and to said lands was vested in her and at a time when the said Everett Teel possessed only an estate by curtesy, if any, and that said estate by curtesy, if any, was inferior and subject to her homestead right until she attained her majority.

"3. Said foreclosure and sale or attempted foreclosure and sale was invalid because same was not had as provided by law in that said notices were neither published nor posted as specifically stated in said mortgage and as are required by law.

"4. Said purported sale by foreclosure was not made nor attempted to be made by the mortgagee and that the power to sell was not properly delegated in writing to a properly appointed agent.

"5. Said attempted foreclosure and sale was invalid because it was premature and at a time long before the said note was due and payable.

"6. Said sale was not under an execution on any judgment from any court for any debt of the said Everett Teel, and did not attempt to sell and/or convey the interest, if any, owned by the said Everett Teel."

Appellants further alleged that the appellee has been in possession of said premises since 1934 and has had the use and benefit of same and has used and col-

lected all rents from same; that she has also cut, used, hauled away and disposed of timber of the fair value of $250; that she permitted a dwelling house on the property of the value of $250 to be destroyed by fire without same being insured and that appellants have been damaged in said aggregate sums; that appellants are entitled to immediate possession.

The appellee filed a demurrer which is not shown to have been acted upon by the court. Appellee filed answer denying each and every material allegation contained in the complaint and specifically admits that on February 3, 1920, appellant, Everett Teel, was the owner and in possession of the lands in controversy; she denied that Everett Teel at any time conveyed the lands to his wife, Anna Teel, or that any deed was acknowledged or delivered or that the deed was valid or effective, such that would pass title; denied that the deed was filed for record by Anna Teel or that she had any knowledge thereof; that the attempted delivery of the deed was conditional and not intended as a valid deed; that after the execution of the deed Everett Teel remained in custody and retained control and exercised full ownership the remainder of the life of Anna Teel, and executed a mortgage on the property to S. G. Harnden on November 15, 1929; admits that Anna Teel died about May 1, 1920, and left surviving her Everett Teel and her daughter, Gladys Teel Latham, a minor, but denies that Anna Teel, at the time of her death, was seized of title to the land in controversy; denies that Gladys Teel Latham was entitled to any interest; she alleges that on November 2, 1920, Everett Teel executed a note to George S. Harnden in the sum of $174 payable one year after date with interest; that Everett Teel on the same date executed a mortgage on the lands in controversy to secure the payment of said note; that said mortgage was recorded January 3, 1921; that at this time Everett Teel was the record owner of the said lands and that Harnden had no notice of any alleged deed; that no part of the principal of said indebtedness had been paid; that on May 15, 1929, there was due and owing to Harnden by Teel the sum of $188 and on said day, in renewal, Teel made and

executed a note in the sum of $188 due and payable two years after date with interest at 10 per cent. per annum, and the same date, in renewal, Teel and his then wife, Myrtle Teel, executed and delivered to said Harnden a mortgage on the lands in controversy; said mortgage was duly executed and recorded; that both the aforesaid mortgages were executed to Harnden to secure the same debt and that both mortgages were taken without knowledge of the claim by Gladys Teel Latham; that the last mortgage was not intended to satisfy or release the first one; she denied that the mortgage was given to secure a debt due in five years, but alleged that it was due in two years after date; that the sale under the mortgage was had as required in the mortgage, and that the appellee, Adeline Harnden, became the purchaser at such sale and the mortgagee executed a deed to her for $260; denied that the sale was invalid and further alleged that should there be any defect or irregularity in the last mortgage the original mortgage be in force and effect; that through the sale Adeline Harnden be subrogated to the rights of the said G. S. Harnden and that the plaintiffs are barred and estopped from maintaining this suit; she denies that she has received any rents or profits from the lands; denies that she has cut, removed, or sold timber from said land of the value of $150 or in any other sum; denies that the residence in the value of the sum of $250 was caused to be burned by her negligence or otherwise; denied that either of the plaintiffs is entitled to the immediate possession of the land; further alleged that this suit should have been brought against the heirs of S. G. Harnden; pleads estoppel and the statute of limitations.

The appellants filed a reply which was a general denial of the allegations contained in the answer.

The court entered the following decree: "On this May 29, 1941, the same being an adjourned day of the Randolph chancery court, the above cause having been reached on the regular call of the calendar, come the plaintiffs in person and by attorneys, George H. Steimel and A. A. Robinson, and comes the defendant, Adeline

Harnden, in person and by her attorney, W. J. Schoonover, and all parties announce ready for trial.

"Whereupon, the cause is submitted to the court upon the complaint of the plaintiffs, and exhibits thereto, the answer of the defendant and exhibits thereto, the reply of the plaintiffs to the answer of the defendant, oral proof adduced in open court as well as documentary records and proof in evidence, and all other pleadings, matters, things and proof in the cause, and the court thereupon takes the case under advisement and asks for the submission of written briefs of counsel.

"On this July 18, 1941, this cause having been taken under advisement and submitted on briefs as aforesaid, the court doth find: that the court has jurisdiction of the parties and the subject of this action.

"That this is an action of the plaintiffs to establish their title, recover possession and an accounting of rents of and to the following described land, real estate and premises, in Randolph county, Arkansas, to-wit: the southeast quarter of the southeast quarter of section twenty-eight; the northeast quarter of the northeast quarter, the northwest quarter and the southwest quarter of the northeast quarter of section thirty-three, all in township twenty north, range one (1) west, containing 160 acres, more or less.

"That the said defendant, Adeline Harnden, is in possession of the said land and premises, under a claim of ownership and title thereto, and that there is a common source of title in the plaintiffs and the defendant, the title thereto having been originally in the plaintiff, Everett Teel, and both parties claiming through said source.

"That the plaintiffs' claim of title to said lands, for the recovery of the possession thereof, for damages and for an accounting of rents is not sustained by the proof herein, and that all issues are found in favor of the defendant, and plaintiffs' complaint should be dismissed for want of equity.

"It is therefore by the court now considered, ordered, adjudged and decreed that the plaintiffs, Everett

Teel and Gladys Teel Latham, take nothing by reason of their cause of action herein, and that their complaint and cause of action be dismissed for want of equity.

"It is further ordered and decreed that the plaintiffs, Everett Teel and Gladys Teel Latham, pay all costs of this cause laid out and expended, and that the defendant, Adeline Harnden, have and recover judgment against them for such costs for which execution may issue.

"To the findings, judgment and decree of the court, the plaintiffs, Everett Teel and Gladys Teel Latham, object and except, and pray an appeal to the Supreme Court of Arkansas which is hereby granted."

The case is here on appeal.

There was introduced in evidence a deed from Everett Teel to Anna Teel, dated February 3, 1920; mortgage with power of sale, Everett Teel to George S. Harnden, November 2, 1920; mortgage with power of sale, Everett Teel and wife, Myrtle Teel, to S. G. Harnden, November 15, 1929; mortgagee's deed under power of sale, S. G. Harnden to Adeline Harnden, March 8, 1934; note dated November 2, 1920, Everett Teel to George S. Harnden for $174 payable one year after date; mortgage with power of sale, Everett Teel, widower, to George S. Harnden, November 2, 1920; note dated November 15, 1929, payable two years after date, Everett Teel to S. G. Harnden; mortgage with power of sale, Everett Teel and wife, Myrtle Teel, to S. G. Harnden, due and payable two years after date; mortgagee's deed, S. G. Harnden to Adeline Harnden, March 8, 1934.

Everett Teel testified in substance that he deeded the land in controversy to his wife, Anna Teel, on February 3, 1920; delivered the deed; nothing was paid for it; gave it to his wife because he wanted to; handed the deed to her in the house, but does not know what she did with it; never saw the deed again; gave a mortgage to Dr. Harnden on November 2, 1920.

Anna Teel died in May, 1920, but the deed that Everett Teel testifies he gave to her was not recorded

until after he had executed a mortgage to Dr. Harnden. Dr. Harnden had no notice that any deed was ever made, and there is really no evidence of what was done with the deed between the time it was made and the date of Anna Teel's death.

Gladys Latham was born March 4, 1916; testifies that she cannot remember when she first came into possession of the deed, but it was at her grandfather's house and was after the death of her mother; her grandfather gave her the deed after she was married in 1935.

Tom Hulvey, a brother of Anna Teel, testified that he was present in Pocahontas on January 30, 1934, at the sale of the land under the power in the mortgage; that Mrs. Harnden did not bid on the land; does not remember who sold the land; Mr. Baker had some papers and gave them to Dr. Harnden; that his brother lived on the place last year under a contract with Mrs. Harnden.

Rufe Baker, the circuit clerk, testified that he prepared the notices of sale when the sale was made under the power in the mortgage; does not know who conducted the sale, but says Dr. Harnden bought the land; does not know who sold it.

It is not denied that before Anna Teel's deed was recorded Everett Teel executed and delivered a note and mortgage to Dr. Harnden for $174. The evidence shows that no part of the principal was ever paid. It is not denied that the debt was due Dr. Harnden from Everett Teel. The note and mortgage executed in 1929 were between the same parties and for the same debt that was originally made in 1920. In fact, the appellants say in their brief that the second note and mortgage perhaps represented the same indebtedness, but different mortgagees. We think the evidence shows conclusively that the mortgagee was the same in each of the mortgages, the one dated 1920 and the one dated 1929.

It is contended by the appellants that Everett Teel had no title or interest in the land in controversy when he mortgaged it in 1920. However, the undisputed proof

shows that this was before the deed to Anna Teel was recorded.

There is some evidence to the effect that the debt secured by the mortgage executed in 1929 was due five years after date, but there is other evidence which shows that it was due in two years. The original note was introduced in evidence, but is not in the transcript. There was evidence tending to show that it was difficult to tell whether the mortgage was due in five or two years, and the clerk, in transcribing and copying the mortgage, fixed it at five. We think, however, the preponderance of the evidence shows that it was two instead of five years.

Not only did Dr. Harnden have no notice of the deed from Teel to his wife, but Teel occupied the land, exercised ownership and control, just as he did before he claims to have deeded the land to his wife.

The contention, however, is principally about the second note and mortgage. It is claimed that the sale was not conducted as required by the mortgage and by law. In our view of this case, it really makes no difference, because the second mortgage was given to secure the same debt, and Dr. Harnden kept possession of the original note and mortgage. No release or satisfaction was ever made of the first indebtedness or mortgage.

"A mortgage does not lose its priority by taking a renewal mortgage when the debt is the same and the property is not released from the lien. . . .

"Likewise the giving of a new note secured by a deed of trust for the same debt, does not deprive the holder of the new security of the right to foreclose the original mortgage." 2 Jones on Mortgages, 664.

In Arkansas Mortgages by Hughes, it is stated on page 246: "A mortgagee who takes a new mortgage to secure the old debt and releases the first mortgage may have the lien of the first mortgage restored if the new mortgage prove to be invalid, if he has acted in good faith and without culpable negligence. This is a rule close akin to the doctrine of subrogation, applied when a defective security has been taken.

"In an early case the mortgagee took a new mortgage in ignorance that a second mortgage had been placed upon the property. He was restored to his rights under the original mortgage as against the second mortgagee who had full knowledge that the new mortgage was but a renewal.

"In a later case the same rule was applied in favor of a mortgagee who had satisfied his original mortgage and taken a new one for the same debt, the new mortgage being void for noncompliance with the homestead statute." See, also, *Shurn* v. *Wilkinson,* 131 Ark. 167, 198 S. W. 279; *Davies* v. *Pugh,* 81 Ark. 253, 99 S. W. 78; *Roark* v. *Matthews,* 125 Ark. 378, 188 S. W. 841; *Jordan* v. *Wilkerson & Carroll Cotton Co.,* 152 Ark. 533, 238 S. W. 780.

The deed given by Dr. Harnden to the appellee, Adeline Harnden, recites that the sale was made in conformity to the law, and there is no satisfactory evidence to the contrary. After this sale was made Teel turned the land over to the appellee without any objection. He did not even suggest that there was any defect until nearly seven years after the sale.

This court recently said in the case of *Clark* v. *Womack,* 192 Ark. 895, 95 S. W. 2d 891: "The deed recites that the sale was made by the trustees named in the mortgage. They executed and acknowledged the deed. One witness, Jim Davis, testified that the sale was made at the court house, and that he thought it was made by A. G. Sanderson, but was not positive. This is not the character of evidence required to overcome the recitals in the deed, which the law recognizes as *prima facie* true."

It will be remembered that both Dr. Harnden and Mrs. Anna Teel were dead at the time of this trial. There is no claim that the original debt was not due from Teel to Harnden, and the only claim with reference to the original note and mortgage is that Everett Teel had already deeded this property to his wife. The evidence conclusively shows that this deed was not put on record; that it was secret, and that Dr. Harnden knew nothing about it.

Section 1847 of Pope's Digest reads as follows: "No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."

The evidence conclusively shows that Dr. Harnden did not satisfy the original debt and did not release the note and mortgage, but kept possession of both; and since there was no satisfaction of the original debt, no release of the note and mortgage, it becomes unnecessary to discuss or decide the other questions raised by the parties.

The decree of the chancellor is correct and is, therefore, affirmed.

E. A. MARTIN MACHINERY COMPANY *v.* THE FIRST NATIONAL BANK OF HUNTSVILLE.

4-6715 161 S. W. 2d 6

Opinion delivered April 20, 1942.

[redacted]

J. T. McGill, for appellant.

G. T. Sullins, for appellee.

HUMPHREYS, J. This suit was brought by appellee in the circuit court of Madison county, Arkansas, against appellant to recover $1,183, with interest from June 15, 1940, at the rate of six per cent. per annum on three county warrants, Nos. 2203, 2207, and 2261, issued against the county road turn-back fund in payment of machinery sold by appellant to Madison county, which warrants were sold, indorsed and delivered by appellant to appellee for the amount sued for; and to recover $693.29, with interest at six per cent. per annum from June 15, 1940, on two county warrants, Nos. 2226 and 2313, issued against the county road turn-back fund in payment of machinery sold by appellant to appellee for the amount sued for, which warrants were sold and delivered without indorsement by appellant to appellee.

The first three warrants were set out verbatim with the indorsements in count number 1 and the other two warrants were set out verbatim in the second count of the complaint. The warrants on their face were payable to bearer and nothing on their face appeared to show that they were void or invalid. The complaint alleged that after the warrants were sold and delivered by appellant to appellee the county court canceled the warrants because they were issued in violation of Amendment No. 10 to the Constitution in that funds against which they were issued in 1940 had already been exhausted when the claims for the warrants were filed and the orders issuing them were void; that the order of the county

court canceling the warrants for that reason was rightfully made.

The complaint also alleged that the warrants were negotiable. This allegation of the complaint, however, was abandoned in the trial of the cause.

The complaint also alleged that the warrants could not be collected by suit against the county on account of their invalidity.

The complaint also alleged that appellee paid appellant when the first three warrants were delivered to it on June 15, 1940, $1,183 in cash, and that it paid appellant $693.29 in cash for the other two warrants.

The complaint also alleged that appellee demanded a return of its money and offered to return the warrants to appellant.

A demurrer was filed to the complaint on the ground that it did not state sufficient facts to constitute a cause of action against appellant.

The court overruled the demurrer to the complaint over the objection and exception of appellant, and appellant refusing to plead further and electing to stand on its demurrer, the court rendered judgment upon the first count in the complaint against appellant for the sum of $1,183, with interest from June 15, 1940, at six per cent. per annum, and on the second count the sum of $693.29, with interest from June 15, 1940, at six per cent. per annum, and for all costs expended by appellee.

To the ruling of the court in overruling the demurrer and rendering judgment in favor of appellee, the appellant excepted and prayed an appeal to this court.

No testimony was taken in the case so the only question involved in this appeal is whether appellee was entitled to recover the amount it paid appellant for the void warrants.

In the cases of *Harriman National Bank* v. *Pope County,* 173 Ark. 243, 292 S. W. 379, and *McGregor* v. *Miller,* 173 Ark. 459, 293 S. W. 30, this court ruled that county warrants were not negotiable instruments in the

sense of the law merchant, and that persons acquiring them take them with notice of the purpose for which they were issued and the order of the county court authorizing their issuance, but the suit in the instant case is predicated upon the sale and delivery of the void or invalid warrants which constituted no consideration at all for the money paid for them. In other words, appellee is asking that the money be refunded to it which it actually paid to appellant for worthless warrants. It is asking for a refund of the money it paid for three of the warrants not only because appellant sold and delivered them to it, but also indorsed them to it which was an absolute warranty by appellant that its title to them was good, and that they were genuine and that there was no legal defense to the collection of them growing out of its connection with the origin of the warrants; and for a refund of the money paid for the other two warrants on the sale and delivery of them to it under the implied warranty that its title to them was good, that they were genuine and that no legal defense existed to the collection growing out of its own connection with the origin of the warrants. Appellee paid out about $2,000 in cash in the purchase of the warrants, and there is nothing in the record indicating that either appellant or appellee knew that they were void or had any reason to suspect from the face of the warrants that they were invalid. It is conceded by the demurrer that the warrants were absolutely void and nothing could be recovered by appellant or appellee from Madison county. Appellant is responsible for their being issued and appellee had nothing whatever to do with them being issued and is not responsible in any sense for their being issued.

The general rule is laid down in § 250, 20 C. J. S., at p. 1148, as follows: "Where there is a failure of consideration for the transfer because of invalidity of the warrant or other reasons, the assignee may recover from the assignor."

In the case of *Sarah Rogers* v. *Walsh & Putnam,* 12 Nebr. 28, 10 N. W. 467, the Supreme Court had before it the exact question involved in the instant case and decided (quoting the syllabus) as follows:

"The plaintiff bought of the defendants what she supposed were, and what purported to be, the warrants of York county, but which having been issued by the county commissioners of that county, without authority of law, were void and of no value. Action to recover the price paid. Held, that the pretended warrants were not a valid consideration for the money paid therefor, and that the plaintiff was entitled to recover it back."

See, also, the case of *Kreutz* v. *Livingston, et al.*, 15 Cal. 344. The identical question involved in the instant case was involved in the case of *Milner* v. *Pelham*, 30 Idaho 594, 166 Pac. 574, and that court ruled, as reflected in syllabi 1 and 2, as follows: "1. Where one purchases county warrants from the payee thereof, which warrant issue is thereafter held by the district court, in a proper action, to be null and void, and the county treasurer enjoined from paying the same, and the order of the county commissioners, directing the auditor to issue the warrants, is reversed and vacated, there is a total failure of consideration from the seller of such warrants, since the purchaser did not in fact receive the county warrants he supposed he was buying, but only pieces of worthless paper.

"2. Whenever one party has in his possession money which in equity and good conscience belongs to another, the law raises a promise upon the part of the first party to repay such money."

The warrants in the instant case appeared on their face to be valid obligations of Madison county, but were in fact void at the time they were issued and for that reason appellee received nothing of value for the money it paid to appellant for the warrants, hence appellee is entitled to recover from appellant the money it paid for the worthless warrants.

No error appearing, the judgment is affirmed.

Mr. Justice GREENHAW disqualified and not participating.

4-6718 161 S. W. 2d 8

Opinion delivered April 20, 1942.

M. P. Watkins, for appellant.

Giles Dearing, for appellee.

McHaney, J. Appellants are the children and heirs at law of Minnie Maude Cooper by a former husband and Hubert Barnes is the administrator of her estate. Appellee is the administrator of the estate of his deceased father, D. O. Cooper, appellee and his brother being the children of said D. O. Cooper by a former marriage. On December 29, 1940, Minnie Maude Cooper shot and killed her then husband, D. O. Cooper. About 30 minutes later she committed suicide by shooting herself. No children were born of that union, but as stated above, each left children by a former marriage.

At the time of his death, D. O. Cooper was engaged in the logging business and had been so engaged for some considerable time. He owned some personal property, consisting of live stock, logging equipment and cash of a total value in excess of $2,000. His wife, Minnie Maude Cooper, was running a camp boarding house. Appellants claimed that their mother was the absolute owner of a one-half interest in the personal property of her husband and filed a claim for same as the heirs of their mother. They also claimed that said personal property was acquired as a result of the joint efforts of the husband and wife, and that, upon the prior death of D. O. Cooper, their mother became immediately vested with a dower interest of one-third of the remaining one-half of said personal property of her husband, and to the additional sum of $450, statutory allowances, under §§ 80 and 86 of Pope's Digest. Appellants also claim that appellee, as administrator of his father's estate, should be charged with the following items:

Sale of personal property at auction	$1,573.55
Cash on hand	619.88
One pump, pipe, tent and a note of Hamlin	166.00
One horse	50.00
One item unaccounted for in inventory	45.00
One-half of an item of $49 unaccounted for	24.50
Or a total of	$2,478.93

Appellants' claim, however, is $95 less than this amount, as they say the total amount chargeable to appellee is $2,383.93. Of this amount they say their mother owned one-half or $1,191.16 as her individual property. Also they claim, because she survived him, a dower interest in his half, or one-third of $1,191.96 which is $397.32, plus $450 as statutory allowances, making a total claim of $2,039.28. This amount deducted from the total estate of $2,383.93 leaves $344.65 with which to pay costs of administration and to distribute to appellee and his brother as their share of their father's estate, thus leaving them everything the hen laid except the egg.

Trial resulted in a finding that, upon the death of D. O. Cooper, his widow became entitled to one-third of his personal estate (found to be the sum of $2,247.93) which descended to appellants as her heirs upon her death. All other claims of appellants were disallowed, including the claim that she owned a one-half interest in said property. There is here a direct appeal and a cross-appeal by appellee from the order allowing a one-third interest to appellants as the dower interest of their mother.

Appellants first contend they should have a judgment against appellee for $2,039.28 by default because he did not file an answer or other pleading as a defense to their claims. No written pleading was necessary or proper. If they ever presented a claim to him as administrator, the record does not show it. They presented their claims to the court and he appeared and contested their rights so asserted.

Appellants also say they were entitled to the statutory allowances of $300 under § 80 and $150 under § 86 of Pope's Digest. These allowances were never claimed by her as she was the widow for about 30 minutes only. It appears to us, as it did to the trial court, that these allowances are personal to the widow, in the absence of minor children, as here, and if the widow dies before the allowances are made to her, the right thereto terminates and does not pass to her heirs. Section 80 provides that the widow "May retain the amount of three hundred dollars out of such personal property at its appraised

valuation." This necessarily contemplates the appointment of an administrator and an appraisement of the deceased husband's property. After which time she "may retain" said sum "out of such personal property at its appraised valuation." The right thereto is permissive, and, by § 87, "The widow shall apply for such property before it is distributed or sold, and not after," and this section applies to the allowance under § 86, as well as to that under § 80. The court, therefore, correctly disallowed these claims.

Another contention of appellants is that their mother was the owner absolutely of a one-half interest in said property, to which they succeeded as her heirs. The trial court found and held that she was not such owner, and we do not find any evidence in the record to overcome such finding.

The question that has given us the most concern is whether she, having shot and killed her husband under circumstances that may or may not have been murder, is entitled to dower in his property. This question is raised by the cross-appeal. In 26 C. J. S., p. 1055, § 47, the general rule is stated as follows: "According to the majority view, the operation of a statute of descent is not affected by the fact that the death of the intestate was caused by the heir apparent in order to obtain the inheritance at once, and therefore an heir who causes or procures the death of the intestate in order that he may inherit the estate at once is not disqualified from taking in the absence of a statute expressly disqualifying him. There is, however, a strong minority view to the contrary, based on the theory that a person should not profit from his own wrong; and it is said that this view displays a tendency to become the majority view. To meet the difficulties arising in such a case, several states have enacted valid statutes intended to prevent a person who has feloniously caused the death of decedent from inheriting or receiving any part of the estate of decedent; but such a statute must be strictly construed and in some situation is held not applicable. A statute disqualifying one who has been convicted of the murder of deceased does not apply in the absence of such conviction, as where there

has been a conviction of manslaughter only, or the person who committed the homicide was insane at the time, or committed suicide shortly thereafter. Also, a statute prohibiting a person from acquiring by descent or distribution any interest in the estate of another whom he has killed in order to obtain such interest is not operative by virtue of an unlawful homicide alone, but only where the killing was done in order to obtain the estate, or an interest therein, of the person killed."

One of the cases cited in a footnote to support the statement that "A statute disqualifying one who has been convicted of the murder of deceased does not apply in the absence of such conviction, as where—the person who committed the homicide—committed suicide shortly thereafter," is In re *Tarlo's Estate,* 315 Pa. 321, 172 Atl. 139. Under a statute of that state, providing that no person who shall be finally "adjudged" guilty of murder in the first or second degree shall be entitled to inherit the estate of the person killed, it was held that the word "adjudged" meant the judgment of a court of competent jurisdiction to pass on the question of guilt in murder, and was the equivalent of convicted and sentenced; and that the "estate of father who fatally shot daughter and then committed suicide held not precluded from taking daughter's estate by inheritance, since father had not been 'adjudged' guilty of murder within statute precluding inheritance." Headnote 1. The Pennsylvania statute is quite similar to ours, the latest being § 3 of Act 313 of 1939, which provides: "Whenever a spouse shall kill or slay his or her spouse and such killing or slaying would under the law constitute murder, either in the first or second degree, and he or she shall be convicted of murder for such killing or slaying, in either the first or second degree, the one so convicted shall not be endowed in the real or personal estate of the decedent spouse, so killed or slain." This section is almost an exact copy of § 1 of Act 190 of 1927, digested as § 4397 of Pope's Digest. We are of the opinion that the word "convicted," as used in said statute, means convicted and sentenced in a court of competent jurisdiction, the circuit court of the proper county. The probate court, from which

this appeal comes, would have no such jurisdiction and it did not undertake to determine this question. Since Minnie Maude Cooper was not tried or convicted of murder for the killing of her husband, but committed suicide shortly thereafter, the above statute does not exclude her or her heirs from asserting dower in her husband's property. In the case above cited, In re *Tarlo's Estate,* three judges dissented from and one concurred in the majority opinion. The courts are very much divided on the question, but it appears the majority view supports the holding in said case, although it is stated in *De Zotell* v. *Mut. Life Ins. Co.,* 60 S. D. 532, 245 N. W. 58, that the minority view displays a tendency to become the majority view. This last mentioned case was cited and quoted from with approval in our own recent case of *Horn* v. *Cole, Administrator,* 203 Ark. 361, 156 S. W. 2d 787. In that case Sarah Horn shot and killed her husband who held a policy of life insurance in the sum of $1,000, in which she was the named beneficiary. The insurance carrier brought an interpleader's suit in the Pulaski chancery court, making her and Cole, the administrator of his estate, parties, paying the money into court. The administrator answered that the beneficiary, Sarah, had disqualified herself from receiving anything under the policy because she had wrongfully and unlawfully killed the insured, and prayed that the entire proceeds of the policy be paid to him as administrator. Sarah answered and denied her disqualification or that she had wrongfully or unlawfully killed the insured. She also alleged that she was indicted, tried and acquitted of the offense of said killing in the Saline circuit court, and asked that she recover the proceeds. Trial resulted in a decree for Cole, administrator, and that "Sarah Horn shall take no part of the proceeds of said policy, either as beneficiary or as widow of Fred Horn." We affirmed that decree, holding that the record made on the criminal charge was not admissible to show her guilt or innocence in the civil action involving her right to the proceeds of the policy, but the court trying the civil action would determine her guilt or innocence in so far as her right to the proceeds was concerned. And it was further held, to quote a

headnote: "Public policy denies the right of a beneficiary who has murdered the insured to the proceeds of insurance policies on his life, appellant who had killed her husband could not take any part thereof as dower, since the same principle of public policy which precludes her from claiming directly under the insurance contract precludes her from claiming under the statute of descent and distribution."

This holding was made apparently without reference to the statute above quoted, § 3 of Act 313 of 1939, and it may be sound as applied to the proceeds of insurance policies. All the courts hold that a sane beneficiary who unlawfully and feloniously kills the insured cannot recover as beneficiary. But the courts are divided as to whether the beneficiary, in such case, may share in the proceeds, which go to the estate, as heir or take dower as widow. As to the ordinary estate of a deceased spouse who was murdered by the other spouse who was convicted thereof, the legislature has said that such a spouse shall not be endowed. Having stated the conditions on which dower will be denied, it follows that, such conditions excepted, the spouse will be endowed in the real and personal property of the deceased spouse.

The case will, therefore, be affirmed on the cross-appeal.

L. G. EVERIST, INC., *v.* J. SAM WOOD, CHANCELLOR ON EXCHANGE.

4-6796 161 S. W. 2d 18

Opinion delivered April 20, 1942.

Miles & Young, for petitioners.

Hardin & Barton and *Daily & Woods,* for respondent.

GREENHAW, J. This is a petition for a writ of prohibition to restrain respondent, judge of the Sebastian chancery court on exchange of circuits, from proceeding further in a suit by several insurance companies against petitioners, and to dissolve an order of that court restraining L. G. Everist, Inc., one of the petitioners, from removing its property from the jurisdiction of the court.

Petitioners are nonresident corporations duly authorized to do business in this state, and since September or October, 1941, it is alleged they have been operating a quarry in Fort Smith and engaging in blasting operations there. The home office of L. G. Everist, Inc., is Sioux Falls, South Dakota, and the home office of Western

Contracting Corporation is Sioux City, Iowa, Hubert Everist being president of both companies.

The complaint, filed March 13, 1942, by Employers' Fire Insurance Company and 37 other insurance companies, alleges that plaintiffs have issued insurance policies on numerous pieces of property in Fort Smith, insuring against loss by fire and other perils, including explosion. Negligent explosion of dynamite by petitioners has injured many of these properties, the owners of which have notified plaintiffs of their damages and their intention to file claims under their policies when the work has been completed and after all of their damages, present and future, have been ascertained. Plaintiffs allege that they will be liable for these damages under the terms of their policies, and they are entitled to be subrogated to the rights of their assureds against petitioners in whatever sums they may be compelled to pay by reason of damages caused by petitioners. Sixty-eight policyholders were made defendants, along with petitioners, and it was prayed that the policyholders be required to assert whatever claims they might have against plaintiff insurance companies.

The complaint further alleges that petitioners have large amounts of property within this state which they are about to remove, leaving no assets in this state out of which plaintiffs or their assureds may make collection of their claims. Plaintiffs pray that petitioners be restrained from removing their property from the jurisdiction of the court, and that plaintiffs have judgment against petitioners for all amounts which they are compelled to pay the policyholders under the terms of their policies.

Petitioners' motion to dismiss was overruled, and on March 18, 1942, the court entered an order restraining L. G. Everist, Inc., from removing its property from the jurisdiction of the court, upon plaintiffs' executing bond for $25,000, which bond was executed, filed and approved. The restraining order further provided that L. G. Everist, Inc., might remove its property upon its executing and filing a bond for $25,000, conditioned upon payment of all sums which might be adjudged against it.

The complaint alleges that suit is brought in equity (1) because there is involved a complicated accounting, (2) to avoid multiplicity of suits, and (3) because plaintiffs have no adequate remedy at law. It is further contended that the chancery court of Sebastian county had jurisdiction in order to prevent a circuity of action, and to afford relief to plaintiffs under the law of subrogation, it being insisted that plaintiffs are entitled under the policies to be subrogated to the rights of the policyholders for the damages which have been sustained by them, after they have been paid by plaintiffs.

Petitioners contend that no accounting is involved, and that equity jurisdiction to avoid a multiplicity of suits is not applicable for the reason that all suits, if filed at law, could be consolidated and tried together. It is further contended by petitioners that the court is without jurisdiction to restrain L. G. Everist, Inc., from removing its property out of this state for the reason that the company is authorized to do business in this state and has an agent upon whom service may be had.

We are unable to agree with the contention of petitioners that the equitable jurisdiction to prevent a multiplicity of suits would not apply. It is asserted that some of the claims or suits might be so small as to be cognizable only in a justice of peace court, while others would have to be filed in the circuit court.

In the case of *Fidelity & Deposit Company* v. *Cowan,* 184 Ark. 75, 41 S. W. 2d 748, the lower court assumed jurisdiction and proceeded to adjudicate all issues, both legal and equitable. In that case this court said: "It is insisted also that the court erred in consolidating the cases, and that the state of the pleadings did not warrant the decree entered of record by the chancery court. We do not agree with counsel in this contention. Equity abhors a multiplicity of suits and adjusts the rights of parties without circuity of action, whenever it is feasible to do so. This principle of equity jurisprudence is so well settled that we need cite only the following cases: *State* v. *Atkins,* 53 Ark. 303, 13 S. W. 1097; *Bledsoe* v. *Carpenter,* 160 Ark. 349, 254 S. W. 677; *Martin* v.

State, 171 Ark. 576, 286 S. W. 873; and *K. C. S. Ry. Co.* v. *Fort Smith Suburban Ry. Co.,* 180 Ark. 492, 22 S. W. 2d 21."

In the case at bar the injury to the various properties was alleged to be a continuing one, in that work was still in progress and damages still occurring to properties, and that until the blasting had been completed and the property owners were able to ascertain all of the damages which had occurred, and would occur to their properties, they were unwilling to file claims, and that after the work is completed the petitioners would remove all of their property from this state leaving nothing from which damages could be collected.

It is well settled that inadequacy of the remedy at law (unless the legal remedy is made exclusive by statute) will confer jurisdiction upon a court of equity. In the case of *Meriwether Sand & Gravel Co.* v. *State,* 181 Ark. 216, 26 S. W. 2d 57, which involved a tort, it was argued that the chancery court had no jurisdiction, and that the parties were limited to their action at law for damages. This court said: "It is insisted, however, that the appellees have an adequate remedy at law by an action for damages. In this contention, the appellant errs for the reason that the injury, as shown by the testimony which was accepted by the chancellor, is a continuing and progressive one, and to remit them to their remedy at law would result in unnecessary expense and inconvenience to the litigants and lead to a multiplicity of suits. 'The remedy at law, to be adequate and complete, and attain the full end and justice of the case, must reach the whole mischief, and secure the whole right of the party in a perfect manner, *in praesenti* and *in futuro.*' Ex parte *Conway,* 4 Ark. 302. See, also, *Lawton* v. *Herrick,* 83 Conn. 417, 76 Atl. 986; *Peterson* v. *Santa Rosa,* 119 Cal. 387, 51 Pac. 557."

First State Bank v. *C., R. I. & P. Ry. Co.,* 63 Fed. 2d 585, was a case arising in Arkansas, in which a temporary restraining order was denied plaintiffs by the district court. The Circuit Court of Appeals held that equity, having taken jurisdiction of the case on an equitable

ground, had the inherent power to issue a restraining order. The court said: "The remedy at law must be plain, adequate, complete and as efficient to the ends of justice as the remedy in equity to preclude the maintenance of the equitable suit."

In *Murdock* v. *Sure Oil Co.,* 171 Ark. 61, 283 S. W. 4, this court said: "The jurisdiction of the cause must be determined from an inspection of the bill. The allegations therein are equitable in nature and cognizable in a court of equity. . . . When equity acquires jurisdiction of a cause for one purpose under *bona fide* allegations, all matters in issue will be adjudicated and complete relief afforded. *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729."

Certainly if petitioners have caused and are causing damage to property owners who hold insurance policies issued by any of the plaintiff insurance companies, the companies would be entitled to be subrogated to the rights of the policyholders for the actual damages sustained and paid by the insurance companies involved. The chancery court held that under the allegations of the complaint it had jurisdiction, as equitable grounds were alleged and equitable relief sought, and therefore granted the injunction. According to the allegations, if an injunction had not been granted it would have been possible for petitioners to have removed all of their assets from the jurisdiction of courts in this state, and there would have been nothing left from which plaintiff insurance companies could have been reimbursed through subrogation for the amounts of damages suffered by the various property owners and policyholders, and paid by the insurance companies in settlement of claims and possible judgments of the policyholders.

We cannot say that the insurance companies, under the facts alleged, would have a complete and adequate remedy at law, since under the allegations no property would be left in this state belonging to petitioners.

Having reached the conclusion that the chancery court had jurisdiction of the subject-matter and the parties, the petition for a writ of prohibition and dissolution of the injunction is denied.

ARKANSAS AMUSEMENT CORPORATION *v.* WARD.

4-6691 161 S. W. 2d 178

Opinion delivered April 20, 1942.

Tom F. Digby and *Cockrill, Armistead & Rector,* for appellants.

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

HOLT, J. March 29, 1940, appellees, Fay Ward, Wayman Ward, her husband, and Melba Bryant, sued appellants for damages growing out of a collision between a panel-bodied truck owned and operated by Arkansas Amusement Corporation and a parked sedan automobile in which appellees were sitting at the time. A jury awarded Fay Ward $34,500 for personal injuries, $5,000 to her husband, Wayman Ward, for expenses following his wife's injuries and damages to his automobile, and $1,000 to Melba Bryant for personal injuries. From judgments on these verdicts comes this appeal.

For reversal appellants urge (1) that the proceedings in the trial court were void; (2) that error was committed in the introduction of certain X-ray pictures; (3) that they were entitled to a reversal on the ground of newly discovered evidence; (4) that the trial court erred in refusing a continuance and in refusing to require witness', Mrs. Strickland's, personal attendance at the trial; and (5) that the verdicts are excessive. We proceed to consider these assignments in the order in which they are presented. It is conceded that a case of liability was made for the jury as to each of the appellees.

I

Appellants' first argument for a reversal is that the proceedings in the lower court were *coram non judice* and that, therefore, the judgments against them are null and void. This argument is discussed under three separate headings, (a) that the March, 1941, term of the third division of the Pulaski circuit court lapsed on May 21; (b) that Judge Auten, judge of the second division of said court, had no authority to preside at the trial of this cause in the third division thereof; and (c) that the

March, 1941, term of the third division of said court lapsed on May 12. These questions were not raised in the court below and are not mentioned in the motion for a new trial, but we assume that they may be raised here for the first time.

Arguments under headings (a) and (c) relate to an exchange agreement between Judge Waggoner of the Lonoke circuit court and Judge Utley of the third division of the Pulaski circuit court, in which it was agreed that Judge Waggoner should preside over Judge Utley's court for six days named in the agreement, to-wit: May 12, 13, 14, 15, 19 and 20, 1941. It appears that Judge Waggoner did not appear and open the third division court on May 12, but that same was opened by Judge Auten of the second division who adjourned the court to May 13, when Judge Waggoner did appear, opened court and held court on the other days named in the agreement, and continued to hold said court on May 21, 22 and 26. Now, the contention is that, because Judge Waggoner did not appear on May 12, the first day of his exchange agreement, the term lapsed for the reason no other judge of the Pulaski circuit court could open said division or adjourn same. Also that because Judge Waggoner held said court on days after May 20, days not covered by his exchange agreement, the proceedings on said extra days are void and the term lapsed. Whether appellants are right or wrong in these contentions is not now decided, because they have not shown any interest in the court proceedings on these days. Their cases were not tried by Judge Waggoner on any of the days named or at all. They were tried before Judge Auten of the second division of said court, and, unless the latter had no power or authority to try these cases, appellants certainly would have no right to question or upset the proceedings had before Judge Waggoner while presiding over the third division of said court.

The record shows that these cases were docketed in the third division and that they were tried before Judge Auten of the second division with the third division jury, and, while the record does not show it, the cases were tried in the second division courtroom. So, it appears to

us that the effect of what happened was that the cases were transferred by agreement to the second division for trial, and were there tried and the record thereof made in the third division records. This action did not render the judgments void, for, by § 8 of Act 64 of the Acts of 1913 which provides for an additional circuit judge of the 6th circuit and regulates the practice in the Pulaski circuit court, it is provided that: "It shall not be reversible error that any case is tried in a division to which it has not been specially assigned." These cases, having been tried before Judge Auten of the second division, cannot, therefore, be reversed because they were tried in a division to which they had not been specially assigned, regardless of whether the third division may or may not have been in session.

II

Appellants contend that the trial court erred in permitting, over their objection, the introduction of certain X-ray pictures of Fay Ward made at the Baptist Hospital and exhibited and interpreted by Dr. Hayes.

It appears that Dr. Hayes, in the course of his testimony on behalf of appellees, was permitted to place the X-ray pictures in question in a shadow box and testify and interpret from them. While he did not make the pictures himself, he identified them as having been made in his presence and under his direct supervision. In these circumstances, we think no error was committed in their introduction.

In *Prescott & Northwestern Railroad Co.* v. *Franks,* 111 Ark. 83, 163 S. W. 180, this court held (quoting headnote No. 3 from the Arkansas Reports): "An X-ray photograph, showing an injury to plaintiff, is admissible in evidence, when a practicing physician testifies that he was present when the same was taken, and identifies the photograph introduced in evidence as the one taken of plaintiff."

III

Appellants next argue that they are entitled to a reversal on the ground of newly discovered evidence. The

alleged newly discovered evidence consisted of affidavits, and testimony at the hearing on the motion, having for their purpose the impeachment of appellees' witnesses, Courtney and Montgomery. The affidavits tended to show that neither of these witnesses was near the scene of the accident when it occurred and that they had sworn falsely.

From one of our earliest cases, that of *Robins* v. *Fowler,* 2 Ark. 133, the rule has been well established that in order to the success of a motion for a new trial, on the ground of newly discovered evidence: "1. The testimony must have been discovered since the trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not impeach the character of a former witness. 5. It must not be cumulative."

After a careful review of the record on this point, we are convinced that no error was committed in denying the motion, for the reason that the alleged newly discovered evidence was in the nature of impeachment testimony only. The granting or refusing such motion is left to the sound discretion of the trial court, and unless it appears that this discretion has been abused, we will not reverse here.

In *Bradley Lumber Co.* v. *Beasley,* 160 Ark. 622, 255 S. W. 18, where the affidavits tended to show that certain witnesses, who testified that they were present when a certain happening occurred, were in fact not present and had sworn falsely at the trial, this court said: "Moreover, the testimony of Johnson and his wife on the matter set out in the affidavits was in the nature of impeachment testimony of the Smiths (§ 4187, C. & M. Digest); and it has been held by this court that newly discovered evidence which goes only to impeach or discredit a witness is not ground for a new trial. *Murphy* v. *Willis,* 143 Ark. 1, 219 S. W. 776; *Hayes* v. *State,* 142 Ark. 587, 219 S. W. 312; *Plumlee* v. *St. L.-S. W. Ry. Co.,* 85 Ark. 488, 109 S. W. 515; *Tillar* v. *Liebke,* 78 Ark. 324, 95 S. W. 769; *Jones* v. *State,* 72 Ark. 404, 80 S. W. 1088; *Minkwitz* v. *Steen,* 36 Ark. 260."

In *Arkansas P. & L. Co.* v. *Mart,* 188 Ark. 202, 65 S. W. 2d 39, this court said: "This court has many times held that motions for a new trial on account of newly discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant unless an abuse of such discretion is shown. *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. 2d 20."

IV

It is next argued that error was committed in refusing a continuance of the cause and in refusing to require Mrs. Strickland's personal attendance at the trial. It appears from the record that at the time of the trial Mrs. Strickland resided in Searcy, Arkansas, and was in a delicate condition on account of impending childbirth and physically unable to appear. Her testimony was taken on interrogatories and cross-interrogatories and introduced at the trial.

Appellants rely upon § 5220 of Pope's Digest which is as follows: "Where it is made to appear, by the affidavit of a party and the written statement of his attorney, that the testimony of a witness is important, and that the just and proper effect of his testimony cannot, in a reasonable degree, be obtained without an oral examination before the jury, the court may, at its discretion, order the personal attendance of the witness to be compelled, although such witness may otherwise be exempt from personal attendance by law."

It is made clear under this section that the personal attendance of a witness, otherwise exempt (§§ 5217, 5219, Pope's Digest), lies within the sound discretion of the trial court. This appellants frankly concede. We are unable to say in the circumstances here, however, that an abuse of discretion has been shown.

V

Finally appellants urge that the verdicts are excessive, and we think this contention must be sustained.

The record reflects that about eleven a. m., November 8, 1939, appellees were driving in a Terraplane sedan

north on Cross street in the city of Little Rock, Arkansas, when they reached a point about fifteen feet from Garland avenue (a cross street). Appellees brought their car to a stop about two feet from the right curb of Cross street to permit traffic to clear the intersection immediately ahead. The three appellees were sitting on the front seat of their car, Wayman Ward under the steering wheel, Melba Bryant next to the right front door and Fay Ward sitting between with the gear shift lever between her knees. While in this position appellants' panel-bodied truck, driven at about forty miles an hour south on Cross, collided with a car driven by Mrs. Strickland near the intersection of Garland avenue and Cross street, causing the Strickland car to run into a telephone pole and the truck to turn over, falling upon and striking the front of the left front fender, radiator grill of appellees' car, smashing and flattening the tire on the left front wheel and otherwise damaging the front of the car. The evidence does not disclose that appellees' car was moved perceptibly from its stationary position by the impact from appellants' truck.

After the collision, appellees got out of their car through the right door. Melba Bryant testified that she stepped from the car onto the curb. As to what happened when the impact came, Fay Ward testified: "Q. What happened to you when that truck came into your car? A. I saw and realized that the truck was going to hit us, and I was in the middle of the car astraddle the gear shift, and I braced my feet for it, to brace myself. When the truck hit our car, it threw us and the car up in the air, but as I started to go up in the air my knees caught the dashboard, and it pushed me suddenly down and forward. I broke the gear shift off with my stomach and my knees, but I stayed down. I didn't go up very high."

Melba Bryant testified that the impact caused her forehead to strike, and cause a crack in the upper right corner of the windshield. The windshield was not shattered. A large knot formed on her forehead. She received no broken bones. One of her ribs was made sore, and she had it taped up. Since the collision, she has been nervous and cries at times. When sixteen years of age,

she was operated on for appendicitis and in February, 1939, before the injury which she received in the collision, she was operated on for adhesions resulting from the appendectomy, and at intervals since the latter operation has taken "shots."

Wayman Ward's injuries were of a minor nature and he did not sue for physical damages.

After appellees got out of their car Fay Ward fainted and was taken to the office of a physician. Shortly thereafter she was removed to a hospital in Little Rock where she was placed in a cast in which she remained for about eight weeks. Since the removal of this cast she has worn a padded steel brace to support her back. At the time of the trial, Fay Ward was twenty-seven years of age. About six years before the trial, she underwent an abdominal operation, but says she had never had any trouble with her back. Since the collision she has undergone much pain and suffering. She was asked: "Q. Can you go to entertainments like you used to? A. No, lots of times I go to church on Sunday morning when I am able because I enjoy going to church, and at night my husband always rides me around awhile. It's the only time I get out. It's the only way I have to go. . . . Q. Have you tried walking any down town? A. Yes, I walked two or three times, oh, more than that, I would say a dozen times. One time down town I got so bad I just didn't have any use of my limbs, and if it hadn't been for my lady friend with me, I would have dropped on the sidewalk. Q. How long ago was that? A. About the 10th of last month. . . ."

Dr. Donald Hays, who treated Fay Ward in his office and at the hospital, testified from X-ray pictures made of her back in his presence and from a diagnosis. As to her injuries we quote from his testimony: "Q. What do those pictures and your diagnosis disclose to you about the condition of Mrs. Ward? A. That she had a broken back, that is a fracture through the left pedicle of the fifth lumbar vertebra and a partial dislocation of the lumbar sacral point permitting the spine to slide forward on the sacrum. The sacrum is the large bone

in the back of the pelvis. . . . Now, of course, if any of these vertebrae from the head down to the pelvis is broken in any part, we speak of it as a broken back."

He further testified from the X-rays that after the cast was removed that the fracture had not healed, but that her condition was worse; that her disability would continue and he considered her to be permanently and totally disabled. He advised a fusion operation and called in Dr. Walter Carruthers, a specialist in this line, who concurred in his view. These specialists testified that these operations which are major in their nature, were not always successful and even though successful she would always have a stiff back.

There was evidence that Fay Ward fell some five or six steps down a stairway at a dance hall in Fayetteville, Arkansas, in 1931 before the injuries complained of here. She testified that no injury to her back resulted from this fall.

Taylor Hannah, a police officer in Fayetteville, Arkansas, and who has lived there about twenty-eight years, testified that he has known Fay Ward since her early childhood and that he knew she had something wrong with her back in 1931; that at that particular time he was wearing a brace himself and was interested in anybody else who might be wearing one and further: "I don't remember whether I accidentally bumped into Fay or whether I just met her on the street. Anyhow, the conversation came up and Fay was walking rather stooped, and I am under the impression now, and was then, that she either had tape on her back or had some sort of brace on. Either that, or her back was so sore she couldn't bend it, because she moved in one piece. . . . Q. How do you know her back was stiff? A. By the way she moved. . . . And, of course, she told me that she did have a stiff back; that her back had been hurt."

Dr. M. D. Ogden, a specialist, testified for appellants that he took X-ray pictures of Fay Ward and that they showed essentially the same condition that was mentioned by Dr. Hayes and Dr. Carruthers. "Q. Doctor, you have

heard the medical testimony in this case and from all the facts found by the other doctors, and from your own examination, are you of the opinion that this slippage existed before the accident? Now, of course, I realize you can't— A. If I had to guess, I would say that it existed before the accident. There is no way to be positive about that, and that guess would be on the fact that the fracture is together and the slippage is still there."

Another specialist for the appellants, Dr. Hollenberg, testified hypothetically, basing his conclusions on the testimony of the other physicians, as to conditions that were shown by X-ray to be present in the back of Mrs. Ward, that Fay Ward's condition was due to a cause pre-existing the collision of the car and truck in question. He further testified that Fay Ward's condition, the proper medical term for same being spondylolisthesis, is congenital in about five per cent. of all cases.

The evidence is very voluminous and it would unduly extend this opinion to attempt to abstract it at greater length. That Fay Ward received some injury is conceded. Her injuries were determined by X-ray pictures although she claimed other injuries which were only subjective. At the time of her alleged injuries the undisputed proof is that she was sitting on the front seat of the car cushioned between her husband and Melba Bryant with the gear shift lever between her knees. The impact caused her to bounce up from her seat, not forward. Melba Bryant was thrown forward, according to her testimony. There is no evidence that the car in which appellees were sitting moved from its position. Photographs in evidence of appellees' car show that the left front fender and radiator grill were smashed along with the tire on the left front wheel.

Wayman Ward, who sat nearest the left front fender, was not injured and the injuries to Melba Bryant were slight.

In any view of the evidence, as reflected by this record, we think the jury's verdict of $34,500 in favor of Fay Ward clearly excessive and not within the range of the evidence adduced.

The rule is well settled in this state that a jury may not be left without some restraint in the matter of assessing damages. In *Aluminum Company of North America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568, this court announced the rule in this language: "It has been frequently said that it is difficult to find a measure of damages for pain, for the obvious reason that none would be an acceptable inducement to suffer it; but when it has occurred the compensation as such must be considered upon a reasonable basis of estimate. Under our system of jurisprudence, the amount of damages must be left largely to the reasonable discretion of the jury. Again, we may say, it has been repeatedly held that they may not give any amount they please."

In the very recent case of *Missouri Pacific Trans. Co.* v. *Simon, et al.,* 199 Ark. 289, 135 S. W. 2d 336, this court re-affirmed the rule announced in the Ramsey case and said: "When our views are firmly fixed in respect of a miscalculation by jurors, or of a mistake that has been made through sympathy, prejudice, or partiality, and the record sustains our conclusions that the extrinsic elements or considerations referred to have entered into the result, it then becomes our solemn duty either to reverse and remand for another trial, or to give judgment here for a sum we think justified, and to eliminate any excess that is not sustained by substantial evidence."

Quoting further from the opinion: "The rule is stated in Corpus Juris Secundum, vol. 5, § 1650, as follows: 'A finding of value or the amount of damages is so much a matter within the exclusive province of the jury that it will ordinarily not be disturbed by the reviewing court where the issue has been fairly submitted under proper instructions, unless palpably without support in the evidence presented at the trial, unless the jury have departed for the same reason from the legal measure of damages, or unless the verdict is so palpably excessive or grossly inadequate as to indicate bias, passion, prejudice, corruption, outside influence, or mistake, or shock the conscience or sense of justice, or unless manifest error therein otherwise appears. . . . However, (p. 646) it has been held that an appellate court may or must

interfere if the verdict is not reasonably within the range of the evidence, or where there has been an abuse of discretion, or if it appears to be the result of passion and prejudice. . . . Since the duty of guarding against excessive verdicts (§ 1651) rests to a great extent on the trial judge, who will presumably not allow excessive verdicts to stand, the authority invested in appellate courts to disturb the verdict of the jury on the ground of excessive damages is one which should be exercised with great caution and discretion. . . .

" 'A verdict will be set aside by an appellate court as excessive where there is no evidence on which the amount allowed could properly have been awarded; where the verdict must of necessity be for a smaller sum than that awarded; where the testimony most favorable to the successful party will not sustain the inference of fact on which the damages are estimated; where the amount awarded is so excessive as to lead to the conclusion that the verdict was the result of passion, prejudice . . . or of some error or mistake of principle, or to warrant conclusion that the jury were not governed by the evidence. . . .' "

The verdict of $5,000 in favor of Wayman Ward we think clearly excessive under the following instruction which was given at plaintiffs' request: "You are instructed that if you find for the plaintiff, Wayman Ward, you will assess his damages at such a sum as will reasonably compensate him for the damages to his automobile, if any, and the amount of money expended for medicine and medical attention for his wife, if any, and the amount of money, if any, that the evidence shows, it will be necessary for him to expend in the future for medicine and medical attention for his wife, if any, and from these as proven by a preponderance of the evidence, assess such damages as will reasonably compensate him for his damages, if any."

This instruction limited Wayman Ward's recovery to the damages to his automobile and the present and future medical expenses of his wife. He asked nothing for loss of services and consortium. There is evidence

that his total recovery under the above instruction would not be more than $2,709.90, which would include an estimated $1,500 for an operation, hospitalization and attendant expenses. It is our view in the circumstances that a judgment for $5,000 would be excessive.

We are also of the view that the judgment in the amount of $1,000 for Melba Bryant is excessive on the facts before us. As a result of the impact of the car and truck she received a knot on the forehead, no bones were broken. While she testified that since the accident she is more nervous than before, there is no substantial evidence showing permanent injury.

Under the rule followed in the Simons case—that a miscalculation by jurors, if materially affecting the verdict, must be corrected—we think error is clearly reflected in the instant appeal. There must have been failure to consider evidence relating to Fay Ward's former injuries—injuries testified to by Taylor Hannah; and there must have been assumption, amounting to speculation that the relatively slight movements of the automobile in which appellees were sitting at the time of collision produced all the consequences of which Fay Ward complains. The very size of the verdict is conclusive of the proposition that it was *assumed* all of the injuries, pain and attending inconvenience resulted from the contact.

On the whole case, we have concluded that a judgment for more than $15,000 for Fay Ward, $3,750 for Wayman Ward, and $750 for Melba Bryant would not be warranted. If, therefore, appellee, Fay Ward, will within 15 days from the date of this opinion, enter a remittitur of the judgment in her favor to $15,000, and appellees, Wayman Ward and Melba Bryant, will within said time, enter remittiturs in their judgments to $3,750 and $750, respectively, then the judgments will be affirmed as to those accepting the reduction; otherwise, the judgments will be reversed and the cause remanded for a new trial.

HUMPHREYS, J., (dissenting). A majority of the court are reducing the verdicts or reversing and remanding this cause for a new trial on the ground that each verdict was excessive. The verdict in favor of Fay Ward was for $34,500 for personal injuries. The verdict in favor of Wayman Ward, her husband, was for $5,000 for expenses following his wife's injuries and expenses he will have to incur in the future on account of her injuries and for damages to his automobile. The verdict in favor of Melba Bryant was for $1,000 on account of personal injuries she received.

It is admitted by appellants that there is substantial evidence in the record to sustain each verdict for some amount, but they argue that the amount of each verdict was excessive. In order to reach this conclusion, they set out some of the evidence, but, in my opinion, have not set out or even mentioned a large part of the substantial evidence tending to show the extent of the injuries and the amount of damages resulting therefrom. The evidence is in sharp conflict as to the extent of the injuries and the amount of damages in dollars and cents each sustained as a result of their respective injuries. In view of the conflicting evidence it was within the exclusive province of the jury to determine the extent of the injuries received and the amount of damages that each sustained. These matters were within the exclusive province of the jury to determine just as much as it was within the jury's exclusive province to determine the question of liability. The extent of the injuries received by each and the pain and suffering resulting therefrom were purely questions of fact to be determined by the jury and not questions of law which are always determined by the courts.

Of course, there is the exception that if it is apparent from the record that the verdict of the jury is a result of passion and prejudice or without any substantial evidence to support same, then the Supreme Court may reverse verdicts and consequent judgments and either remand the cause for a new trial or dismiss the action. The Supreme Court has no right to reverse judgments or reduce them based upon verdicts of juries for any other reason than those just stated. *Missouri Pacific Rd. Co.* v. *Creek-*

more, 193 Ark. 722, 102 S. W. 2d 553; *Humphries* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492; *Mutual Life Insurance Company* v. *Springer,* 193 Ark. 990, 104 S. W. 2d 195.

There is nothing in this record indicating that the verdicts were the result of passion and prejudice or that they were returned by a jury arbitrarily and without evidence to support them.

The Constitution of Arkansas of 1874, art. II, § 7, says:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy."

Section 1490 of Pope's Digest is as follows: "Issues of law must be tried by the court. Issues of fact, arising in action by proceedings at law for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived."

This case was tried by a jury of twelve men, duly selected and qualified, and the verdicts returned by them should not be disturbed by the Supreme Court.

I assert, without the fear of successful contradiction, that the jury in the instant case reached correct conclusions as to the extent of the injuries sustained by Fay Ward and Melba Bryant for personal injuries received by each and also a fair and just amount in favor of Wayman Ward for the expenses he paid out and will have to pay out on account of his wife's injuries and the amount he received on account of damages to his automobile. In support of my assertion that the jury reached the correct conclusion I am going to quote at length from the testimony of Fay Ward:

". . . I realized the truck was going to hit us and when it came into our car I was in the middle, straddling the gearshift, and I braced my feet for the collision. When the truck hit our car it threw us and the car up in the air, but as I started to go up in the air my knees caught the dashboard and it pushed me suddenly down and forward. I broke the gearshift off with my stomach and my knees, but I stayed down. I didn't go

up very high. The gearshift was one of the old-fashioned ones, on the floor, and I broke it off even with the floorboard.

"We had to get out of our car on the right side because the left door was jammed. Mrs. Bryant got out first. As I started to put my weight on my feet I fainted and Mrs. Bryant caught me in front, my husband caught me behind, and they took me and layed me over on the sidewalk. When I came to there was a crowd of people around me. Our car was several feet from the curb and it was impossible to have stepped out of the car onto the curb as you would have to have mighty long legs. I had a severe pain in my left hip, but I didn't realize I was hurt. I had been living in Little Rock going on six years and I have not had a doctor since I have been here. Someone suggested that we go to Dr. Hayes, I don't remember who it was, but some man volunteered to take us to him. When we got there I was lifted out and carried to his office. From his office I went to the hospital in an ambulance. At the end of three days they put me in a cast. Before that I was so nervous they couldn't do it. They put wooden boards on the bottom of my feet and on each foot they hung a gallon water jug off the foot of the bed and layed me on a frame so I would be perfectly straight and stretched out. I was hurt on Wednesday and before they put me in a cast it was impossible for me to raise even a finger and I suffered the utmost misery. The cast was made of plaster of paris and was very stiff. I could not move from the position they had me in. I was in the cast for eight weeks. During that time the pain was almost unbearable. I had bed sores on every angle, from my feet to my head. After eight weeks the cast was taken off and I stayed in bed two weeks. The doctors then made me a brace and when I got it I could then get up and go to the table for my meals, but it wasn't sufficient support, although I tried to use it between two or three weeks. They then made me another brace and this is the picture of the second brace which I wear during the day all of the time. Sometimes the pain is so bad that I can't remove the brace at night. It is very uncomfortable to sleep in. I never take it off when I am up

and around as it is too much support to my back. When I take it off I just slump clear over and I can't hold my shoulders up. I can't endure the pain. When I have the brace on there is pain and I haven't been free from pain. . . . The brace is made of steel covered with leather. I have the brace on now. At the place where these three strips hit the body there are big bruised spots and this place is rubbed raw. It rubs my arms, too, and I grit my teeth and endure it. My doctors have advised that I have an operation. At first I thought the brace would let this grow back, and I argued against an operation. I have suffered so much now that I am perfectly willing to go through with it. Aside from having an incision in my back I will have some comfort when it is all over. I realize the danger I am going through when I have the operation, but I am still willing to do it so that I can enjoy some of the things other people do. I cannot go to entertainments like I used to lots of times. I go to church on Sunday morning when I am able because I enjoy church and at night my husband always rides me around awhile. This is the only time I get out. I have tried walking down town a dozen times or more. One time down town I got so bad I didn't have the use of my limbs and if it hadn't been for a lady friend with me I would have dropped on the sidewalk. This was about the 10th of May, 1941, and the lady friend's name was Mrs. Rogers. She put her arms around me and practically carried me in Sears-Roebuck & Co. I layed in the rest room for an hour or two and when I was able I went over to Dr. Hayes' office and took a light treatment. We just live a block and a half from town and my husband had to take me to town so that I can go into the stores. I have submitted to doctors' examinations by doctors representing the other side . . ."

Two reputable physicians testified that her back was broken and that her injuries are permanent and not temporary. There was much other evidence supporting the extent of her injuries and the amount of damages to which she was entitled. In view of her own testimony, and the testimony of the other witnesses in her behalf, I do not see how the court can reduce these verdicts or reverse and remand the cause for a new trial.

I might add that the testimony of Wayman Ward as to the damages he sustained and will have to sustain on account of the condition of his wife and the testimony of Melba Bryant, fully corroborated and supported, is just as convincing as to the damages they sustained as is the testimony in the record in support of the verdict of Fay Ward.

Mr. Justice Mehaffy authorizes me to state that he concurs in this dissenting opinion.

BENNETT *v.* CITY OF HOPE.

4-6719 161 S. W. 2d 186

Opinion delivered April 21, 1942.

James H. Pilkinton and *C. Van Hayes,* for appellant.

Steve Carrigan and *E. F. McFaddin,* for appellee.

HOLT, J. Appellant, by appropriate action, questions the validity of § 3 of ordinance No. 554 which was duly enacted by the council of the city of Hope, Arkansas. This section reads as follows: "It shall hereafter be unlawful for any person, firm or corporation to construct or have constructed any building to be used or occupied by any person without having such building connected with the sanitary sewer system of the city of Hope, Arkansas."

Municipal corporations derive their legislative powers from the general laws of the state. Article 12, § 4, Constitution of Arkansas. In the *City of Argenta* v. *Keath,* 130 Ark. 334, 197 S. W. 686, L. R. A. 1918B, 888, we said: "A municipal corporation has no powers except those expressly conferred by the Legislature, and those necessarily or fairly implied as incident to or essential for the attainment of the purposes expressly declared. *Willis* v. *City of Fort Smith,* 121 Ark. 606, 182 S. W. 275; *Bain* v. *Fort Smith Light & Traction Co.,* 116 Ark. 125, 172 S. W. 843, L. R. A. 1915D, 1021; *Morrilton Waterworks Imp. Dist.* v. *Earl,* 71 Ark. 4, 69 S. W. 577, 71 S. W. 666."

Section 9615 of Pope's Digest provides: "Nothing in this act shall be so construed as to authorize the board of health to order or compel the building of a sewer by one property owner over the property of another, or for a greater distance from his property through or into any street or alley than three hundred feet, to a place where a connection can be made with a sewer."

Appellant among other things alleged, as a fact, in his complaint that he had partially completed a residence on lot 3, block 5, Wallace Addition to the city of Hope, Arkansas, and that this lot is more than three hundred feet from any point where connection can be made with any city sewer. Demurrer alleging that the complaint did not state a cause of action was sustained. This appeal followed.

It is our view that the city council of Hope had clearly exceeded its legislative powers in the instant case and § 3 of the ordinance in question is invalid. By this section of the ordinance, the city council attempts to do exactly what § 9615, *supra,* says that it may not do, and that is that it may not require a property owner to connect with a sewer line unless the city provide sewer facilities within three hundred feet of his property. It is generally known that in many, if not all, municipalities of this state, there are outlying lots suitable for residence purposes more than three hundred feet from any sewer connection and it seems quite clear that the Legislature in enacting § 9615, *supra,* of course, had such property in mind and had no intention of preventing the erection of residences on such lots.

In the instant case appellant seeks to erect a residence on a lot which he owns and which is more than three hundred feet from a sewer connection. Certainly it cannot be said that the building of a residence is a nuisance *per se.* It may become one by its use. In which event the city of Hope, under its police power, could abate such nuisance, but to say to appellant in advance of the completion of the building in question that he cannot finish it because he alleges in his complaint that he proposes to equip it with "toilet facilities of the outdoor type approved by the State Department of Health and to be built according to WPA specifications," is, we think, clearly an invasion of his constitutional rights. Unquestionably the city of Hope could force appellant, after he has erected his residence, to connect with its sewer when and if a sewer is provided within three hundred feet of appellant's lot. A city may regulate the construction of buildings (§ 9619, Pope's Digest), but it

cannot prevent construction unless the proposed construction is *per se* dangerous to the public health and safety.

Section 9615, *supra,* of the general statutes, is clearly a valid enactment—within legislative powers—and comes within the rule announced by this court in the *City of Helena* v. *Dwyer,* 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. Rep. 206, where it is said: "The police power of the state is very broad and comprehensive, and can be exercised to promote the health, comfort, safety and welfare of society. Its limits have not been definitely defined. It is not, however, without its limitations."

But, as indicated, the ordinance in question goes further than the state law authorizes. This court in *Martin* v. *Hilb,* 53 Ark. 300, 14 S. W. 94, in construing §§ 9612 and 9615 of Pope's Digest, said: "It [act approved March 22, 1881, § 18, p. 161, now § 9612, Pope's Digest] provides that after the completion of any sewer authorized to be built under the provisions of the act, it shall be lawful for the board of health of the city, whenever in their opinion the public health will be promoted thereby, to order any one or more property owners near or adjacent to any sewer to construct upon their property sewers leading from some point on their premises to the sewer of the city for the purpose of conducting the sewage about such premises into the city sewers. The only conditions placed upon the exercise of this authority are, that, in the opinion of the board of health, the public health will be thereby promoted, and that their orders shall apply only to property owners near or adjacent to the city sewer. What is intended by property near or adjacent to the sewer is defined in a subsequent part of the act. Section 876, Mansfield's Digest." Section 876, Mansfield's Digest, is now § 9615 of Pope's Digest.

In *Malone* v. *Quincy,* 66 Fla. 52, 62 So. 922, Ann. Cas. 1916D, 208, American and English Ann. Cas. 1916D, p. 211, the general rule is announced in this language: "Power to regulate does not include power to prohibit. . . . The charter seems to contemplate the use of a sewer system and also of earth closets and privies, the

power given to abate nuisance being broad enough to prevent the improper use of either utility. The ordinance here complained of in substance forbids the use of earth closets upon property in the city that is situate not more than 200 feet from the 'main sewer line or the water main' without reference to whether such closets are a nuisance. The enforcement of such an ordinance is not within the express or implied powers of the city; and as the city can exercise only such powers as are conferred upon it by statute, the ordinance is invalid because not authorized by law; . . ."

Having reached the conclusion that the trial court erred in dismissing appellant's complaint, the decree is reversed, and the cause remanded with directions to proceed in conformity with this opinion.

BARTH *v.* BARTH.

4-6720 161 S. W. 2d 393

Opinion delivered April 27, 1942.

Doran, Doran & Doran and *Shouse & Shouse,* for appellant.

C. T. Bloodworth, for appellee.

GRIFFIN SMITH, C. J. The appeal is from the court's action in declining to vacate a divorce decree granted Paul M. Barth, a dentist serving in the army with the rank of major. His complaint of July 7, 1941, bore fruit September 1. The wife, Gayle, was informed by her husband's father, through her daughter, that a divorce had been granted. She promptly moved, as she contended, to protect rights that had been destroyed by a court having, *prima facie,* jurisdiction of the parties, but in fact being without power to render the decree because of the major's fraudulent conduct.

Gayle and Paul, citizens of Iowa, were married in 1917. Wyllis Glee, an only child, was nineteen years of age in 1941.

Testifying in opposition to the motion, Major Barth asserted that he had been separated from Gayle since June, 1936, and cohabitation between them had not been reëstablished. The court asked what caused separation, to which there was the response: "We just couldn't get along. I will take half of the blame."[1]

In June, 1939, Major Barth endeavored to procure a divorce in Polk county, Iowa. His wife, then living at Boone, answered and cross-complained. She alleged her mate's misconduct, consisting in the main of perilous proclivities for Polly Powell, whose propensities for paramours entailed substantial and continuous contributions. Professionally, Polly was a strip-tease dancer. Whether the lady's finesse in disrobing had the effect, constructively or actually, of alienating Paul from his own fireside, or whether artistic dancing filled his soul with memories of King David, is not as satisfactorily revealed as was Polly's shapely form.

Be this as it may, the Major quite suddenly developed an appreciation of the aesthetic—musical or otherwise—

[1] This testimony was given in the trial which resulted in a decree of divorce, and not in the hearing to set the decree aside.

and followed the apparition to Des Moines, where Polly's professional business required her physical presence. Thereafter matrimonial sedition seethed. It was difficult for Mrs. Barth to believe that "the good girl" Paul represented Polly to be could appear on the public stage in rakish costume for introductory purposes, and then, without violation of modesty's mandates, bid garment by garment a gentle adieu while remaining insensible to Apollo's prototype symbolized by an erring family man who mentally measured distance and longed to participate in vociferous applause.

The Iowa court, on agreement of the parties, gave judgment for separate maintenance and dismissed the Major's complaint. Appellee returned to his assignment at Fort Leonard Wood, Missouri, 175 miles distant from Harrison. Payments were made until the Arkansas decree was procured. Thereafter he sent money to the daughter.

It is denied that appellee's residence here was *bona fide.* His testimony on this issue is substantially as follows:

Having been sent to Fort Wood, (May 1, 1941) Barth was directed to report at Camp Robinson for manœuvres, which continued until August 11 or 12. Appellee became ill and spent two days in a hospital. Military manœuvres were conducted at Camp Robinson; also in South Arkansas, and in Louisiana. After being assigned to Fort Wood, appellee voluntarily came to this state "from a little town near Poplar Bluff." From the hospital "somewhere in Louisiana" appellee returned to Camp Robinson, remaining ten days from September 17. He then returned to Fort Wood, where he had been stationed until time of trial, and where, with the exception of a 14-day leave, he remained.

Major Barth testified he selected Harrison as a home "because I expected to start practicing as a dentist if I got out of the service within the next year." The residence, appellee said, was established May 15, 1941. When not on army duty, spare time was spent "in or about Harrison." The day of trial appellee went from Little

Rock to Harrison and remained from Tuesday night until Friday noon. Although the record at one place shows that appellee "established" his residence at Harrison May 15, at another place May 5 is given, "and I am very sure I was here two times before that."

During May appellee engaged a room because he wanted to establish a residence "for the purpose of divorce." He did not remain all night, but paid a month's rent and left a suit of clothes. Second and third trips were made during May, the visitor remaining over night. He did not know the hotel proprietor's name, nor was he acquainted with the mayor, any county official, the postmaster, or anyone else. When asked regarding frequency of visits during June, appellee replied: "I will tell you the honest truth: I would bring Major Cottrell to his place and then I would come down here and stay all night." Such trips were made "two or three times" in June. Appellee was in Harrison "two or three times" in July, and on one of these occasions probably spent three hours. Being on manœuvres during August, he was unable to spend much time in the rented room, but did patronize it overnight.

Residence in good faith for sixty days before filing suit, and ninety days before a decree may be issued, are statutory requirements.[2] In *Squire* v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281, the appellant admitted she came to Arkansas to obtain a divorce, intending to remain if she could secure employment. It was held that "even though [one moved] to this state to bring a divorce suit and had the intention of leaving after the divorce was granted, this would not deprive the court of jurisdiction." It was then added that the residence must be actual, and acquired in good faith.

The holding in *Hillman* v. *Hillman,* 200 Ark. 340, 138 S. W. 2d 1051, is that a plaintiff seeking divorce may file his or her complaint in the chancery court of the county of such plaintiff's residence, but residence must not be colorable, nor may the venue be sought as a mere pretext.

[2] Pope's Digest, § 4386. [For statutory provision regulating acquirement of domicile, see Act 355, approved March 26, 1941.]

In commenting upon § 1618 of Sandels & Hill's Digest, Mr. Justice HUGHES, after saying that meaning of the statute might have been made plainer by particularity in the use of language, was of opinion that "it is easily understood by anyone who does not want to misunderstand, and the court has no difficulty in determining what it means." *Furth* v. *State,* 72 Ark. 161, 78 S. W. 759. So, here, the court has no difficulty in finding that the legislature did not intend to extend facilities of the state's divorce courts to a nonresident who paid a month's room rent, deposited a suit of clothes, and almost immediately returned to army headquarters where his presence was required. That he made a few trips from Little Rock to Harrison for the admitted purpose of qualifying under § 4386 of Pope's Digest is of but slight importance in view of his status as an officer of the armed forces.

Testimony relating to appellee's conduct toward his wife was not improperly admitted. It tended to explain why the particular forum was selected.

The decree is reversed. Directions are that the order of divorce be vacated.

McHANEY, J., (concurring). The only question presented by this appeal is whether appellee had been a *bona fide* resident of this state for ninety days within the meaning of our divorce statute when the divorce was granted him. I agree that he had not. It is undisputed that he and appellant had lived separate and apart for more than three years, and that he would be entitled to obtain a divorce in this state on that ground, if he had established a *bona fide* residence here sufficient to give the court jurisdiction, and we all agree that he had not.

My objection to the opinion of the majority is that it reflects upon appellee, who is a major in the armed forces of the United States, when it is wholly unnecessary to a decision of his case to do so. The critical and flamboyant language concerning his previous conduct is wholly beside the point, is *obiter dicta,* and serves no useful purpose in a decision of the question of his residence. Whatever his previous conduct may have been, whether good or bad, does not disentitle him to a divorce under our three-year separation statute, if he is a resident of

this state. I do not think it is the province of this court to criticize and castigate a litigant in this court when it is not necessary to do so in the opinion, even though the evidence may support such criticism.

I, therefore, concur in the opinion of the majority holding appellee had not established a residence in this state. I am authorized to say Mr. Justice HOLT and Mr. Justice GREENHAW concur also.

NOBLE *v.* DAVIS.

4-6663 161 S. W. 2d 189

Opinion delivered April 27, 1942.

Jack Holt, Attorney General, and *Clyde E. Pettit,* Assistant Attorney General, for appellant.

John L. Carter, for appellee.

McHaney, J. Appellee is a citizen, resident and taxpayer of Little Rock, Arkansas. He is a barber and operates a barber shop at 2202 South Maple street, Little Rock, charging 25 cents for a haircut and 20 cents for a shave. Appellants are members of the State Board of Barber Examiners, by authority of act No. 313 of 1937.

Appellee brought this action against appellants to enjoin them from establishing and promulgating a minimum price to be charged by barbers in Little Rock at 40 cents for a haircut and 20 cents for a shave, which he alleged they were about to do, under the provisions of act No. 432 of 1941, in violation of the Constitutions of this state and of the United States. He further alleged that said act 432 is unconstitutional and void, especially § 3 thereof. A temporary restraining order was granted. Appellants demurred on the grounds of lack of jurisdiction of the court and failure of the complaint to state a cause of action. The demurrer was overruled. Appellants declined to plead further and a decree was entered making the temporary order permanent. This appeal followed.

The business or profession of the barber is an ancient and honorable one. The New International Encyclopaedia says: "The office is of great antiquity and is referred to by the prophet Ezekiel: 'And thou, son of man, take thee a barber's razor, and cause it to pass upon thine head and upon thy beard.' From ancient monuments and papyri we know that the Egyptians shaved both the beard and the head. In all eastern countries including China, the shaving of the whole or part of the head continues to be performed by barbers. The barber shops of Athens and Rome were great meeting places for idlers and gossips, and in provincial towns they continue to serve such purpose up to the present day." Barbers once practiced elementary medicine and surgery and were known as barber surgeons and the red band around the barber pole with a basin at the

bottom still are insignia of this ancient practice, the red band representing the bandage used to stop the bleeding incident to the operation and the basin to catch the blood. The barber is celebrated in song and story, and at least two operas were built about him—the Barber of Bagdad and the Barber of Seville—the latter being perhaps the most tuneful opera ever composed, and the part of Figaro, the barber in it, has been sung by many of the great singers of modern times.

Act 432 of 1941 became a law without the Governor's signature. No significance is to be attached to this fact, except he too may have thought the Legislature had exceeded its powers. After declaring that it is found to be a fact that the public health and safety cannot be protected under the present law, referring to act 313 of 1937, and that the present schedule of prices for barber services is the result of unfair and uneconomic trading practices, it is said in § 1, that: "The purpose of this act is the protection of the public safety, health, welfare and general prosperity, and the provisions herein contained for the establishment of minimum prices for barber services, minimum commissions or wages of barbers, and opening and closing hours for barber shops are hereby expressly declared, as a matter of legislative determination, to be the only means by which in this instance the public safety, health, welfare and general prosperity can be adequately and effectively protected."

Section 3 provides that the Board of Barber Examiners shall be empowered to establish minimum price schedules for barber work, minimum commissions to be paid to barbers for their services, and opening and closing hours for barber shops in cities of the first or second class or incorporated towns in the manner and with the limitations therein provided. We do not set out these provisions as they are too long to copy and we do not deem them pertinent here. Power is conferred on the Board to adopt and enforce all rules and orders necessary to carry out the provisions of the act. Section 5. By § 10, a violation of the act or any rule, subpoena or order of the Board is made a misdemeanor punishable by fine or imprisonment or both. Broad powers are con-

ferred on the Board in the granting, suspension and revocation of licenses to barbers in § 11.

What we said at the beginning of this opinion about the business or profession of the barber was said for the purpose of emphasizing the fact that it is one of common right, subject to proper regulation under the police power, and, as we said in *State, ex rel. Attorney General* v. *Gus Blass Co.,* 193 Ark. 1159, 105 S. W. 2d 853, "Statutes limiting and regulating occupations which before were of common right can find no excuse except as they relate to the public and are for its benefit." Act 313 of 1937, digested as § 12069, *et seq.* of Pope's Digest, being an act to regulate the practice of barbering, etc., was sustained as a valid exercise of legislative powers in *Beaty* v. *Humphrey, State Auditor,* 195 Ark. 1008, 115 S. W. 2d 559. Act 198 of 1939, similar in all respects to the act now under consideration, a price fixing act, was attacked in the lower court on the grounds that it never became a law, because improperly passed, and, if not so, that it deprived the plaintiff of his civil liberties and property in violation of his constitutional rights. The attack was sustained in the lower court on both grounds. On appeal it was conceded that the act was improperly enacted and never became a law, and this court sustained the lower court on this ground, not passing on the other. *McDougal* v. *Davis,* 201 Ark. 1185, 143 S. W. 2d 571.

One of the contentions made in the case of *Beaty* v. *Humphrey, Auditor,* was that said act 313 constituted an unnecessary duplication of state agencies having power to prescribe sanitary regulations, in that the State Board of Health already prescribed such regulations. This contention is mentioned to emphasize the fact there is full, ample and plenary power, already vested in appellants and in the State Board of Health, to safeguard the public health by prescribing sanitary and other regulations of barber shops.

That portion of § 1 of said act 432, above quoted, where the Legislature declared that the purpose of the act is the protection of the public health, safety, etc., is the declaration of a non-existent fact. The fact that the

Legislature so declared the purpose of the act does not make it so, if, in fact, the declared purpose has no substantial connection with the real purpose of the act. The real and only purposes of the act were to confer power on appellants to establish (1) minimum price schedules for barbers; (2) minimum commissions to be paid to barbers for their services; and (3) opening and closing hours for barber shops. Now just what connection these three purposes have with the "protection of the public safety, health, welfare and general prosperity," or with either of them, is difficult to perceive. How can the price a barber charges for a haircut or shave, or the commission the owner pays the barbers, or the hour the shop opens or closes affect the public safety, health, welfare or prosperity? Such connection is visionary and not real. In line with what we have just said, Am. Jur., vol. 11, p. 1077, it is said: "The mere assertion by the Legislature that a statute relates to the public health, safety, or welfare does not in itself bring that statute within the police power of a state, for there must always be an obvious and real connection between the actual provisions of the police regulations and its avowed purpose and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. A statute or ordinance which has no real, substantial, or rational relation to the public safety, health, moral, or general welfare is a palpable invasion of rights secured by fundamental law and cannot be sustained as a legitimate exercise of the police power. One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect, and not by its title or declared purpose, is that a constitutional right cannot be abridged by legislation under the guise of police regulations. The exercise of the power must have a substantial basis and cannot be made a mere pretext for legislation that does not fall within it. The Legislature has no power, under the guise of police regulations, arbitrarily to invade the personal rights and liberty of the individual citizen, to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights."

The state of Louisiana has an act similar to our act now under consideration. In *Board of Barber Examiners* v. *Parker,* 190 La. 214, 182 So. 485, the court first held the act invalid by a four-to-three decision. On rehearing, by a five-to-two decision, the act was sustained. Chief Justice O'Niell filed a dissenting opinion, from which Judge McKinney of the Supreme Court of Tennessee quoted with approval in *State* v. *Greeson,* 174 Tenn. 178, 124 S. W. 2d 253, as follows: "The only question in these cases is whether a statute authorizing a public board to fix the minimum fees that a barber may charge for his services really tends to protect the public health. It does not dispute that the barber's trade is one which may endanger the public health, and which is therefore subject to regulation by the Legislature. But I do not see how an act of the Legislature prescribing the minimum fees—or delegating to a public board the authority to prescribe the minimum fees—that a barber may charge for his services can protect, or have a tendency to protect, the public health. The only appropriate way in which the Legislature can protect the public health or promote the public welfare, in that respect, is to establish sanitary requirements and regulations, to maintain cleanliness in the barber shops, and to guard against unhealthy barbers, to prescribe qualifications and standards of efficiency, and to enforce them by means of examinations, or by requiring terms of apprenticeship. If a barber complies with all of the requirements of efficiency, and all of the sanitary regulations, as laid down by the Board of Health or by the Board of Barber Examiners, it cannot possibly endanger the public health or the public welfare."

It was there (Tennessee case) further said: "This class of legislation, that is, fixing prices, is new and likely resulted from the decision of the Supreme Court of the United States in *Nebbia* v. *New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, decided March 5, 1934, in which the court sustained a statute fixing the price of milk in New York. A dissenting opinion was filed in that case, concurred in by four members of the court. The various acts fixing

prices to be charged by barbers, to which our attention has been directed, were passed since the decision in the Nebbia case." The following are some of the cases where the courts have held similar legislation invalid, in addition to the Tennessee case: *Duncan* v. *City of Des Moines,* 222 Ia. 218, 268 N. W. 547; *State, ex rel. Fulton* v. *Ives,* 123 Fla. 401, 167 So. 394; *Mobile* v. *Rouse,* 233 Ala. 622, 173 So. 266, 111 A. L. R. 349; *Hollingsworth* v. *State Board of Barber Examiners,* 217 Ind. 373, 28 N. E. 2d 64. The decisions in all these cases are based on the fact that the statutes of those states are not regulatory, but are mere price fixing statutes, or a delegation of the power to fix prices to a board, which have no real or substantial relation to the public safety, health, welfare or prosperity, and are thus distinguishable from the Nebbia case. In the Tennessee case the further observation is made: "If the act in question is valid, then the Legislature can directly, or through a board, fix the fees that physicians and dentists may charge for their services; the prices that hotels, restaurants and lunch counters may charge for food; the prices of meats, packing house and canning factory products; and so on *ad finitum* until the liberty of the individual and the right to contract is destroyed." We agree with the principles announced in this case and the other cases above cited as also others that might be cited.

Appellants rely on the case of *Nebbia* v. *New York, supra; West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 707, 108 A. L. R. 1330; *Board of Barber Examiners* v. *Parker, supra;* and a few other price fixing cases. The West Coast Hotel case overruled, by a five-to-four decision, the former case of *Adkins* v. *Children's Hospital,* 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238. In the West Coast Hotel case it was held that a statute of the state of Washington, which authorized the fixing of reasonable minimum wages for women and minors in any industry or occupation in that state was not invalid as being in violation of the due process clause of the Federal Constitution. We cannot agree that said case is controlling here, nor can we agree with the reasoning in the Louisiana barber

price fixing case, or the other cases cited so holding, some of which are *State* v. *McMaster,* 204 Minn. 438, 283 N. W. 767; Ex parte *Herrin,* 67 Okla. Cr. 104, 93 Pac. 2d 21; *Arnold* v. *Board of Barbers,* 45 N. M. 57, 109 Pac. 2d 779.

We, therefore, conclude that said act 432 of 1941 is unconstitutional and void, as we think it is in violation of § 1 of the 14th Amendment to the Constitution of the United States providing: "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"; but if not, then it is certainly in violation of §§ 2, 18, 19 and 29 of article II of the Constitution of this state.

The decree is accordingly affirmed.

McCain, Commissioner of Labor, *v.* Hammock, Chancellor.

4-6658 161 S. W. 2d 192

Opinion delivered April 27, 1942.

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

Aubert Martin, D. A. Bradham, Lamar Williamson, J. Emmett Gaughan, N. F. Lamb and *Daggett & Daggett,* for respondent.

GREENHAW, J. Petitioners are respectively the Commissioner of Labor and the Director of the Employment Security Division in the Department of Labor of the State of Arkansas. They seek a writ of prohibition restraining respondent from proceeding further in three suits filed against them in the chancery court of Bradley county by Southern Lumber Co., Inc., Bradley Lumber Company and Arkansas Wood & Paper Products Corporation, firms engaged in manufacturing and processing of lumber, and all domiciled in Bradley county.

Petitioners allege that individually and officially they are domiciled in Pulaski county, and it is their duty to administer and enforce the provisions of Act 391 of 1941, being specifically charged with the duty of collecting taxes that are and were delinquent under Act 155 of 1937 as amended by Act 200 of 1939, the collection of such delinquent taxes, if not voluntarily paid, to be enforced in accordance with § 14 (e) of Act 391 of 1941.

Their petition further recites that on August 26, 1941, the three companies aforesaid filed in the Bradley chancery court bills in equity wherein each of them sought to restrain petitioners from enforcing the above acts, and from exercising the powers and duties bestowed upon them as officers of the state of Arkansas. Summonses issued by the clerk of the Bradley chancery court, directed to the sheriff of Pulaski county, were served upon petitioners at their office in the State Capitol. On September 6, 1941, petitioners filed a motion to quash the summons in each of said actions, on the ground that they were issued and served contrary to law. They also filed motions to dismiss the causes of action on the ground that the venue was not in Bradley county, because the defendants (petitioners here) are domiciled in their official capacities in the State Capitol.

On October 27, 1941, both motions were presented to the court and overruled, and petitioners were required to answer in said actions. Petitioners allege that the respondent, as judge of the Bradley chancery court, is about to proceed in said cases without authority of law, and that said court is without jurisdiction; that no legal summons has been or can be issued from said court upon said complaints, and no legal service has been or can be had on these petitioners; and that unless this court prohibits the respondent from proceeding further in said actions, petitioners will be required to litigate actions in the Bradley chancery court, which is without jurisdiction, and where the venue does not lie.

On August 21, 1941, the Director of the Employment Security Division certified to the Commissioner of Labor "Certificates of assessment of contributions levied by the Arkansas Employment Security Act" against the

three companies, copies of which were mailed to the respective companies, and which recited that the director assessed said contributions against each of them for the years 1937, 1938, 1939 and 1940. Each of the certificates stated the amount claimed to be due, together with penalties and interest. The certificates purported to be executed under authority of § 14 (e) of Act 391 of 1941, and contained the statement: "A copy of this assessment is being mailed or delivered to said employer and at the end of ten days thereafter said assessment shall become *prima facie* correct, and if the contributions are not paid within said period of ten days the amount of said delinquent contributions will be certified to the clerk of the circuit court of the county wherein the employer is domiciled, or has a place of business, to be filed, as provided by law, and thereupon an execution will be issued against such employer, and placed in the hands of the sheriff for action as by law in such cases made and provided."

On August 25, 1941, each of these companies filed in the Bradley chancery court its complaint, asking that the assessment be canceled, and that petitioners be restrained from attempting to enforce it. The allegations of the three complaints are the same with the exception of the names of the parties and the amounts involved.

The complaints alleged that the assessment was an illegal exaction, was based upon an arbitrary estimate of wages paid by persons with whom the company had dealt as independent contractors, and was in violation of provisions of the state and federal constitutions. These companies purchase timber, but do not engage in the logging business, in severing timber or in converting it into logs. They have paid all contributions due on their employees, and the assessments levied and certified against them were based upon wages paid to employees of independent contractors by the independent contractors, who agreed at the time of the enactment of the Arkansas Unemployment Compensation Law (Act 155 of 1937, as amended by Act 200 of 1939, which was repealed by Act 391 of 1941) to pay all contributions due upon wages due their employees. Compensation to the independent contractors was increased by the companies when this

law was first passed to enable them to pay the contributions due thereunder, and the threatened assessment would in most instances constitute a double assessment.

They further alleged that the assessments are not based upon wages actually paid to any of their employees, and, if collection of the assessed contributions were permitted, it would not benefit known individuals or definite employees, but most of it would go into a dummy account to the credit of unknown persons. None of the employees for whose benefit contributions are sought to be collected were ever employed by plaintiff companies, and none were actually paid by them, nor do their names appear upon their pay rolls. Defendants undertook to ascertain the amount of compensation paid to several independent contractors by examining plaintiffs' books with respect to acquisition of logs from the independent contractors and vendors, which estimate was made arbitrarily, unfairly, illegally, and in an excessive amount.

They allege that the amounts of the assessments were fixed prior to July 1, 1941, when Act 391 became effective, and were based upon rules, regulations and interpretations wrongfully made of the provisions of Act 155 of 1937, as amended by Act 200 of 1939, which was repealed by Act 391 of 1941, and the assessments therefore are illegally based upon laws which no longer exist; that the assessment is not made by authority of Act 391, but is in direct violation of the express provisions of § 2 (i) 5 of Act 391.

Plaintiffs invoke the provisions of § 13 of art. XVI of the constitution of Arkansas to protect themselves against the enforcement of an illegal exaction, and further invoke the ancient jurisdiction of equity to prevent a wrongful imposition of a cloud upon their properties, and allege that said assessments, their threatened collection, and threatened cloud upon the title of their properties constitute an illegal exaction. They pleaded estoppel and the statute of limitations as a complete bar, and prayed, among other things, that the defendants be enjoined from undertaking to enforce the alleged illegal exaction.

Petitioners contend that the Bradley chancery court is without power to proceed in the cases pending there for the reasons that no court has jurisdiction to hear and decide the issues that will arise on the complaints, for they seek to substitute a court procedure for a valid, adequate statutory procedure, and there has been and can be no lawful service of process upon petitioners because the venue of a local action is in Pulaski county.

Petitioners say they have proceeded under § 14 (e) of Act 391. The first and fourth paragraphs, which they claim are pertinent to the inquiry, are as follows:

"If any person, firm or corporation shall become delinquent in the payment of any contribution or interest or penalties required to be paid by this act, it shall be the duty of the director, when the amount of such contribution, interest and penalties is determined, either by the report of the employer or by such investigations as the director may have made, to assess the contributions, interest and penalties so determined against such delinquent employer, and to certify the amount of said contributions, interest and penalties to the commissioner, and mail or otherwise deliver a copy of said assessment to the delinquent employer. At the end of ten days thereafter, said assessment shall become *prima facie* correct, and the director shall certify the amount of said delinquent contributions, interest and penalties to the clerk of the circuit court of the county wherein the employer is domiciled or has a place of business and it shall be the duty of the clerk to file such certificate of record and to enter the same in the record of the circuit court for judgments and decrees under the procedure prescribed for filing transcripts of judgments by §§ 8440 and 8442 of Pope's Digest of the Statutes of Arkansas, 1937, and thereupon the said assessment shall have the force and effect of a judgment of the circuit court. Execution shall thereupon be issuable, at the request of the director, his agent or attorney, or any other employee of the Employment Security Division of the Department of Labor of the State of Arkansas, forthwith by the clerk of the circuit court, directed to the sheriff, who shall make a levy on any property, assets, or effects of the

employer against whom the contribution is assessed. . . .

"Any aggrieved employer may have a review of the action of the director in making an assessment for contributions, interest, or penalties, by filing, within ten days after the filing of such assessment with said clerk, a petition for such review in the chancery court having jurisdiction, and all actions for such review shall have precedence on the docket of the court where filed and all appeals from the action of any court on such review shall be prosecuted within thirty days after the final order of the court is made."

They also contend that under the second paragraph of § 14 (b) of Act 391, neither the Bradley chancery court nor any other court has power to grant the relief sought in the pending suits.

Section 14 (b) of Act 391 reads in part as follows: "No suit, including an action for a declaratory judgment, shall be maintained and no writ or process shall be issued by any court of this state which has the purpose or effect of restraining, delaying, or forestalling the collection of any contributions under this act or substituting any collection procedure for those prescribed in this act."

The respondent contends that notwithstanding the statutory procedure set out in § 14 (e) which permits aggrieved taxpayers to have the contribution assessment reviewed in the chancery court, and notwithstanding the provisions of § 14 (b), the Bradley chancery court has jurisdiction to grant the relief prayed in the three suits pending there, for the reason that the actions on the part of petitioners constitute an illegal exaction within the meaning of § 13, art. XVI, of the constitution of Arkansas, which reads as follows: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

Respondent further insists that equity not only has the power to remove a cloud upon title, but that the Bradley chancery court has jurisdiction to prevent clouds

being placed upon the title to the properties of the plaintiff companies through the filing of the assessments, which under Act 391 become judgments when filed.

Many of the questions raised in the complaints in the Bradley chancery court involve questions in controversy between the petitioners and the companies against which assessments have been levied, and are not pertinent to the issues involved in the prohibition proceedings. The questions, therefore, for this court to decide are whether the statutory procedure provided in Act 391 is the exclusive remedy afforded a taxpayer, whether the Bradley chancery court has jurisdiction, and whether Bradley county is the proper place of venue.

There is no question but that the companies against which the delinquent contribution assessments were levied had the right, under Act 391, to wait until the certificate had been filed with the circuit clerk of Bradley county and then, within ten days thereafter, ask for a review as provided in the statute. The plaintiff companies elected to take another course for their protection. They invoked the jurisdiction of the chancery court of the county where they were domiciled, and where the alleged delinquent contributions arose. We have concluded that under the allegations of the complaints in these cases the Bradley chancery court did have jurisdiction, and that in so far as § 14 (b) is in conflict with § 13, art. XVI of our constitution, it is invalid.

This court has held that under this provision of our constitution a citizen and taxpayer has the right to invoke the jurisdiction of the chancery court to enjoin the collection of illegal taxes levied on his property. In the case of *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43, this court said: "Section 13 of art. 16 of the Constitution of 1874 provides that any citizen of any county may institute a suit in behalf of himself and all others interested to protect the inhabitants thereof against the enforcement of any illegal exactions whatever. Under this section this court has uniformly upheld the jurisdiction of chancery courts, upon the application of citizens and taxpayers, to enjoin the collection of illegal taxes levied on their property."

In a recent decision of this court wherein this constitutional provision was involved, the case of *McCarroll, Commissioner,* v. *Gregory-Robinson-Speas Company,* 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977, the Commissioner of Revenues had notified plaintiff that "he intends to take action to collect" an alleged delinquent tax under the provisions of the Arkansas Income Tax Law, Act 118 of 1929. That act specifically prohibited recourse by the taxpayer to injunctive relief, and provided a statutory procedure for the relief of taxpayers. Pertinent parts of the act are:

"The collection of income taxes under this act shall not be stayed or prevented by any injunction, writ or order issued by any court; and no writ, order or process of any kind, staying or preventing the commissioner from taking any steps or proceedings in the assessment or collection of any income tax, whether the same is legally due or not, will be granted by any court or judge; but in all cases, the person against whom any income tax shall stand charged shall be required to pay the same, and thereupon shall have his remedy as hereinafter provided. . . .

"The person so paying said taxes under protest may, at any time within 30 days thereafter but not afterwards, bring an action against the commissioner for the recovery thereof in the chancery court of Pulaski county. . . ."

The taxpayer in that case did not wait and take the procedural route provided in the act, but sought and obtained an injunction in the Pulaski chancery court. In that case this court said: "The constitution of the State of Arkansas contains, we think, authority for equity jurisdiction in a case of this character in § 13, art. XVI. . . . The right of any citizen or taxpayer to go into a court of equity for relief was upheld in *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43. . . .

"We are of the opinion, therefore, that an individual has the right to go into a court of equity to enjoin the enforcement of any illegal tax or exaction and that this same right inures to the corporation, appellee, in the instant case, since a corporation is a person within the meaning of the equal protection and due process clauses

of the Fourteenth Amendment to the Constitution of the United States. . . .

"We, therefore, hold that the provisions of the Arkansas State Income Tax Law (Act 118 of the legislative session of 1929) which prohibit recourse by injunctive relief, are invalid as applied to appellee in the instant case and that the chancery court had jurisdiction to hear this cause and to grant the injunction."

This court in the above case did not hold that the income tax law of 1929 was wholly unconstitutional, but was invalid in so far as it affected that portion of the income of a domestic corporation derived from business transacted from sources outside the state, and that the taxpayer had the right, under § 13, art. XVI of the constitution, to prevent the collection of the illegal tax through injunctive relief, and was not compelled to follow the statutory procedure provided in the act.

In the instant case plaintiff companies, instead of waiting and pursuing the statutory remedy provided in the act, have elected, as did the taxpayer in the Gregory-Speas case, to invoke chancery jurisdiction for relief under § 13, art. XVI of the constitution, and also under the ancient, inherent jurisdiction of equity to prevent threatened invasion of property rights and placing of a cloud upon the title of their properties. It is our opinion that the Bradley chancery court had jurisdiction under the allegations of the complaints.

Petitioners further contend that if plaintiff companies have the right to proceed against them in courts of equity for injunctive relief, the venue is fixed by § 1397 of Pope's Digest in Pulaski county, where petitioners are officially domiciled.

This contention has caused us the most concern, but we cannot agree that petitioners cannot be brought within the jurisdiction of the Bradley chancery court under the service had. These are not suits against the state. Petitioners are attempting to obtain judgments against plaintiff companies which will necessarily become liens on all of their real estate in Bradley county. Not only are they attempting to obtain this judgment lien, but

by the certificate they have threatened that if the alleged delinquent taxes, penalty and interest are not paid, executions will thereafter be issued and levied upon the properties of these companies. If petitioners had not been stopped by the temporary injunction, they would have proceeded against properties of the plaintiff companies in Bradley county. We do not think that § 1397 of Pope's Digest prevents the exercise of jurisdiction by the Bradley chancery court, nor denies it the power to draw petitioners within its jurisdiction to grant the relief prayed for, under the allegations of the complaints.

Section 14 (e) of Act 391 has this provision: "Any aggrieved employer may have a review of the action of the director in making an assessment for contributions, interest, or penalties, by filing, within ten days after the filing of such assessment with said clerk, a petition for such review *in the chancery court having jurisdiction,* . . ." (Italics supplied.)

Whether it was or was not the intention of the Legislature to give the Pulaski chancery court exclusive jurisdiction in reviewing the actions of the director need not be determined in this case, nor do we determine whether the Legislature had such power. The act fixed the venue "in the chancery court having jurisdiction," and this, in our opinion, shows an intent that any chancery court in the state should have jurisdiction to review the acts of the director, depending upon the facts in each case.

If plaintiff companies had elected to wait until the assessment had been filed with the circuit clerk of Bradley county to have the resulting judgments reviewed under Act 391, petitioners would necessarily have been drawn into the jurisdiction of the Bradley chancery court, regardless of their official positions and domicile in Pulaski county.

It follows that venue is in Bradley county, where suits were instituted to prevent filing of the assessments and the resulting judgments, liens and clouds on the titles of properties of respective companies.

We think the following statement from the case of *Drinkhouse* v. *Spring Valley Water Works,* 80 Cal. 308,

22 Pac. 352, cited with approval in the case of *Cox* v. *Railway Company,* 55 Ark. 454, 18 S. W. 630, is applicable: "The injury is the same, whether threatened or completed, and the privilege accorded to the plaintiff to prevent the injury by injunction ought not to be held to give him the right to have the trial in a county where the cause would not have been triable if he had waited the completion of the injury before seeking redress."

Petitioners cannot be permitted to proceed in a course of action which will, if not prevented, result in a judgment and cloud upon the title to the real estate of plaintiffs in Bradley county, and then be heard to say that even though they are attempting to do this they are not subject to the jurisdiction of the Bradley chancery court, and can be sued only in Pulaski county.

The venue being in Bradley county, the summonses issued from that court and service thereof were valid under Act 21 of 1941, providing for state-wide service of process in local actions.

Having concluded that the Bradley chancery court had jurisdiction over the subject-matter and over the parties in the cases before it, the petition for writ of prohibition is denied.

HANCOCK *v.* STATE.

4244 161 S. W. 2d 198

Opinion delivered April 27, 1942.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

GREENHAW, J. Appellant, a negro, was charged by information with the crime of arson, it being alleged that on June 18, 1941, he unlawfully, willfully and feloniously set fire to and burned a certain barn located on the G. L. Salmon estate, with the intent of burning and destroying the same. He entered a plea of not guilty, and was convicted and sentenced to two years imprisonment, from which is this appeal.

The building which burned was a cow barn, and contained a large amount of corn, all or most of which was destroyed along with the barn. Appellant and a number of other colored people lived near the scene of the burning. There were a number of other buildings, such as a large mule barn, hay barn and shop, near the cow barn. The fire was discovered between daylight and sunup, after the hostler had milked cows in the building which burned.

There was no evidence whatever that appellant had been in the barn before the fire was discovered. As far as the record reveals, the only person who had been in the barn that morning was the hostler. Only one witness testified that he saw appellant before the fire was discovered. George Harris, colored, testified that he saw him in a lane a short distance from the cow barn, but did not see him enter or leave the barn. Appellant and other witnesses who lived in the house with him testified that he was at the house at the time the alarm was given, and they thereafter went to the fire.

There was no evidence that the barn burned as a result of arson, and evidence was wholly lacking to show the *corpus delicti.* This court has repeatedly held that

there is no presumption that an unexplained fire is of incendiary origin. In the case of *Johnson* v. *State,* 198 Ark. 871, 131 S. W. 2d 934, this court said:

"There is no presumption that an unexplained fire is of incendiary origin. On the contrary, the presumption is that such fire was caused by an accident, or, at least, that it was not of criminal design. In a prosecution for arson, as in other criminal cases, it is incumbent on the state to prove the *corpus delicti,* and it is now recognized as the universal rule in the law of arson that in order to establish the *corpus delicti* it is not only necessary that the state prove the burning of the building (or property) in question, but the evidence must also disclose that it was burned by the willful act of some person criminally responsible for his acts, and not by natural or accidental causes." (Citing Corpus Juris Secondum, par. 29, 746, 16 Corpus Juris, par. 1514, pp. 735, 736, 737.)

There was no substantial evidence to connect appellant with the burning of this barn, and there was no evidence which showed that the barn was willfully set on fire by anyone.

We have concluded that the evidence in this case does not sustain the verdict of guilty, and the judgment is reversed and the cause is remanded for a new trial.

LANCASTER *v.* STATE.

4246 161 S. W. 2d 201

Opinion delivered April 27, 1942.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

HUMPHREYS, J. On October 10, 1941, Marcus Fietz, prosecuting attorney within and for the judicial circuit of the state of Arkansas, of which Mississippi county is a part, filed an information against appellant in the circuit court of Mississippi county, Osceola district, charging him with larceny of two mules on the 8th day of June, 1941, in said district and county, of the value of $300, property of Clem Whistle.

The cause was tried by a jury on the 21st day of October, 1941, under correct instructions on the testimony introduced by appellee and appellant, resulting in a conviction as charged in the information and his punishment was fixed at five years in the state penitentiary, from which an appeal has been duly prosecuted to this court.

The testimony introduced by appellee in support of the conviction was circumstantial. Appellant did not testify himself nor introduce any evidence in the trial of the cause and relies for a reversal of the judgment upon the alleged insufficiency of the state's testimony to support the verdict of conviction.

The applicable rule of law is that this court will not, on appeal, disturb a verdict of a jury if there is any substantial evidence in the record supporting same. It was said by this court in the case of *West* v. *State,* 196 Ark. 763, 120 S. W. 2d 26, that: ". . . it is also a well-settled rule that the evidence at the trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury, it will be sustained."

Appellant contends that the testimony in the instant case is not substantial because based upon circumstantial evidence alone. It was said by this court in *Scott* v. *State,* 180 Ark. 408, 21 S. W. 2d 186, that: "They [re-

ferring to the jury] 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."

The record reflects by the undisputed testimony that two mules belonging to Clem Whistle were stolen out of his lot on his farm on the night of June 8, 1941, being taken out of the lot across the farm for about one mile to a highway. This was shown by the tracks of the mules and the tracks of the person with them. The tracks were easily followed because they were made after the rain that night. The tracks stopped at the bank adjoining the highway. At this point truck tracks were made in the bank by a truck with dual rear wheels. One set of the rear wheels did not have any tires on them and they made cut marks on the bank. No mule tracks could be found beyond that point. The reasonable inference is that the mules were loaded into a truck at this point, or bank, which had backed into the bank adjacent to the highway.

Manual Toles, who lived on Whistle's farm and who worked for him, testified that as he returned to the farm on the night the mules were stolen he met a truck with tandem axles and with tires off of the back set of dual wheels about one quarter of a mile from the barn where the mules were.

Hayward Hughes testified that he saw appellant on the Sunday afternoon before the mules were stolen Sunday night in a new Chevrolet truck with a green body; that it had dual wheels and an extra set of dual wheels behind it; that he went to a picture show that Sunday night, and as he was going back home he met this same truck about a quarter of a mile from Whistle's place coming away from the direction of the mule barn; that the wheels of the truck he saw that night all had tires on them except one pair; that the truck had sideboards on it which looked to be six or seven feet high and were solid, and there were no cracks in the end gate.

Paul Tucker, a constable in Craighead county, testified that he arrested appellant several days after the

mules were stolen, and appellant asked him to let him drive his truck down to his father's home and leave it; that the tires were off of one set of the dual wheels when he attempted to arrest appellant; that instead of taking the truck down to his father's home he absconded with the truck while he (witness) was putting out a fire that started in his car about the time he was attempting to arrest appellant; that appellant was not found for six or seven weeks when he was finally picked up in Paragould.

Hale Jackson, sheriff of Mississippi county, testified that he went to Detroit, Michigan, looking for appellant and sent word to the officers of Paragould to arrest him if found there.

There is no question that the mules were stolen on Sunday night by someone and it is reasonably inferable that they were loaded into a truck about a mile from the barn which had backed up to the bank adjacent to the highway. The positive evidence shows that this truck made indentations on the bank which reflected that two tires were off two of the back wheels. The positive evidence also shows that appellant was seen in a truck of that kind on Sunday afternoon before the mules were stolen on Sunday night with the tires off of two of the back wheels; that a truck of the same description was seen Sunday night about a quarter of a mile from the barn with high sideboards on it and with no cracks in the end gate. The positive evidence also shows that when appellant was first apprehended by the constable he was in a truck of the same kind, that is, one with the tires off of two of the rear wheels. The positive evidence also shows that he asked permission to take the truck to his father's home, but instead of doing so he absconded with the truck while the constable was putting out a fire in his own car, which prevented him from following appellant, and that appellant could not be found and was not arrested until six or seven weeks thereafter.

We think the circumstances detailed above are substantial and sufficient to connect appellant with the crime charged.

No error appearing, the judgment is affirmed.

4-6726 161 S. W. 2d 202

Opinion delivered April 27, 1942.

[redacted]

W. J. Dungan, for appellant.

J. Ford Smith and *Ross Mathis,* for appellee.

GREENHAW, J. Appellee, a negro, was employed by appellant, a domestic corporation, his duties at the time of his injury being to help unload and weigh bales of cotton which were brought to appellant's compress and warehouse in Brinkley. On October 31, 1940, appellee and Mose Clark, colored, were working together unloading bales of cotton from wagons and other vehicles, placing them on the scales to be weighed and otherwise handling the bales.

The warehouse had been filled, and at the time of the injury cotton was being unloaded and weighed on scales located on the ground near the warehouse. Mose Yarborough, colored, drove into the yard with one bale of cotton, weighing about 500 pounds, placed upon the top of the sideboards of his wagon. He could not lift

the bale, and Clark and appellee left the automobile in which they had been sitting, Clark going immediately to the wagon, and appellee going by the scales to get a tag to place upon the bale. Appellee then started to the wagon to help Clark and Yarborough unload the cotton.

Clark had gone on the other side of the wagon, and pushed up on the bale so that it fell on the ground on the side of the wagon nearest the scales, bounced, rolled and landed upon appellee, who was endeavoring to get out of its way, badly injuring his right leg and fracturing the bones in the knee.

Thereafter suit was filed against appellant, alleging that the injuries which appellee sustained were due to the negligence of his fellow-servant, Mose Clark, in pushing the bale of cotton off of the wagon without looking and without ascertaining the whereabouts of appellee. The jury returned a verdict in favor of appellee for $2,000, upon which judgment was entered, and from which is this appeal.

Only two grounds of error are assigned and relied upon for reversal of this case: (1) that the Woodruff circuit court had no jurisdiction, it being alleged by appellant that appellee was a resident of Brinkley, Monroe county, at the time his injury occurred in Monroe county, and that suit therefore could not be brought in Woodruff county under the Venue Act; (2) that the court erred in not directing a verdict for appellant, for the reasons that there was no negligence shown on the part of the fellow-servant, Mose Clark; that the injury was due to the appellee's negligence, which was the proximate cause of his injury; and that appellee's injury was the result of an accident.

We are unable to agree with the contention of appellant that appellee at the time of his injury was a resident of Monroe county. The evidence showed that appellee was born and reared at Cotton Plant, in Woodruff county, where he has lived all of his life, farms in the spring and summer and owns his home. He has been working around cotton compresses during the fall and winter for many years.

The only evidence upon which appellant predicates its contention that appellee was a resident of Monroe county is the testimony of Mose Clark to the effect that some time before the accident he and appellee rented a room in Brinkley for about three weeks. However, Clark testified that on this date he left his home in Cotton Plant and rode to Brinkley in a truck operated by Ben Walker which transported some 12 or 15 negroes from Cotton Plant to Brinkley to work for appellant. He did not remember whether appellee rode from Cotton Plant to Brinkley that morning with him and the other negroes. Clark further testified that it was customary for men working at the Brinkley compress to go back and forth from Cotton Plant to Brinkley.

Appellee testified that he never lived in Brinkley or Monroe county, and that he rode from Cotton Plant to Brinkley on this occasion in the truck of Ben Walker. Appellee further testified: "Q. About how many went from Cotton Plant to Brinkley and back every morning? A. About 12. Q. Where did those negroes live? A. At Cotton Plant. Q. How did they go to work every morning? A. With Ben Walker. Q. All 12 of them? A. Yes, sir. Q. How did he take them? A. In a truck. Q. When did you come home, every evening? A. In the evening. Q. All of them lived at Cotton Plant and came back every night? A. Yes, sir. Q. Do you own a home in Cotton Plant? A. Yes, sir."

We have concluded that under the evidence appellee was a resident of Woodruff county within the meaning of act 314 of 1939, the Venue Act, and that he had a right to prosecute his suit in Woodruff county.

We think there was substantial evidence of negligence on the part of Mose Clark, an employee of appellant and fellow-servant of appellee, which warranted the submission of this case to a jury. In determining the question as to whether there was substantial evidence of negligence, this court views the evidence in the light most favorable to the appellee in whose favor the verdict was rendered. *Graves* v. *Jewell Tea Co.*, 180 Ark. 980, 23 S. W. 2d 972.

The undisputed evidence showed that at the time appellee was injured it was his duty, in company with Mose Clark, to unload bales of cotton and place them upon the scales to be weighed. The owner of the bale of cotton in question was unable to remove it from the sideboards of his wagon. Both Clark and appellee, when the owner of this cotton drove into the yard near the scales, left the automobile in which they were sitting to handle this bale of cotton. Clark went directly to the wagon, and seeing that the owner was unable to lift the cotton off the wagon went around on the opposite side of the wagon from appellee in order to help the owner get the cotton off the wagon. Appellee testified that he went first to get tags to place on the cotton, and was proceeding to the wagon to help unload it, and when he had reached a point a few feet from the wagon, without any warning whatever the bale was toppled off in his direction, and he endeavored to run away to avoid being struck by it. The bale bounced and rolled in the direction which he was running, rolled upon him, resulting in serious injury to his leg and knee. His testimony was corroborated by the testimony of both Clark and the owner of the cotton.

Clark admitted that he did not see Elston at the time he pushed the cotton off the top of the wagon, did not look, and gave no warning that he was going to push the bale off the wagon. He testified: "I tilted the bale of cotton without knowing where Elston was."

Mose Yarborough, the owner of the cotton, testified: "Q. When he saw the bale coming he started to get away from it? A. Yes, sir. Q. He was going away from the bale of cotton? A. Yes, sir. Q. It hit the ground and bounded after him? A. Yes, sir. Q. And later he slipped and fell? A. He went to the ground. I don't know whether he slipped or not; it seemed like he did. Q. The bale caught up with him? A. The last I seen of him the bale was going on him; he was on the ground on his face."

There was practically no conflict in the testimony of all the witnesses as to the facts resulting in the injury to appellee, nor was there any material conflict in the

testimony of the physicians who treated and examined appellee. All conceded he was seriously injured, and the testimony showed that appellee, due to his knee injury, would be permanently incapacitated from performing all of the manual labor to which he was accustomed. Appellant does not contend that the verdict is excessive.

We have concluded that the court did not err in refusing to direct a verdict for appellant, since there was substantial evidence which warranted the submission of the issues to a jury. We find no error, and the judgment is affirmed.

MILLERICK, EXECUTRIX, *v.* BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES.

4-6731 161 S. W. 2d 205

Opinion delivered April 27, 1942.

James Merritt, for appellant.

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

HOLT, J. This cause originated in the justice of the peace court for Bowie township, Desha county, Arkansas,

June 2, 1941. In this suit J. H. Millerick sought to recover benefits alleged to be due under the sickness provisions of an insurance policy carried by him with appellee, Benefit Association of Railway Employees. Appellee defended on the ground that the policy had lapsed for failure to pay premiums. July 14, 1941, Mr. Millerick died and October 21, 1941, the action was appealed to the circuit court by appellee and revived in the name of appellant. On this latter date the cause was heard before the circuit court, sitting as a jury, and the issues determined in favor of appellee, Benefit Association. This appeal followed.

The record discloses that on June 3, 1933, J. H. Millerick, the deceased, obtained from appellee a policy of insurance, and delivered to it a pay roll deduction order, directing his employer, The Missouri Pacific Railroad Company, to deduct from his salary each month $3.60, the amount of the premium due upon said insurance policy. The policy provides in part that "The Association hereby insures J. H. Millerick . . . by occupation locomotive engineer, from 12 o'clock noon of the above date . . . until 12 o'clock noon . . . on the same date of the month following and for such terms of one calendar month each thereafter as the monthly premium of $3.60 paid by the insured will continue this policy in force."

The deduction order was deposited with the railroad company in St. Louis, Missouri, and deductions were begun as of June 19, 1933, and continued by the railroad company and remitted to the insurance company, appellee, each month up to and including March, 1939. At this time Mr. Millerick changed his place of work. We quote from his testimony: "Q. Did you change? A. Yes, I changed place of work. Q. Did you have a new timekeeper on that other division? A. I don't know. I don't think so, think same timekeeper in St. Louis." The railroad company made no deduction from Mr. Millerick's pay roll for April, 1939, or for any month subsequent thereto, and appellee insurance company received no premium from anyone after March, 1939. During the time from and including April, 1939, through January,

1941, Mr. Millerick was earning and receiving an average of $312 per month from the railroad company.

Appellee, having received no premium payments upon the policy in question after March, 1939, wrote a letter to Mr. Millerick in part as follows: "September 1, 1939. File—63608 old—J. W. Millerick. Dear Brother: For some time past, no deduction has been reported from your earnings by the railroad company by whom you are employed, covering the monthly premiums on your health and accident policy, and it has now lapsed. This may be due to your being transferred or temporarily laid off. A lapsed policy is of no value to anyone and we could not give you claim service if you were disabled. . . . The association issues policies covering all classes of railroad occupations, which give full coverage at unusually low rates. You cannot afford to work on a railroad without B.A.R.E. health and accident coverage. If you have been laid off, we will gladly reinstate you if a remittance of one month's premium is sent into the home office. If you have been transferred, please let us know immediately your present occupation and where employed, and we will place you on our billings and automatically reinstate your policy as soon as deductions are made. May we hear from you in the enclosed self-addressed envelope which does not need a stamp? Fraternally yours, F. B. Ahara, Vice-President."

Mr. Millerick admitted having received this letter either in the fall of 1939 or in the fall of 1940. We quote from his testimony on this point: "Q. Didn't the company as of the date of September 1, 1939, write you? A. Don't think the date is right, it was long in the fall before I got back that I got this letter. I couldn't tell you the date, I left the letter on the engine. . . . Q. Either in the fall of '39 or the fall of '40 you got a letter? You did receive a letter from the company at some date, either in the fall of '39 or '40 to the effect that your premium had not been paid for some time prior thereto, is that correct? A. Yes."

Mr. Millerick also admitted that he did nothing after the receipt of this letter to pay the premium due or anything in an effort to reinstate his policy.

In February, 1941, Mr. Millerick became disabled within the terms of the policy and subsequently made demand for indemnity and was informed by appellee that his policy had lapsed.

For reversal appellant earnestly argues here (quoting from her brief) "That the policy never lapsed as from March, 1939, to January, 1941. Mr. Millerick earned from the M. O. P. Ry. Co. from March, 1939, to January, 1941, $7,176.75, the smallest amount of his monthly earnings was $223.17 and the largest $533.66, an average of $312 each month from March, 1939, to January, 1941. That the appellee could have collected the monthly premiums on the deduction order it held if proper demand had been made on the railroad company for them in that the deduction order nor the policy was ever canceled; that the letter did not constitute notice sufficient to lapse the policy because the appellee negligently and carelessly failed and refused to make proper demand for the insurance premiums." To support her contention, appellant relies on the case of *Pacific Mutual Life Ins. Co.* v. *Harris*, 187 Ark. 772, 63 S. W. 2d 219.

We think, however, that the Harris case does not control here and is clearly distinguished from the instant case on the facts. The Harris case seems to have been predicated on the failure of the insurance company to notify, or make demand, for the payment of the premium in question. In the instant case, however, the appellee insurance company, after waiting from April until September, 1939, and having received no premiums, proceeded by letter to notify Mr. Millerick of that fact, in addition informed him that his policy had lapsed and offered to reinstate his policy if he would remit one month's premium. There was no requirement for a physical examination. In addition to this notice by appellee to Mr. Millerick that premiums were not being received, that his policy had lapsed and demand for premium payments, Mr. Millerick had the additional information that his premiums were not being paid from the fact that the monthly premium payments of $3.60 were not being deducted from his pay check on or after April, 1939, since he was drawing all the money due him. Cer-

tainly, therefore, he must have known that the railroad company was not paying his monthly premiums when all his wages were being paid to him.

After appellee, insurance company, had given the insured, Millerick, direct notice that his policy had lapsed for failure to pay premiums, no further duty rested upon appellee to make demand upon the railroad company or anyone else for the payment of the premiums in question. It was within the power of Mr. Millerick to lapse the policy in question if he so desired and this, we think, Mr. Millerick did in the instant case.

The principles announced in the following cases, we think, apply here:

In *Pacific Mutual Life Ins. Co.* v. *Walker,* 67 Ark. 147, 53 S. W. 675, this court held (quoting headnote No. 3 from the Southwestern Reporter): "Where an insured gives an order to a railroad company to pay part of his future wages to an insurance company in payment of an installment of premium on an accident policy, which order the insurance company accepts, and the railroad company retains funds in its hands belonging to the insured to pay said premiums, and the insurance company does not collect it, and does not return the order, or make any effort to notify the insured that it is unpaid, the insured, on suffering loss, is entitled to recovery, though said premium is not paid."

We think the effect of this holding is to relieve the insurance company of all liability upon the giving of notice and demand to the insured, as was done in the instant case.

In *Benefit Association of Railway Employees* v. *Hancock,* 248 Ky. 315, 58 S. W. 2d 578, it is said: "It devolves upon the insurer to present the order for the payment as the installments fall due and in case of the nonpayment to notify the insured of their nonpayment as a prerequisite of its right to insist on a forfeiture thereof."

And in *Stewart* v. *Continental Casualty Co.,* 229 Ky. 634, 17 S. W. 2d 745, 67 A. L. R. 175, this language is used: "But the insured, in a case like this, when he has provided for the payment when due, and the premium

made is in the possession of the defendant or under its control, payment will be deemed to have been made, until the insured is notified by the defendant to the contrary."

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

LONDON AND CORBIN *v.* STATE.

4247 161 S. W. 2d 207

Opinion delivered April 27, 1942.

Claude F. Cooper, Ivy & Nailling and *T. J. Crowder,* for appellant.

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

MEHAFFY, J. The prosecuting attorney filed his information charging the defendants with burglary and grand larceny. It charged that they did, in the nighttime, on April 17, 1941, with force break and enter the store building of E. G. Robbins in the town of Joiner, Arkansas, with the intent then and there of committing grand larceny by stealing and carrying away personal property of the value of more than $10, and that they did steal and carry away one adding machine of the value of $225 and $300 in lawful money of the United States.

The appellants were arraigned and entered pleas of not guilty. Appellants were found guilty of the crime

of burglary and their punishment fixed at imprisonment in the state penitentiary for a period of three years. They were not found guilty of grand larceny.

There was a motion for new trial which was overruled, the defendants saved their exceptions, prayed an appeal to the Supreme Court which was granted and the case is here on appeal.

William Guthrie, a witness for the state, testified that his home is in St. Louis; that he has been in the penitentiary both in Missouri and Arkansas; was sent to the penitentiary in Missouri on a charge of robbery and released August 12, 1940, and went to Sikeston, Missouri; worked four months for Paul Jones, who runs a night club in Sikeston, and then worked a short time as a taxi driver for Jack London; London owns two taxicabs, drove one of them himself; on April 17, 1941, he was cooking for Joe Ryan; that was the first time he had met Ben Adams and Arthur McRee; Russell Corbin brought them to Ryan's cafe; Corbin lived in Caruthersville; they went to find a man who could open a safe; witness told them Jack London could, so they went to get in touch with him; they said they knew a safe down in Arkansas where they could get from $500 to $1,000; when witness got off from work he went home and changed clothes; the others picked him up there and they all went to Joiner; got in London's taxi in front of the house and talked; their car had Oklahoma license behind; London asked about the safe; witness had never had any dealing with safe breaking before; somebody said London would get the tools; the deal was made in London's taxi; the five of them went to Hayti; two in London's taxi and the rest in the Ford; left London's taxi in Hayti and all got in the other car and went to Joiner; got there about midnight and parked the car behind the store; could not get into the store and went down to a junk pile and got a piece of iron and opened the door with it; London got the tools out of the car and opened the safe; the fellow that got the death penalty and Russell Corbin stood guard on the outside; witness held a flashlight; McRee was around in the store; Jack opened the safe with a punch and hammer; witness did

not know how much he got, all he saw was about $30; McRee took the cash register out with him; he tried to open it and could not; they took about four cartons of cigarettes; after they left the store, they stopped on a bridge and someone threw the cash register out; later stopped to change a tire; witness does not know where it was; he was asleep; McRee and Adams went after the tire and Jack and Corbin were in the back seat; waked up just before they got to Hayti; divided the money and witness got $7; when they got to Hayti, London and witness got in the taxi and went to Sikeston; the other three got in their car and said they were going to Caruthersville. On cross-examination this witness said that he had quite a criminal career; served two terms in the penitentiary before this one; both terms for robbery; did not rob anyone at Sikeston; has gone as long as several months without robbing or stealing; never knew Ben Adams or Arthur McRee until they came that day with Russell Corbin; had never been in Joiner before, but has passed through; after they had broken into the store and got the cash register and money they went through Truman, but did not stop until they had a flat tire; does not remember where they had the flat, he was asleep; got to Hayti about three o'clock in the morning; got to Sikeston about 4:15 and stopped at the cafe; went to the penitentiary in Arkansas in connection with another job; have been there about three and a half months; witness is cook at the cafe and doing his best to make a parole; his brother is a salesman, his father a real estate salesman in St. Louis, and witness is the black sheep. When they went to Joiner witness was armed with a gun, a .44, and there was another gun, a .38, but does not know who carried it.

Arthur McRee, another witness for the state, testified that he is 29 years old, single; present address in Arkansas State Penitentiary; serving a life sentence on a charge of robbery and murder. His testimony as to the burglary and larceny is practically the same as that of Guthrie; witness said that he had known Guthrie since 1939; had been in jail together. Witness then testified about their having crooked dice to sell; tried to

sell to Corbin, but he would not buy; witness testified that he had killed a man in Arkansas and he got a life term in the penitentiary; Ben Adams got the death penalty for the murder; they were arrested on the Joiner job about the first of June at Dallas, Texas; Guthrie was in jail at Blytheville; Ben actually killed the man; he owned a liquor store and when they went in to rob him he resisted and they killed him.

Donald Watson testified that he lives at Arbyrd, Missouri, and runs a filling station owned by E. J. Eubanks; has worked there about two years; 34 years old and married; in April, 1941, he fixed a flat; drove out after midnight and fixed it; it was either a Chevrolet or Ford; thinks it was a Ford; witness recognized Ben Adams and Arthur McRee as the men who came to the filling station; Adams came first and stayed at the filling station while witness went up and got the tire and brought it back; McRee came back with him; witness had trouble jacking up the car; it was muddy and the car was heavy; did not notice how many people were in the car; thinks McRee got out of the front seat; heard voices in the car and when they moved around in the car it would shake; does not know how many people were in the car; McRee and Adams are the men who came after the tire, and they are the only ones witness saw; just heard talking in the car and knew that there must have been more than one in the car.

Ike Lane testified that he lived between Joiner and Tyronza; was present when Alfred Jones found the cash register; the water was about two feet deep in the river; the register was open.

Riley Staton testified that he was present when Jones found the cash register in Tyronza River about fifteen feet north of the bridge.

Ben Adams testified that he was confined in the death cell at the state penitentiary for murder. His testimony was substantially the same as that of Guthrie.

E. T. Robbins testified about his store being entered and the cash register being stolen and said there was about $30 in it; was positive that $235 was stolen from the safe.

There was other evidence about the finding of the cash register and that cash register in court is the one taken from Robbins' store.

The appellants then made a motion for a directed verdict, which was overruled. They introduced Harry Walden who testified in substance that he lived in Sikeston; had lived there 20 years; that he drove one of Jack London's taxis for about a year, and was driving for him in April, 1941; that he knows positively that Jack London was in Sikeston, Missouri, on the night of April 17, 1941, and worked with him all night.

Glenn Grigsby testified that he worked for the government and employed Jack London to drive him in his cab when it was necessary; saw London on April 17, 1941; London took him to a tavern in West Sikeston, stayed there about fifteen minutes, and then drove him to the Top Hat; drove him until about 10:15, witness fixed the date and what took place from a diary he keeps.

Clyde Smith testified that he has lived in Caruthersville since 1934, and works for the Brown Shoe Company; on the night of April 17, 1941, he was in Caruthersville and attended a picture show at the Rodgers Theatre; saw Russell Corbin at the theatre and talked to him; left the show before Corbin did, about 11 o'clock.

Ralph Willburn testified that he has lived in Sikeston about a year and a half; that on the night of April 17, 1941, he saw Jack London about nine o'clock at the Lane Theatre; London came in his cab and took witness to work.

Floyd Hinchey testified that he lives at Point Pleasant, Missouri, about 20 miles from Caruthersville; witness is Russell Corbin's cousin; that they went to a show together about nine o'clock on the night of April 17, 1941, and left about 11 o'clock.

Mrs. Orie Corbin testified that she lives at Caruthersville and runs a grocery store; Russell Corbin is her nephew and was staying with her in April, 1941; he came in between 11 and 12 o'clock on the night of April 17, 1941; was there in the morning; Floyd Hinchey was with him and stayed all night there.

Other witnesses testified to the same effect; that is, about seeing the appellants at different places at the time of the burglary. There was then some rebuttal testimony introduced about the reputation of witnesses, but it is unnecessary to copy it here.

Appellants contend that the evidence is not sufficient to support the verdict; that the state relied upon the testimony of three accomplices and offered no testimony connecting the appellants with the burglary. In this contention, we agree with appellants. The three witnesses testifying against the appellants were all criminals; they had all been guilty of murder and robbery, and one of them, at the time, was under sentence of death for murder.

Section 4017 of Pope's Digest is as follows: "A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. Provided, in misdemeanor cases a conviction may be had upon the testimony of an accomplice."

The only evidence claimed to corroborate the testimony of the accomplice in this case was that of Donald Watson. He testified that he ran a filling station owned by E. J. Eubanks; that he fixed a flat tire in April, 1941, on either a Chevrolet or Ford; he recognized Ben Adams and Arthur McRee as the men who came to the filling station; went up and got the tire and brought it back; McRee came back with him; it was almost daylight; car was about a mile and a quarter from the station; after he fixed the tire they rode back with him to the car. When asked if witness knew how many people were in the car he answered that he did not; that he only heard voices in the car and that people moved about, shaking the car; the only men he saw were the two he identified.

This was all the evidence offered in corroboration of the evidence of the accomplices, and there is nothing in this evidence that tends in any way to connect the

appellants with the commission of the offense. He says there were some persons in the car, but he does not know who they were. How can it be said that this testimony tends to connect the appellants with the commission of the offense?

In the case of *Bennett and Holiman* v. *State,* 201 Ark. 237, 144 S. W. 2d 476, 131 A. L. R. 908, this court quoted with approval from the case of *Casteel* v. *State,* 151 Ark. 69, 235 S. W. 386, as follows: "The court instructed the jury that the witness, Termis Butts, was an accomplice, and that the appellant could not be convicted upon his testimony unless the same was corroborated by other testimony tending to connect appellant with the commission of the crime charged against him, and that the corroboration was not sufficient if it merely showed that the offense was committed and the circumstances thereof, and that unless the jury were convinced beyond a reasonable doubt that the testimony of Butts was so corroborated they should find the appellant not guilty. In the above instruction the court correctly declared the law applicable to the testimony of an accomplice." To support this holding the following cases are cited: § 3181, C. & M. Digest; *Earnest* v. *State,* 120 Ark. 148, 179 S. W. 174; *Brewer* v. *State,* 137 Ark. 243, 208 S. W. 290.

This court has many times passed on the statute above quoted and has always held that the corroboration was not sufficient unless it tended to connect the defendant with the offense.

In the case of *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885, this court said: "The corroboration must be something more than 'to merely show that the offense was committed, and the circumstances thereof.' He must be corroborated by other evidence *tending to connect the defendant with the offense.* Facts that go to the identity of the defendant in connection with the crime—that tend to connect him with it—would be *material,* and if the accomplice is corroborated as to these, it is sufficient."

Speaking of the corroboration necessary for a conviction, this court said in the case of *Wilson* v. *State,* 190 Ark. 651, 80 S. W. 2d 925: "The court is of opinion

that the testimony of the Lees, A. J. Kent and Buck Martin, at the most, created only a suspicion against appellant and did not, independently, and without the aid of the testimony of the accomplices, tend to connect appellant with the commission of the crime."

Many decisions of this court might be cited in support of the rule that requires corroborating evidence tending to show the connection of the defendant with the offense, but it would serve no useful purpose to collect all of them.

In the case of *Griffin* v. *State,* 172 Ark. 606, 289 S. W. 765, this court said, after quoting the above rule: "It is immaterial whether the court and jury believe the accomplice or not." So, in this case, it is immaterial whether the court and jury believe the accomplices or not.

Under the statute quoted the testimony of the accomplices must be corroborated by other evidence tending to connect the defendants with the crime, and in this case there is no such corroboration.

It is unnecessary to discuss the other question raised by appellants.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

TEAGUE *v.* NATIONAL LIFE COMPANY.

4-6724 161 S. W. 2d 754

Opinion delivered April 27, 1942.

Robert Bailey and *Robert C. Stark,* for appellant.

Hays, Wait & Williams, for appellee.

HUMPHREYS, J. Appellant, Maggie E. Teague, brought suit against appellee, successor to National Life Association, on the 12th day of February, 1940, in the circuit court of Pope county under a permanent disability clause contained in a life insurance policy issued by its predecessor, National Life Association, to appellant on April 24, 1919, being policy No. 59041, providing for the payment of an annual premium of $41.70. It was alleged that all premiums were paid on the policy until the payment due on April 24, 1931, after which time she paid no premiums. It was alleged in the complaint that under the terms of said policy there was a clause providing for disability benefits "should the insured before reaching the age of seventy years and while this policy is in full force and effect become totally and permanently disabled, by accident and because thereof be wholly and permanently incapacitated from doing any labor or business . . . in lieu of all other benefits payable under this policy, the association will, if the insured shall so elect, upon receipt by the association of proper and satisfactory proof of such disability, pay to the insured one-tenth of the amount of this policy, and so long as the insured shall keep the policy in full force and effect by making all payments required hereunder within the time herein provided, one-tenth of said amount shall be paid to the insured at each anniversary of such first payment upon receipt of satisfactory proof of continued disability until the entire amount of the policy shall have been paid; provided, however, that any such payments made on this policy by the association before the death of the insured shall be indorsed on the policy when said payments are made and should the death of the insured occur while the policy is in full force, all amounts theretofore paid on disability settlement shall be deducted from the amount stated in the face of the policy and the remainder only shall be paid to the bene-

ficiary named in the policy. . . ." The policy further states "Proof of death or disability of the insured shall be furnished to the association at its home office which proof shall comprise satisfactory statements and evidence establishing any claim under this policy. . . ." It was also alleged that before reaching the age of seventy and while the policy was in full force and effect the appellant became totally and permanently disabled by reason of an accident and has remained totally and permanently disabled by reason of said accident ever since that time; that in the spring of 1925, the appellant was kicked in the lower part of her body, below the stomach, by a cow while engaged in milking said cow, from the effects of which she has never been able to do any work since that time.

A demurrer to the complaint was filed by appellee stating two grounds for dismissal of the complaint, the second ground being that the complaint shows on its face that any right of action appellant might have had is now barred by the statute of limitations, and that appellee specifically pleads the statute of limitations in bar of any recovery.

The court sustained the demurrer to the complaint and dismissed same, to which ruling and judgment of the court the appellant at the time excepted and prayed an appeal to this court which was granted.

The allegations of the complaint were met by demurrer specifically pleading the statute of limitations which had the effect of admitting the allegations in the complaint. In other words, the sole contention made by appellee in the trial court and in this court was and is that whatever claim appellant had under the permanent disability clause in the policy was barred by the statute of limitations. According to the face of the complaint appellant made no report as to her disability until December 9, 1939; that she furnished no proof as to her disability, but instead brought suit on the 12th day of February, 1940. One of the salient provisions in the policy or contract of insurance was that in case of disability the yearly premiums due thereafter must be paid

before the annual benefits provided for in the disability clause of the policy could be collected. The policy or contract does not provide for the waiver of premiums in case of permanent disability. The policy required that she should elect whether she would accept disability payments or not and in the event of electing that she would do so, the disability payment of $300 per year should be deducted from the face of her policy, and had she made the election it would have been the duty of appellee to pay her $300 a year for ten years in order to satisfy its liability. Had it done this, appellee would have never had any money in its hands with which it could have paid the premiums and kept the policy alive. She did not keep the policy alive herself by paying the premiums, but defaulted in the payment of the premiums on April 24, 1931. The policy, therefore, lapsed on the 24th day of May, 1931, thirty days grace period in which she had the right to pay the premium after the 24th day of April, 1931. She made no premium payment after April 24, 1931, so the policy remained lapsed from and after the expiration of the grace period. Under the contract she must have made the proof of permanent disability before the policy lapsed and could not make it after the policy lapsed. It was said by this court in the case of *Home Life Ins. Co.* v. *Couch,* 200 Ark. 783, 141 S. W. 2d 20, that: "The policy lapsed June 1, 1931. Thereafter he could not have made proof, 'while the policy is in full force and effect,' because it was not in effect after that date."

Appellant cites and relies upon the cases of *Aetna Life Insurance Company* v. *Langston,* 189 Ark. 1067, 76 S. W. 2d 50, and the *Pacific Mutual Life Insurance Company* v. *Jordan,* 190 Ark. 941, 82 S. W. 2d 250, but in both of those cases premium payments were waived from and after permanent disability occurred and in neither of those cases was an election required on the part of the assured to entitle him or her to disability payments and in both of those cases under the terms of the contract the insurer had money in its hands with which to pay the premiums to keep the policies alive.

In the instant case it was the duty of the assured to keep the premiums paid up in order to keep the policy

alive, and also the duty of the assured in case of permanent disability to elect whether she would accept the disability payment or whether she would permit the disability payment to remain in the hands of appellee for the purpose of paying premiums and for the use and benefit of the beneficiary of the policy. She did not do either and did not even notify appellee that she had received a permanent injury in the spring of 1925. She did not attempt to do this until 1939 by a letter from her attorney to the appellee and did not bring her suit for the amount claimed until February 12, 1940. At that time her policy had been lapsed more than eight years and even if she had complied with all the provisions of the policy the suit was not brought until more than five years after the last installment under the disability clause would have been due.

Finding no error in the judgment same is in all things affirmed.

HALL *v.* CASTLEBERRY.

4-6725 161 S. W. 2d 948

Opinion delivered May 4, 1942.

Denver L. Dudley and *Foster Clarke,* for appellant.

H. A. Northcutt and *Oscar E. Ellis,* for appellee.

HOLT, J. Appellee, Rex Castleberry, brought suit in the Fulton chancery court against J. A. Hall and Josie Hall, his wife, making two Jonesboro banks garnishees.

He alleged in his complaint that on April 14, 1936, he obtained a judgment against the Halls in a foreclosure suit No. 1098 in the amount of $1,251.65, copy of the alleged judgment was made a part of the complaint.

He further alleged sale of the land under the foreclosure decree; that the proceeds from the sale amounting to $900 was duly credited on the judgment, and that a deficit, or balance, of $602.70 was left due and unpaid on said judgment.

Appropriate allegations for writs of garnishment were made, writs issued and served and the Citizens Bank of Jonesboro answered that it had $825.48 to the credit of J. A. Hall.

April 8, 1941, the Halls appeared specially and filed motion questioning the court's jurisdiction and alleged lack of service on them. Upon a hearing the court overruled this motion, whereupon, appellants answered preserving their right to object to the court's jurisdiction, lack of service on them, and saving their exceptions to the action of the court in overruling their motion, filed answer denying every material allegation of the complaint and also denied that there was any valid deficiency judgment existing against them in favor of appellee Castleberry.

Upon a trial the court found the issues in favor of appellee and this appeal followed.

The record discloses that in 1933 the Halls purchased land from Rex Castleberry for a consideration of $1,050. In payment they executed notes in favor of Castleberry secured by a mortgage on the land. Shortly after the execution of these notes, they were sold and assigned to G. T. Cunningham by Castleberry. Upon the failure of the Halls to pay the notes, Cunningham filed foreclosure suit on March 10, 1936, making the Halls and Rex Castleberry, the original mortgagee, defendants. This suit was numbered 1098. On the same day suit was filed Castleberry and the Halls entered their appearance.

The record further reflects that the court below entered a *nunc pro tunc* order in case No. 1098 as follows: "The above decree in case No. 1098 should have been recorded on April 14, 1936, and is now entered of record *nunc pro tunc.*" And after the recording of the decree under this *nunc pro tunc* order, there appears this notation on that decree: "Pd. on Judgment by sale of land April 14, 1936, $900 this 2/1/41—Rex Castleberry. Attest: Lester Collins, Clerk."

The decree entered under the *nunc pro tunc* order recites that Rex Castleberry as plaintiff was given a judgment against the Halls for $1,251.65, foreclosure ordered, and a commissioner appointed to carry out the decree, and this *nunc pro tunc* order appears to have been made January 27, 1938.

On April 8, 1941, after the present suit had been filed another *nunc pro tunc* order was made in foreclosure suit No. 1098 in which it is recited: ". . . that this suit was originally filed by and in the name of G. T. Cunningham as plaintiff but that before said cause proceeded to judgment and decree on the date of April 13, 1936, this defendant had been substituted as party plaintiff and the same should have been entered in his name as such plaintiff but that said order of the court then made was not entered of record but should now be entered as of that date.

"It is, therefore, by the court considered, ordered and adjudged and decreed that Rex Castleberry, one of the original defendants herein, be and he is hereby substi-

tuted as the plaintiff in place of the original plaintiff, G. T. Cunningham, and that this judgment, decree and order be now entered as of the date of April 13, 1936, the date same was originally made but not then placed of record herein."

It is conceded that in the instant case docketed as case No. 1327, and wherein Rex Castleberry, appellee, appears as plaintiff and J. A. Hall and Josie Hall, appellants, appear as defendants, that no service of summons either personal or constructive, has been had upon either of appellants and that appellants are nonresidents of the state of Arkansas.

There can be no question but that if a valid judgment were obtained against the Halls by Rex Castleberry in the original foreclosure suit No. 1098, the land sold and proper credit given on the decree for the sale price, then the money of the Halls held by the garnishee bank would be subject to be applied on any deficiency judgment that might be due Castleberry from the Halls without personal or constructive service on the Halls. If, however, there were no such valid judgment obtained against the Halls in suit No. 1098, then the garnishment obtained against the Halls must fail for lack of service on the Halls in the instant case.

The purpose of a *nunc pro tunc* order, and the rule governing its entry is stated in *Citizens Bank* v. *Commercial National Bank,* 118 Ark. 497, 177 S. W. 21, as follows: "The purpose of a *nunc pro tunc* order is to make the record reflect the transaction that actually occurred and as often announced by this court, 'The authority of the court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak but ought to have spoken.' *Lourance* v. *Lankford,* 106 Ark. 470, 153 S. W. 592, Ann. Cas. 1915A, 520."

In January, 1938, in the instant case, the court below reinstated by *nunc pro tunc* order a foreclosure decree rendered April 14, 1936, but which had been omitted from the record; and on April 8, 1941, subsequent to the filing of the instant suit, the lower court by the other

nunc pro tunc order, *supra,* substituted Rex Castleberry, appellee here, as plaintiff for G. T. Cunningham, the original plaintiff in case No. 1098.

Appellants first complain because they were given no notice of the *nunc pro tunc* orders, *supra.* In the instant case, the record on the *nunc pro tunc* orders is silent as to notice. Since, however, the attack on these orders by appellants is collateral, the orders may not be attacked by showing that notice was not given. This court so held in *Miller Land & Lumber Company* v. *Gurley,* 137 Ark. 146, 208 S. W. 426, where it is said: "Appellant answers . . . that the *nunc pro tunc* order entered by the court, was void on account of notice to appellant not being given, and it was shown by oral testimony at the hearing below that notice was not in fact given to appellant. The record of the order is silent as to notice. This is purely a collateral attack on the validity of the *nunc pro tunc* order of May 7, 1917, and it has been decided by this court that the judgment of a court correcting a former entry cannot be attacked collaterally by showing that notice was not given. *King* v. *Clay,* 34 Ark. 291. Even on appeal, where the record is silent, the presumption is indulged that notice was given."

We have many times held that courts possess continuing power over their records not limited by lapse of time. The chancellor, who tried the instant case, was chancellor of the district comprising Fulton county at the time the foreclosure suit No. 1098 was instituted and tried, and has continued as chancellor to the present time. In the absence of evidence to the contrary, the presumption is that the *nunc pro tunc* orders, *supra,* were entered and based upon satisfactory evidence, or personal recollections of the chancellor as to the court proceedings, in case No. 1098, *supra.*

In *Bobo, Adm'r,* v. *State, use, etc.,* 40 Ark. 224, this court said: "Courts have a continuing power over their records not affected by the lapse of time. Should the record in any case be lost or destroyed, the court whose record it was possesses the undoubted power, at any time afterwards, to make a new record. In doing

this it must seek information by the aid of such evidence as may be within its reach tending to show the nature and existence of that which it is asked to re-establish. There is no reason why the same rule should not apply, when, instead of being lost, the record was never made up, or was so made up as to express a different judgment than the one pronounced by the court. Hence the general rule that a record may be amended, not only by the judge's notes, but also by other satisfactory evidence. . . .

". . . we think it clear, upon authorities, that the court may make such amendments upon any legal evidence, and they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceedings before it, etc. When there is nothing more to rely on than the memory, the court will act, if at all, with great caution."

Having reached the conclusion that the *nunc pro tunc* orders in question were within the powers of the trial court to make, and that there is an outstanding valid judgment against appellants in favor of appellee on which a balance of $602.70 remains due and unpaid, the decree is affirmed.

PHILLIPS *v.* STATE.

4245 161 S. W. 2d 747

Opinion delivered April 27, 1942.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

SMITH, J. Appellant was found guilty of involuntary manslaughter and given a sentence of one year in the penitentiary, from which judgment is this appeal.

Appellant was jointly indicted with three other persons who were occupants of a car which he was driving at the time the homicide was committed; but at the conclusion of the introduction of the testimony the case was dismissed as to all the defendants except appellant.

The indictment alleged that the occupants of the car "did unlawfully, feloniously, wilfully, culpably and negligently, without due caution, care and circumspection, drive his car into and over one Jewel Faulkenberry, . . .," thereby killing the said Faulkenberry.

The indictment sufficiently charged a violation of § 2982, Pope's Digest, which is our involuntary man-

slaughter statute. The trial judge was under the apprehension that a violation of § 48 of act 300 of the Acts of 1937, p. 1103, now appearing as § 6706, Pope's Digest, was charged; but withdrew those instructions and submitted the case under § 2982, Pope's Digest.

This action of the court is assigned as error, it being insisted that § 6706, Pope's Digest, supersedes § 2982, Pope's Digest, in so far as it relates to homicides in driving automobiles; and it is further insisted that the testimony is insufficient to sustain a conviction under § 2982, Pope's Digest.

Considering first the last stated contention, it may be said that none of the defendants testified, and no other person saw the automobile strike Faulkenberry, a child twelve years old, and the state's case depended upon proof of statements made by appellant subsequent to the collision.

A deputy sheriff testified that it was not known who had killed the child, but that he arrested appellant as a suspect. Appellant first stated that his wife was driving the car, but after he had been placed in jail, he admitted that he, and not his wife, was driving the car when the collision occurred, and he detailed the circumstances of the accident as follows. He was driving on highway 40 from Osceola, and he met a car the lights of which were on, and he could not see very well, and that the boy darted out and he could not tell whether the boy was in front or behind the car that was approaching from the opposite direction, and that he hit the boy with his car. He slowed down and started to stop, when someone in the car told him he was in a white settlement and that he had better drive on or they would get hurt; that he did not report the accident because he had never heard any more about it and figured the boy was not hurt very badly. Appellant is a colored man and the child killed was a white boy, but the accident did not occur in a village or "settlement," as there was only one house in that neighborhood. Appellant accompanied the deputy sheriff to the scene of the killing, and other officers found evidence of the collision at that point. Blood stains on the highway were found twenty feet from

the place where the body was found, and the clothes worn by the boy were exhibited to the jury. The child's head was crushed.

We think it fairly inferable that the occupants of the car were drinking, if not intoxicated, and that fact would be clearly shown if we might consider the proof of statements made by a woman who was in the car, but after a verdict had been directed in her favor the testimony as to her admission was excluded from the jury. However, we think the testimony supports the finding that appellant was not driving the car with "due caution and circumspection," as that term will be hereinafter defined.

As has been said, none of the occupants of the car testified, but we think it fairly inferable from appellant's own admissions and the circumstances of the case that he was driving without due caution and circumspection, and in all probability at an unlawful speed, as is evidenced by the distance the car threw the body.

Act 300 of the Acts of 1937 is a comprehensive act, consisting of 165 sections, and is entitled "An act regulating traffic on highways and defining certain crimes in the use and operation of vehicles. . . ." Article IV of this act is entitled "Accidents," and embraces §§ 36 to 47, both inclusive, of the act, and it is certain that appellant did not comply with the requirements of any of these sections. He made no inquiry as to the extent of the injury he had inflicted; and he made no report thereof; and he offered no aid to the injured party as the law required him to do. These omissions of his statutory duty, aside from his humane duty, all strongly support the inference that appellant struck the boy while driving without due caution and circumspection.

We conclude, therefore, that the testimony is sufficient to support the conviction. *Madding* v. *State,* 118 Ark. 506, 177 S. W. 410; *Nichols* v. *State,* 187 Ark. 999, 63 S. W. 2d 655.

Appellant insists, as has been said, that § 2982, Pope's Digest, in so far as it relates to a death inflicted

by the driver of an automobile, has been superseded by § 48 of act 300 of the Acts of 1937 (§ 6706, Pope's Digest).

Section 2982, Pope's Digest, reads as follows: "Involuntary manslaughter. If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter."

Section 48 of act 300 of 1937 (§ 6706, Pope's Digest) reads as follows: "Negligent homicide. (a) When the death of any person ensues within 1 year as a proximate result of injury received by the driving of any vehicle in reckless, wilful or wanton disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide. (b) Any person convicted of negligent homicide under the provisions of this act shall be punished by imprisonment for not more than 1 year or by fine of not less than $100 nor more than $1,000, or by both such fine and imprisonment. (c) The commissioner shall revoke the operator's or chauffeur's license of any person convicted of negligent homicide under the provisions of this act."

After defining voluntary manslaughter, the crime of involuntary manslaughter is defined in § 192 of the Penal Code of California as follows: "2. Involuntary —in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The similarity of this statute to § 2982, Pope's Digest, is apparent.

At the 1935 session of the General Assembly of California, an act was passed which appears as chapter 27 of the acts of that session. This is an act to establish a "Vehicle Code . . .," and our act of 1937, *supra,* may have been patterned after it, as many of the provisions of that act are identical with our act of 1937. Under the title, "Negligent Homicide," a section of the California act reads as follows: "500. Negligent Homicide. When the death of any person ensues within one year as

the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of a lawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the state prison for not more than three years."

In the recent case of *People* v. *Crow,* (Calif. App.) 120 P. 2d 686, it was held that these statutes of the state of California were not in conflict, and that the offenses were so separate that a verdict of acquittal of negligent homicide was not inconsistent with a subsequent verdict of conviction of manslaughter arising out of the same automobile accident, for the reason that the statute defining "Negligent Homicide" defines a crime different from involuntary manslaughter or any other crime defined in the Penal Code.

What effect a conviction or an acquittal in this state would have under either § 2982 or § 6706, Pope's Digest, as a bar to a prosecution under the other section is a question not requiring decision here. But we are convinced, as was the California court, that the sections are not in such conflict that the later (the Vehicle Act) repealed the former (the Penal Code).

If our act of 1937 repeals § 2982, Pope's Digest, where one had been killed by an automobile, it also repealed any other law that would apply to a homicide committed in driving an automobile; and we think the General Assembly had no such intention. It is easily conceivable that the driver of an automobile might, with deliberation and premeditation and with malice aforethought, drive over a person with the intention of killing him, in which event he would be guilty, not of involuntary manslaughter, but of murder. Of course, to make such an act murder, proof of the specific intent to kill would be required, and no degree of negligence, however gross, would suffice to make the unlawful killing murder; but if such proof were made of the specific intent to kill, it could not be said that the grade of such

a homicide had been reduced to a grade less than murder by the act of 1937.

Now, § 2982, Pope's Digest, is a criminal statute, and the phrase, "without due caution and circumspection," must be construed in that light. It means not ordinary negligence or the lack of ordinary care, which would constitute civil liability for an injury; it means criminal negligence. Many cases define the difference between ordinary negligence, upon which civil liability might be predicated, and the criminal negligence required to constitute a crime.

It is pointed out in the chapter on Automobiles, 5 Am. Jur., p. 927, where, at § 790, it is said: "Degree of Negligence Necessary. In cases dealing with homicides, resulting from negligence in operating automobiles, the decisions of the courts have stated in different terms the kind of negligence required to constitute a crime. In some of them it is said to be negligence that is 'culpable and gross'; in others, that it must be such as to show a reckless disregard of the safety of others, etc.; but all of the authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to hold one a criminal there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue, and that, in order to sustain a conviction of criminal homicide attributable to a negligent omission of duty when engaged in a lawful act, it must be shown that a homicide was not improbable under all the facts existing at the time, and which should reasonably have had an influence and effect on the conduct of the person charged. Carelessness in driving an automobile at a speed that is unreasonable, or likely to endanger life or limb, is not necessarily criminal carelessness within the meaning of a statute making one guilty of manslaughter who causes the death of another by culpable negligence or criminal carelessness."

In defining the phrase, "Criminal Negligence," vol. 10, Words and Phrases, p. 521, there appears the following quotation from the case of *Croker* v. *State,* 197 S. E.

92, 57 Ga. App. 895: " 'Criminal negligence,' within involuntary manslaughter statutes, is something more than ordinary negligence, which would authorize recovery in a civil action, but is the reckless disregard of consequences or a needless indifference to the rights and safety of others with a reasonable foresight that injury would probably result. Code 1933, §§ 26-1006, 26-1009, 26-1010."

In the case of *Bell* v. *Commonwealth,* 107 Va. 597, 195 S. E. 675, it was said by the Supreme Court of Appeals of Virginia that "The courts and the authorities agree, in the absence of statutory regulations, that a higher degree of negligence is required to establish criminal negligence than to establish liability in a civil action. The negligence required in a criminal proceeding must be more than a lack of ordinary care and precaution. It must be something more than mere inadvertence or misadventure. It is a recklessness or indifference incompatible with a proper regard for human life. It must be shown that a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on the conduct of the offender. 99 A. L. R. 829; 5 Am. Jur. 927; *Cain* v. *State,* 55 Ga. App. 376, 190 S. E. 371."

We think the state, had it so elected, might have predicated this prosecution upon a violation of the portion of act 300 of 1937, appearing as § 6706, Pope's Digest, above quoted; but, even so, the right to prosecute under § 2982, Pope's Digest, also existed. The testimony here shows more than a lack of care which would constitute ordinary or simple negligence, but establishes criminal negligence, in that, although driving a car was a lawful act, yet it was not driven with due caution and circumspection, and the judgment of the court below must, therefore, be affirmed. It is so ordered.

REED *v.* WHITE.

4-6734 161 S. W. 2d 751

Opinion delivered April 27, 1942.

Bernal Seamster, for appellant.

C. D. Atkinson, Chas. W. Atkinson, Price Dickson and *O. E. Williams,* for appellees.

McHANEY, J. Appellant is the owner of a two-story business building in the city of Fayetteville, Arkansas, and, in August, 1937, she leased same for a period of five years to appellee, Bob White, who owns and operates therein his Pastry Shop, consisting of a confectionery, restaurant and bakery. A written lease agreement was executed by them. White took possession under said lease, made extensive repairs, and installed his machinery and equipment for the purposes of his business, including a gas heated bakery oven. On October 20, 1939, this oven exploded causing damage to the building, including the breaking of the windows therein. White repaired the damage to the building and equipment, other than the windows, but contended that he was not responsible

under the lease for the cost of replacing the windows. In order that the repairs might be made at once, he and appellant stipulated that he should replace the broken windows and the question of liability for this cost would be later determined. Appellee, Kelley Brothers Lumber Company, furnished the material and installed the windows for which it rendered a bill to White for $295.93, exclusive of interest, and neither appellant nor White questions its correctness. White did not pay the bill so Kelley Brothers brought suit against him for this amount. He filed an answer and a cross-complaint against appellant, alleging that, under said lease, appellant should pay said bill. Appellant answered denying her liability and filed a cross-complaint against White for $10.93 which she alleged was the necessary amount to replace the broken windows in the upstairs portion of the leased premises, caused by said explosion, and which have not been replaced. White denied his responsibility therefor.

Trial before the court sitting as a jury resulted in a judgment in favor of Kelley Brothers against appellant for the amount of its bill with interest, and a dismissal of its complaint against White and that neither White nor appellant recover anything on their respective cross-complaints against the other. The case is here on appeal.

The lease agreement provides that lessee, White, "will not suffer any strip, damage or waste and that he will at his own expense make all repairs, including piping and plumbing caused by his negligence or the negligence of his employees or by freezing and not caused by the ordinary wear and usage . . . and will keep the premises in such repair as the same are in at the commencement of said term . . . reasonable use and wearing thereof and damage by accidental fire or other inevitable accidents only excepted. . . ." Another clause reads as follows: "Lessee further agrees not to allow any gasoline or any other inflammatory material to be left or stored in said building. And that in case any glass in doors or windows of said building are broken or any damage that may result in the loading or

unloading of any material or merchandise caused by the backing in of trucks or any other conveyance to said building, shall be replaced and repaired by said lessee at his own expense and within a reasonable time after such accident may occur." Another clause is: "It is also provided that in case the premises or any part thereof shall during said term be destroyed or damaged by fire or other unavoidable casualty so that the same shall thereby be rendered unfit for use and habitation, then and in such case the rent hereinbefore reserved, or a just and proportionate part thereof according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the lessor, or these presents shall thereby be determined and ended at the election of the said lessee or his legal representatives."

In the clause second above quoted lessee, White, agreed: "And that in case any glass in doors or windows of said building are broken . . . shall be replaced . . . by said lessee at his own expense and within a reasonable time after such accident may occur." We think the trial court failed to give this provision in the lease any force or effect. It is true that the lease does not bind the lessee to pay damage caused by "accidental fire or other inevitable accidents," but the damage done to the glass in the windows was not caused by fire or an inevitable accident. We think the lessee would be liable under the lease for damage to the glass in windows and doors in any and all circumstances and no matter how caused, except fire or inevitable accident. Webster defines "inevitable accident" as "an accident not foreseeable or to be prevented by due care or diligence; nearly equivalent to (though broader) an act of God." The explosion was not an inevitable accident. It could have been foreseen with due care and caution. It was testified to and not disputed that the pilot light used to light the six burners in the oven consisted of a length of half-inch pipe with a series of holes along the top, through which, ignited gas passed to light the burners; that many of these holes were stopped up which

might prevent the burners from being ignited; and that escaping unlighted gas from a burner would cause an explosion. White and his employee said they did not know what caused the explosion. It appears to us that, in some manner, gas escaped into the oven, became ignited and exploded. Nothing else could have caused it. The oven was an instrumentality wholly under White's control, one appellant had nothing to do with, and we think he should bear the loss caused by its improper operation, regardless of his agreement to replace broken glass above set out, and this applies to whatever damage was sustained to the windows in the upstairs part of the building as well as to the damage downstairs.

The judgment will be reversed, and cause remanded for a new trial.

Mr. Justice GREENHAW, being disqualified, did not participate in the consideration or determination of this case.

ANDERSON *v.* REAMES.

4-6704 161 S. W. 2d 957

Opinion delivered May 4, 1942.

Mahony & Yocum, for appellant.

Surrey E. Gilliam, for appellee.

HOLT, J. Appropriate proceedings were instituted in the Union chancery court by appellees, J. B. Reames and H. O. Reames, styled "Operating Plaintiffs," and a large number of other parties styled "Public Plaintiffs," to restrain appellants and other defendants from enclosing the shore, or dock site, and from interfering with the rights of appellees in the use and occupancy as a camp site, of a strip of land approximately 200 feet wide, along the west shore of Grand Mere Lake in Union county, Arkansas.

The principal issue presented on the trial below, and here on appeal, relates to riparian rights on Grand Mere Lake and more particularly to the right to maintain and

operate a commercial boat dock on the water and shore of this lake. Upon a trial the court found and decreed in effect, that the "Operating Plaintiffs" (appellees here) were without right to use the shore of the property controlled by appellants under a lease, but decreed that appellees had the right to maintain and operate their equipment on the water of the lake and refused to order its removal from its position in front of the shore line of appellant's property. This appeal followed. Appellees have cross-appealed.

The record reflects that appellees, since 1938, have operated a commercial fishing camp on Grand Mere Lake, which is conceded to be a navigable body of water and part of the Ouachita river. This camp was located on and in front of a strip of land approximately 200 feet wide on the shore of the lake. The Crossett Lumber Company owns practically all of the land bordering on this lake, including the strip of land in question here. Appellants have the use and control of this property to high-water mark under a lease from the Crossett Lumber Company.

In the operation of their commercial fishing camp, appellees maintained a minnow dock, or raft, on the surface of the lake directly in front of appellants' property and forty-eight feet from the water's edge. This minnow dock is 21 x 24 feet. Fifty-one feet from the water's edge and within a few feet of the minnow dock, appellees have a houseboat 40 x 60 feet, which they use as a home. Both the raft and the houseboat are anchored to posts in the bed of the lake. In addition, appellees owned a large number of small boats which they rented to fishing parties. They also had constructed plank walkways from the houseboat and minnow dock to the shore and maintained a refreshment booth on the shore about forty-seven feet from the water's edge. Appellees kept their small boats, which they rented to the public, beached at the water's edge in front of their houseboat and minnow dock, and on the 200-foot strip of land in question. Appellants erected a fence along the shore line in an attempt to prevent its use by appellees in the manner above stated.

The trial court in its decree held that Grand Mere Lake is a navigable body of water; that appellants, as lessees of the Crossett Lumber Company, control the land bordering on the lake to the high-water mark and that there was so little variation between the high and the low-water mark that they are practically the same, it appearing that the water level of the lake is largely controlled by a lock or dam. The decree also directed appellants to remove their fence, and directed appellees to remove their refreshment booth from the shore, to remove all rental boats from the shore and to remove the platform, or boardwalks, leading from the minnow dock and the houseboat to the shore. By the decree, however, appellees were permitted to retain their houseboat and minnow dock in their present position.

We quote from the decree as follows: "The plaintiffs and cross-defendants, J. B. Reames and H. O. Reames, have the right to maintain a commercial fishing dock upon the surface of the lake, but they and their agents, servants and employees should be enjoined and restrained from using, directly or indirectly, any part of the leased premises in the conduct of their business and from inviting the public to make use of the same;

. . .

"J. B. Reames and H. O. Reames, their agents and employees, are perpetually enjoined from occupying or using the leased premises, or any part thereof, and from conducting any business thereon pertaining to the operation of the boat dock aforesaid; . . . from using the leased premises in the operation of their said business, and from directly or indirectly inviting the public or members thereof to go upon the leased premises; from going upon the leased premises in passing to or from their boats or other equipment upon the water; from parking any vehicle or inviting the public or members thereof to park automobiles or other vehicles upon the leased premises, and from going upon the leased premises for any purpose whatsoever; from . . . receiving or discharging passengers or customers from or on the shore of the leased premises. . . ."

Appellants were also awarded a small judgment against appellees for damages covering the use of the shore to date of decree.

The contention of the parties is stated by appellants in this language: "We have heretofore stated the contention of the appellees, J. B. Reames and H. O. Reames, to be that by reason of the fact that this lake is navigable water, they, as members of the public, have the right to maintain and operate the commercial boat dock and, in so doing, to the exclusive use of the water occupied by them and immediately fronting and paralleling the shore, and to use the shore in the conduct of their business.

"The appellants contend that the right to maintain and operate the dock is a right belonging or pertaining to the bank and incident to the ownership of the soil above high-water mark, and is therefore a riparian right of Crossett Lumber Company granted by said company to appellant, J. R. Withers, and by him sub-let to appellant, H. L. Anderson, and that the Reameses are squatters without any right or authority to use the water or shore for a commercial boat dock and that they should be enjoined from so using the same and directed to remove their equipment from the water fronting the leased premises."

The parties here concede that Grand Mere Lake is a navigable body of water. There is no dispute that appellants, as riparian owners or lessees, would have the use and control of their land to the high-water mark. The test in determining high-water mark is announced by this court in the case of *State ex rel. Thompson* v. *Parker,* 132 Ark. 316, 200 S. W. 1014. There it is said: "In *St. L., I. M. & S. Ry. Co.* v. *Ramsey,* 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195, we defined 'high-water mark' and prescribed the test for ascertaining it as follows (quoting syllabus): 'The high-water mark of a navigable stream, the line delimiting its bed from the bank, is to be found by ascertaining where the presence and action of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a

character distinct from that of the banks in respect to vegetation and the nature of the soil'."

On the record before us, which includes a carefully drawn plat and photographs of the shore fronting appellants' property, we think the preponderance of the testimony shows that there is a marked difference between the high and the low-water mark of this lake and that there is a defined shore or beach of sand and gravel clear of all vegetation for a distance of approximately fifty feet slightly rising from the water's edge back to where all vegetation ends, constituting the high-water mark above defined. To this extent appellees' contention on cross-appeal must be sustained. However, in the view that we take on the whole case, this does not require a reversal.

On appellees' contention that appellants had no valid lease and, therefore, no control over the property in question to the high-water mark, it suffices to say that we think the record clearly reflects that they do hold a valid lease from the Crossett Lumber Company. The lumber company is not a party to this litigation.

Under the court's decree the appellees, as we have indicated, were required to move all of their equipment from any proximity to the shore. Under the decree they are forbidden in the prosecution of their business to use any boat to pick up the public on appellants' shore or unload them there at any time, and they may not use the shore in front of appellants' property reaching from high to low water in carrying on their commercial fishing and boating enterprise. Appellees' minnow dock and houseboat floating upon the navigable waters of the lake do not touch or come in contact with the shore and were permitted to remain under the court's decree.

The position of appellants here is clearly expressed by them in their brief in these words: "The right to maintain and operate the dock is a right belonging or pertaining to the bank and incident to the ownership of the soil above high-water mark, and is therefore a riparian right . . ." We cannot agree that the riparian rights of appellants go as far as appellants insist.

In *State ex rel. Thompson* v. *Parker,* 132 Ark. 316, 200 S. W. 1014, this court said: "It is held in the well-considered cases of *Railway* v. *Ramsey,* 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195, and *Barboro* v. *Boyle,* 119 Ark. 383, 178 S. W. 378, that the title to the bed of navigable waters in our state, that is, the title to the bed of such waters to high-water mark, is in the state. The character of such title is well expressed in the case of *Pewaukee* v. *Savoy,* 103 Wis. 271, 79 N. W. 436, 74 Am. St. Rep. 859, 50 L. R. A. 836, as follows: 'Upon the admission of the state into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, which trusteeship is inviolate, the state being powerless to change the situation by in any way abdicating its trust.' . . .

"Of course, appellees, being still the owners of the lands bordering on the lake to high-water mark, would have certain riparian rights which other members of the public would not have, . . . They would have the same common right of hunting and fishing in such waters as other members of the public would have." *Id.,* p. 323.

In *Barboro* v. *Boyle,* 119 Ark. 377, 178 S. W. 378, this court said: "The land rises gradually, and it is difficult to tell where the high-water mark is on that side of the lake. As we have already seen, the title to the bed of the lake to high-water mark is in the state for the use of the public, and the public have a right to hunt and fish therein."

The only right that appellants, as riparian owners, would have over the general public and appellees is the right to the uninterrupted and free ingress and egress to their property along its water's edge between high and low-water mark.

The rights and privileges of riparian ownership is defined in 45 C. J. 491, § 143, as follows: "The rights of riparian owners upon navigable streams include the rights possessed by riparian owners upon other watercourses; and as to navigable waters generally, they in-

clude (1) the right of access to the water; (2) the right to build a pier out to the line of navigability; (3) the right to accretions; and (4) the right to a reasonable use of the water as it flows past the land, and have been often so enumerated."

Appellants' rights will not permit them to interfere with the rights of the public generally in the use of the shore or beach in front of their property from high-water mark to the water's edge for the purposes of bathing, hunting, fishing and the landing of boats, so long as such use does not unreasonably interfere with appellants' right of ingress and egress. Nor do these rights permit appellants to prohibit appellees, or the public generally, from the use of the navigable waters in front of their property for the above purposes so long as such use does not unreasonably interfere with appellants' rights of ingress and egress.

The riparian rights of appellants do not permit them to force appellees to remove their houseboat and minnow dock from that part of the lake fronting appellants' property.

We think the chancellor was correct in holding that the houseboat and minnow dock of appellees in no way interfered with the free egress and ingress of appellants to their property or to any of their rights as riparian owners.

In *Kuramoto* v. *Hamada,* 30 Haw. 841, that court held: "The right of navigation in tidal waters includes the right of anchorage, and the same may be exercised for business purposes or for pleasure."

In 45 C. J. 501, § 152, the text-writer says: "The owner of the uplands cannot so exercise his right of passage or access to the channels as to destroy or unreasonably interfere with the right of the state to put its own land to such use as it may think proper, or in such a way as to prevent other persons to whom the sovereign has granted the bed of the river, or some portion of it, from using their own property in a reasonable way. The right of access and of navigation does not include any right arising from the use of the land under

water or the bed of the river below high-water mark. The right of access of the riparian owner cannot be enlarged at will or according to his own convenience or necessity, but he has no ground for complaint so long as the natural condition of things is left practically unchanged and opportunity is afforded at all times for reasonable methods of access.

In the case of *Hedges* v. *West Shore Railroad Co.,* 55 Am. St. Rep. 660, 150 N. Y. 150, 44 N. E. 691, the court said: "The right of access and navigation which the law secures to the riparian owner as one of the incidents of his title to the uplands does not include any right arising from the use of the land under water or the bed of a tidal river, below high-water mark."

In the case of *Tiffany* v. *Town of Oyster Bay,* 234 N. Y. 15, 136 N. E. 224, 24 A. L. R. 1267, in discussing the riparian owner's rights, the court said: "The rights of the riparian owner, the owner of the upland fronting on navigable tidewaters, over the foreshore, are rights of reasonable, safe and convenient access to the water for navigation, fishing, and such other uses as commonly belongs to riparian ownership. *Brookhaven* v. *Smith, supra.* Each right—the right of the public, of the owner of the foreshore, and of the riparian owner—must be exercised in a reasonable way. *Hedges* v. *West Shore R. Co.,* 150 N. Y. 150, 55 Am. St. Rep. 660, 44 N. E. 691."

And in the case of *Stewart* v. *Turney,* 197 N. Y. S. 81, 203 App. Div. 486, the court said: "The owner of the upland may utilize the foreshore of an inland navigable lake, for hunting; but such use is not absolute and exclusive, and the public at large has the same rights. Wild duck hunters standing and walking along the water's edge, and crouching behind temporary hides, and also drawing their boats partly out of the water and onto the beach, cannot be enjoined on the broad ground that the plaintiffs, to whom the owners of the upland have granted the right of hunting and trapping, have an exclusive right to the foreshore."

And in 26 C. J. 602, the author says: "Fishing implies a reasonable use of the waters and shore line of

navigable streams, and as a general rule all of the members of the public have a common and general right of fishing in public waters, such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters, except in so far as he has acquired such right by grant or prescription. . . . An owner of land abutting on one of such lakes or ponds has no greater rights than others to fish in front of his land, except to the extent that he is given greater rights by statute, or acquires them by grant or prescription."

On the whole case, the decree is affirmed both on direct and cross-appeal.

GRIFFIN SMITH, C. J., dissents in part and concurs in part. MCHANEY, J., dissents.

RODGERS *v.* MASSEY.

4-6686 161 S. W. 2d 378

Opinion delivered May 4, 1942.

E. H. Tharp and *R. C. Waldron,* for appellant.

Smith & Judkins and *O. C. Blackford,* for appellee.

McHaney, J. The southeast half of section 2, township 16 north, range 1 east, Lawrence county, forfeited in 1929 for the taxes of 1928 and was sold to the state, and, not having been redeemed in the time provided by law, was certified to the state in 1931. On November 12, 1931, appellant applied for and received a donation certificate to said land from the State Land Commissioner, entered into possession thereof and made certain improvements thereon, his intention being to perfect his donation and get a donation deed thereto. Prior to his accomplishment of this purpose, the legislature of 1934, in special session, by Act 2, extended the time for redemption by owners of lands theretofore sold for taxes to April 10, 1934. On April 3, 1934, E. D. Wells, the then record owner of the lands above described, redeemed same from the state. Wells conveyed same to appellee Massey. Said Act 2 further provides that if land is so redeemed, and there is a donee in possession thereof that has made improvements or betterments thereon, he shall be remitted to the courts to establish his rights, if any.

Appellant brought this action on July 14, 1936, against Wells and appellee in the chancery court, alleging the above facts and that he had made improvements on said lands of the value of $837, for which amount he prayed judgment, and that same be declared a lien on said lands and the lien foreclosed and the land sold, if same is not paid in a reasonable time to be fixed by the court. Appellant evidently filed an amendment to his complaint before an answer was filed by appellee. An amendment was filed January 5, 1938, alleging that said Act No. 2 of 1934 is unconstitutional for three reasons: 1, that it was not in the Governor's call; 2, that it violated vested rights; and 3, that it was not the intent of the act to pre-

vent the Land Commissioner from carrying out the terms of laws then existing.

Appellee answered with a general denial, except he admitted he was the owner of the land and that he had redeemed it from said tax sale, and specifically denied the unconstitutionality of said Act 2, or that appellant had made improvements of the value alleged, or that they were subject to donation. He further alleged by way of cross-complaint that appellant had been in possession thereof since 1932, receiving all the rents and profits and all government payments, which amounts are greatly in excess of the value of improvements and he prayed judgment for such excess, which, in an amendment, was alleged to be $300.

On a trial on conflicting evidence the court found that appellant had received all the rents from 1932 to the time of trial and that such rents, including government payments, were of a greater value than all of the improvements placed thereon by appellant, and that decree should be for appellee who is "the legal owner in fee simple of said lands and who is entitled to possession thereof together with all of the rents and government benefits therefrom for the year 1941. That judgment over for excess rents would probably be uncollectible." Possession was continued in appellant until January 1, 1942, at which time he should surrender same, or appellee should have a writ of assistance. Judgment was entered accordingly. This appeal followed.

This is an action for betterments under Act 2 of the Special Session of 1934. Appellant was in possession under a donation certificate which had not ripened into title and was not even color of title. *Young* v. *Pumphrey,* 191 Ark. 98, 83 S. W. 2d 84. Appellee redeemed under the provisions of said act. The State Land Commissioner canceled the donation certificate and refunded appellant his donation fee of $10 which he accepted without objection. He brought this action under the provisions of said act to recover the value of his improvements. He did not allege in any pleading that he claimed to own said land, but on the contrary alleged that Wells, the record owner,

had redeemed under said act, thereby affirmatively recognizing Wells as the owner who was entitled to redeem as also the validity of said act. All the testimony, both for appellant and appellee, was directed to the value of the improvements made and to the value of the rents and profits. The court found the latter exceeded the former, but declined to give a judgment over, because probably uncollectible. Appellee makes no complaint of this action of the court and appellant could not. The burden of appellant's complaint is that the court offset rents and profits against the value of the improvements. He says: "Our conclusion is that Rodgers should receive pay for the value of his improvements, without interest, to date of decree, and without deduction for rents." And he asserts that in no event should he be charged with rents prior to April 3, 1934, when a redemption was effected. We cannot agree. The betterment statute, § 4658, Pope's Digest, in ejectment actions, provides that any person who, believing himself to be the owner of land, under color of title, improves same and which is judicially determined to belong to another, shall be paid by the successful party the value of such improvements. "It is essential that the improvements be made under color of title." *Nunn* v. *Lynch,* 89 Ark. 41, 115 S. W. 926, 16 Ann. Cas. 852. A donation certificate, not being color of title, appellant could not recover for improvements, except under said Act 2 of 1934. No tender of the value of improvements was necessary as appellant held under a donation certificate. *Beloate* v. *State, ex rel. Atty. Gen'l,* 187 Ark. 17, 58 S. W. 2d 423. This was not an ejectment action, nor one for the possession and, therefore, no tender was necessary under § 4663 of Pope's Digest, and Act No. 7 of 1937, digested as 8925 of Pope's Digest, has no application, because this is not a possessory action. Moreover, the latter is a statute of limitations and was not pleaded, was not even mentioned by appellant until in his reply brief.

We think the court correctly offset the improvements with the rents and profits. In *Emerson* v. *Voight,* 196 Ark. 129, 116 S. W. 2d 348, it was held to quote a headnote: "Since the state's tax deed constitutes color of

title, appellants purchasing from the state land forfeited for taxes and sold at a void tax sale were entitled to a return of the taxes paid and improvements made by them (Pope's Digest, § 4568); but the evidence being sufficient to sustain the finding that the rents and profits were equal to or greater than the taxes paid and improvements made, there was no error in refusing to render a money judgment in favor of appellants."

We cannot say, from the court's decree, that appellant was held for rents for 1932 and 1933, while in possession under his donation certificate, and prior to redemption, but, if so, it is not shown that the rents for the other years did not equal or exceed the improvement.

Affirmed.

GENERAL MOTORS ACCEPTANCE CORPORATION *v.* PURKINS, JUDGE.

4-6735 161 S. W. 2d 398

Opinion delivered May 4, 1942.

Barber, Henry & Thurman and *Lowell W. Taylor,* for petitioner.

Ike Murry and *J. R. Wilson,* for respondent.

GREENHAW, J. Roy E. Kilgore, Deen W. Kilgore, Dail E. Kilgore, Fern J. Kilgore Nutt and Mrs. J. H. Kil-

gore filed suit in the Dallas circuit court against R. Collins Kilgore and General Motors Acceptance Corporation, seeking to recover damages arising out of an alleged breach of contract and for fraud and deception practiced upon plaintiffs by defendants.

The complaint alleged that plaintiffs and the defendant, R. Collins Kilgore, were engaged in business at Fordyce as partners, under the firm name of Kilgore Brothers, and in January, 1934, entered into a contract with General Motors Acceptance Corporation whereby it agreed to purchase commercial paper which they received in sale of Frigidaire products such as electric refrigerators, etc., it being agreed that General Motors Acceptance Corporation would retain five per cent. of the purchase price of commercial paper received on the sale of household equipment and ten per cent. of the purchase price of commercial paper received on sales of commercial equipment, to constitute a reserve fund as protection to General Motors Acceptance Corporation in the collection of the commercial paper purchased by it. It was further agreed that plaintiffs would indorse and guarantee payment of all commercial paper sold to General Motors Acceptance Corporation. The reserve fund was to be the property of Kilgore Brothers, and was to be held by General Motors Acceptance Corporation only as an additional indemnity against losses on commercial paper purchased by it from Kilgore Brothers.

Thereafter Kilgore Brothers obtained the agency for Frigidaire products in Hot Springs, and later obtained an agency in Memphis, Tennessee. R. Collins Kilgore was given power of attorney to act for the partnership in dealing with General Motors Acceptance Corporation and with McGregors, Inc., of Memphis, distributors of Frigidaire products to the respective agencies. It was alleged that financial difficulties ensued in the respective agencies, and that R. Collins Kilgore and General Motors Acceptance Corporation entered into a conspiracy to cheat and defraud plaintiffs out of the reserve fund, amounting to around $16,000, and by reason of false and fraudulent representations made by defendants, plaintiffs authorized the transfer of the accumulated reserve

to R. Collins Kilgore, who, with General Motors Acceptance Corporation, it was alleged used it to enrich themselves at plaintiffs' expense.

The complaint further alleged that R. Collins Kilgore permitted General Motors Acceptance Corporation, without the consent or knowledge of plaintiffs, to deduct as much as 20 per cent. of the amount advanced to said agencies on contracts involving household transactions, and as much as 40 per cent. on contracts involving commercial equipment.

It was further alleged that ". . . General Motors Acceptance Corporation and Collins Kilgore conceived the idea, and conspired and agreed together to promote the organization of Collins Kilgore, Inc., for the ostensible purpose of carrying on the business of buying, selling and dealing generally in goods, wares and merchandise, wholesale and retail, especially in electrical refrigeration equipment in Memphis, Tennessee, but for the real purpose of deceiving and cheating (plaintiffs) and enriching themselves at the expense of these plaintiffs by obtaining sole and exclusive control and ownership of the reserve account owned by plaintiffs and held by the defendant, General Motors Acceptance Corporation, which amounted to approximately $16,000 at that time."

Numerous other allegations of joint fraud and deception on the part of R. Collins Kilgore and General Motors Acceptance Corporation were set out, and it was alleged that by reason of the false representations and fraudulent conduct on the part of R. Collins Kilgore and General Motors Acceptance Corporation, the assets in the three agencies were dissipated, resulting in heavy losses to plaintiffs, including the $16,000 reserve fund.

General Motors Acceptance Corporation filed a motion to quash service of summons on it, for the reason that it has no branch office or other place of business in Dallas county, and that the defendant, R. Collins Kilgore, was not a *bona fide* defendant, and was made a defendant only for the purpose of bringing General Motors Acceptance Corporation within the jurisdiction of the Dallas circuit court. The motion was overruled. The record

shows that summons was served upon R. Collins Kilgore in Dallas county, and service was had upon General Motors Acceptance Corporation by service of summons upon its agent designated for service of process in Pulaski county, where its office and place of business, as a foreign corporation duly authorized to do business in Arkansas, is located.

General Motors Acceptance Corporation has filed a petition in this court for a writ of prohibition, seeking to prohibit the trial of this case in the Dallas circuit court, and insists that the Dallas circuit court has no jurisdiction for the reason that a joint cause of action against R. Collins Kilgore and General Motors Acceptance Corporation was not alleged in the complaint.

Many of the allegations of the complaint are not pertinent to the issue involved upon petition for prohibition. It is conceded that if a case of joint liability has been alleged against R. Collins Kilgore and General Motors Acceptance Corporation the Dallas circuit court has jurisdiction, in which event prohibition would not lie. We have carefully studied the lengthy complaint filed in this case, and have reached the conclusion that a joint cause of action has been alleged.

In *Teal* v. *Thompson,* 180 Ark. 63, 20 S. W. 2d 307, it was held that courts regard substance of pleadings rather than form, and in *Wade* v. *Brocato,* 192 Ark. 826, 95 S. W. 2d 94, it was stated that pleadings under the Code are liberally construed. In *Harnwell* v. *Arkansas Rice Growers' Cooperative Association,* 169 Ark. 622, 276 S. W. 371, it was held that every reasonable intendment and presumption should be indulged in favor of a pleading.

Whether there is joint liability under the pleadings in this cause will depend upon the facts as developed in the trial. The lower court held that under the pleadings there was no joint liability of R. Collins Kilgore and General Motors Acceptance Corporation for breach of contract which would give the Dallas circuit court jurisdiction of General Motors Acceptance Corporation, but that a joint cause of action against them in tort was

alleged. Giving the complaint a liberal construction, under the rule that every reasonable intendment and presumption should be made in favor thereof, we are unable to say that a case of joint liability against R. Collins Kilgore and General Motors Acceptance Corporation in tort has not been alleged.

The petition for writ of prohibition is, therefore, denied.

HIGGINS *v.* STATE.

4256 161 S. W. 2d 400

Opinion delivered May 4, 1942.

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

MEHAFFY, J. The prosecuting attorney filed the following information, the formal parts of which are omitted:

"I, Boyd Tackett, prosecuting attorney within and for the Ninth Judicial Circuit of the State of Arkansas

of which Pike county is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant, Jim Higgins, of the crime of assault with intent to kill committed as follows, to-wit: The said defendant on the 3d day of July, 1941, in Pike county, Arkansas, did unlawfully, willfully, knowingly and feloniously and with malice aforethought make an assault in and upon one Charlie Gentry, to-wit: a knife, by cutting and stabbing him, the said Jim Higgins, with the unlawful, willful and felonious intent then and there to kill and murder him, the said Charlie Gentry, against the peace and dignity of the State of Arkansas."

The evidence introduced on the part of the state showed that appellant was at Mrs. Gillispie's restaurant; that he went into the restaurant with Mr. Kelly and some other men and had an argument over paying for the food; the argument was between appellant and another man. After they had eaten and started to leave, Mrs. Gillispie asked who was going to pay for the food and appellant answered that he had already paid for it. Mrs. Gillispie told them no one had paid for it, and they continued to argue the matter. Charlie Gentry, marshal of Delight, Arkansas, came to investigate the trouble. He told the men to pay for their food and get out; that they were too drunk to stay there. The amount of the bill was fifty-five cents; Kelly paid fifty cents, and another man paid five cents, and they all left except appellant. When Gentry told appellant to get out, appellant swore at him and told him he would get him into it. He then tried to stab the marshal, who first threw a gun in his face and then changed his mind and beat him down with his blackjack and handcuffed him. The marshal took the knife away from him. The shirt and scabbard of the marshal which witness said were cut by appellant were introduced in evidence.

Appellant introduced witnesses who contradicted some of the state's evidence, but the evidence being in conflict, it was a question for the jury to decide.

The jury returned the following verdict: "We, the jury, find the defendant guilty and fix his punishment at one year in the state penitentiary."

Judgment was entered accordingly, and appellant was sentenced to one year in the penitentiary. Motion for new trial was filed and overruled, and the case is here on appeal.

"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." *Collier* v. *State,* 202 Ark. 939, 154 S. W. 2d 569.

So, in this case, the appellant has furnished no abstract or brief, and we determine the assignments of error by the motion for a new trial.

The first three assignments in the motion for new trial are: that the verdict is contrary to the law; that the verdict is contrary to the evidence; that the verdict is contrary to the law and the evidence. These raise the question of the sufficiency of the evidence. *Bourne* v. *State,* 192 Ark. 416, 91 S. W. 2d 1029.

It is 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; *Brown* v. *State,* 203 Ark. 109, 155 S. W. 2d 722.

There was substantial evidence to support the verdict and judgment, and the evidence being in conflict, it was the province of the jury to determine the credibility of the witnesses and the weight to be given to their testimony.

There was no prejudicial error in the giving of the instructions.

The judgment is affirmed.

Opinion delivered May 4, 1942.

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

SMITH, J. Appellant was tried upon an indictment containing two counts. The first count alleged that he had embezzled certain public funds which had come into his hands as treasurer of Ashley county. The second count charged that he had failed to pay over these funds to his successor in office. He was found guilty under the first count and given a sentence of five years in the penitentiary, from which judgment is this appeal.

Appellant has not favored us with a brief in the case, and we have before us a bill of exceptions which does not contain any of the testimony heard at the trial. The presumption that the testimony was sufficient to support the verdict is, therefore, conclusive.

The bill of exceptions does contain the instructions, and there were fifteen of them, and it appears that a general objection was interposed to each of them. The

thirteenth assignment of error in the motion for a new trial is that the court erred in giving each of these instructions over the general objections and exceptions of appellant. The instructions were not objected to *en masse,* but separately, and we have, therefore, so considered them, but we do not feel called upon to set them out in this opinion and to approve them separately. Most of the instructions are what might be called "the usual instructions in criminal cases," and this assignment of error will be disposed of by saying that we find no error in any of the instructions.

The bill of exceptions recites that appellant objected to the competency of Luther Franklin to serve upon the grand jury which returned the indictment. The basis of the objection was that Franklin had unsuccessfully opposed appellant as a candidate for the office of clerk of the circuit court, to which office appellant was elected while serving as county treasurer. Franklin was asked, "Would that fact in any manner bias or prejudice you in your part of the investigation to be had of his (appellant's) affairs and as a member of this body?" and he answered that "It would not."

The statute provides (§ 3827, Pope's Digest) that "Every person held to answer a criminal charge may object to the competency of anyone summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such; and, if such objection be established, the person so challenged shall be set aside."

There was no testimony that Franklin was the prosecutor or complainant or that he had been summoned or bound in a recognizance as such, and the challenge of Franklin as a grand juror was, therefore, properly overruled.

It appears also that appellant excepted to the action of the court in excusing for cause one C. L. Miller, a member of the petit jury panel, who, upon his *voir dire* examination, expressed his distrust of circumstantial

evidence, and stated that "I believe lots of fellows have been convicted on circumstantial evidence that was not guilty."

This assignment of error may be disposed of by saying that it has been many times held that no one is entitled to the services of any particular juror.

The only other assignment of error appearing in the bill of exceptions relates to the following statement made by the prosecuting attorney in his closing argument that "He (appellant) is holding an office he cannot be put out of unless and until you go down the line and convict him." We cannot hold this statement erroneous, as it is a correct statement of the law.

It was held in the case of *Jacobs* v. *Parham,* 175 Ark. 86, 298 S. W. 483, to quote a headnote, that "Under Crawford & Moses' Dig., §§ 10335, 10336, a public officer is not subject to removal from office because of acts done prior to his present term of office in view of Const., art. 7, § 27, containing no provision against re-election of officer removed for any of the reasons named therein."

In the later case of *Montgomery* v. *Nowell,* 183 Ark. 1116, 40 S. W. 2d 418, the headnote reads as follows: "Crawford & Moses' Dig., § 10335, providing for suspension of an officer on presentment or indictment for certain causes including malfeasance in office does not provide for suspension of an officer on being indicted for official misconduct during a prior term of office."

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

ARKANSAS POWER & LIGHT COMPANY *v.* KERR.

4-6732 161 S. W. 2d 403

Opinion delivered May 4, 1942.

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

A. A. Pöff, for appellee.

GRIFFIN SMITH, C. J. June 21, 1941, Leonard L. Kerr delivered to "the ice compartment" of Arkansas Power & Light Company twelve cases of eggs. The appeal is from a judgment of $108 based upon allegations that the eggs, when stored, were of high quality, and in good condition; that the company's agreement was to keep them at proper temperature for a charge of ten cents per case per month; that such eggs were not kept at correct temperature "for the reason that when reclaimed they were spoiled."

The answer pleaded a written contract, by the express terms of which the company was relieved of liability.[1]

A demurrer to the answer, which was sustained, alleged invalidity of the contract on the ground that it contravened public policy. The defendant refused to plead further.

Appellant says in its brief: "Appellee thinks the contract form is a general exemption from liability not only for unknown causes, but from negligence itself. This we admit."[2]

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[1] The contract, so-called, was: "Arkansas Power & Light Company. Receipt for Storage. . . . The goods for storage as listed hereunder . . . are accepted with the express understanding that the company is not responsible for their condition while in storage or at their removal; nor for loss or damage by fire, water, storm, or other causes reasonably beyond its control. . . . Conditions accepted by L. L. Kerr."

[2] It is further argued: "From a practical standpoint this court is fully aware that whenever any person suffers a damage to his property, he is always able to find some supposed ground of negli-

The "contract" is a printed sheet, 4 x 6½ inches, evidently issued in duplicate. Conditions are printed conspicuously, but in small type easily read. The answer states that plaintiff stored with the defendant *a case of eggs,* receipt of which was evidenced "by an instrument marked 'Exhibit A'." The receipt or contract so filed shows storage of twelve cases, instead of *a* case. The answer does not deny that ten cents per crate per month was to be paid, although nothing to this effect is to be found in the contract. The demurrer to the answer admits all well-pleaded defenses; and, since the contract or receipt was an exhibit to the answer, it is also admitted. It would be otherwise, however, if the receipt were a mere exhibit, rather than the contract on which the action is founded. But there must have been an oral contract regarding the price to be charged, or a writing not exhibited.

In an action at law exhibits are not parts of pleadings unless the right claimed is founded on the written instrument so exhibited. *Euper* v. *State,* 85 Ark. 223, 107 S. W. 179. In equity written instruments filed as exhibits to a complaint, and thereby made a part of the record, will control averments. *Cazort & McGehee Co.* v. *Dunbar,* 91 Ark. 400, 121 S. W. 270. An exhibit to a complaint at law may be referred to in order to complete and explain allegations of the complaint. *Lindsey* v. *Bloodworth,* 97 Ark. 541, 134 S. W. 959.

The demurrer admits expressed conditions under which the eggs were received, but alleges it was void, and the court so found. The answer alleges, and the demurrer admits, that Exhibit "A" constituted the contract between the parties. The contract undertakes to relieve appellant in three instances: (1) No liability attached if the eggs were not in good condition when stored. (2) Responsibility is disclaimed for condition of the eggs while in storage, and (3) when they were removed.[3]

gence on the part of another party. If every time eggs are removed from the ice chambers of the appellant in bad condition, we must stand a lawsuit, with expert testimony necessary on the ground of negligence and natural deterioration and our contract is no defense, then the return does not justify the expense."

[3] Other conditions of the contract are not involved in this appeal.

First.—Condition No. 1 is enforcible. The parties had a right to agree that if impaired foods should be stored, liability for condition when redelivered should not attach to appellant. Chemical analyses would have been required to determine whether deterioration would be progressive, or whether it would be halted, by reason of the semi-refrigeration afforded. Neither the contract nor the pleadings indicates that appellant's facilities were other than ordinary cold storage where moderately low temperatures were induced by ice, as distinguished from mechanical refrigeration.

Second.—Condition No. 2 is not enforcible if by it appellant sought to relieve itself from consequences of its negligence. A consciousness that failure to exercise due care will require compensation for injury to person or property is productive of caution and forethought by those in whose control rest the agencies that may cause damage; hence, public policy is involved when one employing another seeks protection through the instrumentality of contract, although within appropriate limitations not here an issue, conduct and the consequences of physical activities may be circumscribed.[4]

That it was appellant's purpose to contract against negligence is clear from its answer and brief.

Third.—Whether appellant would be liable for condition of commodities at the time of removal depends upon the care exercised during the storage period. It might also depend upon condition at the time of acceptance—a matter that may, as heretofore stated, be covered by contract.

The judgment is reversed, and the cause is remanded with directions that appellee be permitted to have trial if he elects to allege negligence.

[4] American Jurisprudence, v. 12, "Contracts," pages 683-84, § 193.

4-6722 161 S. W. 2d 405

Opinion delivered May 4, 1942.

[redacted]

Daily & Woods and *R. S. Wilson,* for appellant.

Batchelor & Batchelor and *Hardin & Barton,* for appellee.

SMITH, J. O. W. Bohannon and his wife and daughter organized a canning business, which they incorporated in 1936 under the name of Bohannon Canning Company. The company's place of business was at No. 104 Cane Hill Street, in the city of Van Buren. About June 1, 1940, one E. L. Peterson came to Van Buren from Springfield, Missouri, where he had resided before coming to Van Buren. Bohannon and Peterson were friends and had had previous business relations.

On the last-mentioned date these parties entered into a "Contract for Sale of Canning Factory," the relevant portions of which read as follows:

"This contract and agreement, made and entered into on this 1st day of June, 1940, by and between Bohannon Canning Company, Inc., and O. W. Bohannon and Virginia Lee Bohannon of Van Buren, Arkansas, presi-

dent and secretary thereof, respectively, party of the first part, and E. L. Peterson of Springfield, Missouri, party of the second part, is as follows, to-wit, witnesseth:

". . . the party of the first part agrees to sell and does hereby bargain, sell, convey, transfer and deliver unto the party of the second part, . . . the following described personal property, to-wit: Certain canning factory consisting of equipment used for canning spinach (and other vegetables) now constituting the factory of the party of the first part located at 104 Cane Hill Street in the city of Van Buren, Arkansas, said property being more particularly described as follows: . . ." There then follows an enumeration of a large number of articles used in connection with the canning business.

It was recited that the consideration for the sale was the sum of $12,500 of which $2,000 was cash in hand paid, and that the party of the second part should take possession of the business on August 1, 1940, at which time $2,000 additional should be paid, and that the balance of $8,500 should be paid "on the basis of five cents per case on products packed in and about said factory by the party of the second part or for him until said remaining sum of $8,500 is paid in full, . . ." such payments to be made monthly.

It was further recited "that the party of the second part may use Bohannon Canning Company labels so long as he may desire, etc.," and that "Any canning supplies on hand on August 1, 1940, such as salt, empty cans, corrugated boxes (containers), stitching wire, glue or paste, labels, etc., shall be invoiced by the party of the first part to the party of the second part at f.o.b. Van Buren prices, same being the price already paid for such supplies, and to be paid for by the party of the second part as used, such payments to be made monthly as such supplies are so used, the terms on same to be net."

It was further provided that the balance of $8,500 should be evidenced by the note of the party of the second part and should be secured "with a chattel mortgage as security therefor on the above described factory equipment."

Peterson took charge of the plant and began to operate it, and it was alleged by him in the complaint which forms the basis of this suit that the contract carried with it the sale of the name and good-will of the Bohannon Canning Company, and that under this contract he acquired the right to the exclusive use of the name Bohannon in connection with the canning business and the Bohannon labels, and he alleged that Bohannon violated the contract by continuing the use of the name and of the labels placed upon the canned products, thereby causing confusion and damage to plaintiff, and that this conduct on Bohannon's part constituted an unfair business practice, and he prayed that the same be enjoined.

A demurrer to this complaint was overruled, after which an answer was filed joining issue on all the material allegations of the complaint. Much and very conflicting testimony was heard, after which the complaint was dismissed as being without equity, and from that decree is this appeal.

Peterson testified that Bohannon stated that he intended to retire from the canning business, and that at Bohannon's suggestion he reincorporated the business after taking charge of it, under the name of Bohannon Canning Company, Inc., but that instead of retiring from the business, as he had agreed, Bohannon filed an appropriate certificate with the Secretary of State changing the name of the Bohannon Canning Company to O. W. Bohannon, Inc.

It was alleged that this action constituted unfair competition, which should be enjoined, but the chief insistence is that Peterson bought the Bohannon Canning Company as a going concern and thereby acquired the good-will value of its name and the sole right to the use of that name on products canned.

It was shown that confusion resulted from the reincorporation and change of names and that mail and mail orders were on frequent occasions delivered to one corporation which were intended for the other.

Briefs of opposing counsel manifest extensive research, but apparently the case chiefly relied upon for the

reversal of the decree is our own case of *Terry* v. *Cooper*, 171 Ark. 722, 286 S. W. 806, 48 A. L. R. 1254. It was there held that the sale by one corporation to another of all of its assets of every kind and description included the trade-name as a part of the assets sold, and that an injunction would lie to restrain the use by the corporation (which had sold all its assets) of its former corporate tended to confusion and to enable such corporation or name, when the continued use of the corporate name firm to obtain, by reason of the similarity of names, the business of the purchasing corporation or firm.

We reaffirm that holding; but it does not apply here, for the reason that Bohannon did not sell all the assets of the Bohannon Canning Company, and certainly did not sell the good-will and corporate name of that company. This is conclusively shown by the fact that the mortgage given to secure the unpaid purchase money employed the same description of the property sold as was employed in the contract of sale, and the mortgage was given to the Bohannon Canning Company. Certainly Peterson did not intend to give a mortgage to a corporation which he had just purchased to secure the payment of a balance of purchase money for that corporation. To do so would be to give a mortgage to himself or to a corporation which he owned. Peterson did not operate as the Bohannon Canning Company, but reincorporated as the Bohannon Canning Company, Inc.

Moreover, the contract of sale did not recite that Peterson had purchased the good-will of the Bohannon Canning Company, nor did it recite that he had purchased all the assets of that corporation, as did the contract in the Terry case, *supra*. It did recite that Peterson had purchased a "Certain canning factory consisting of equipment used for canning spinach (and other vegetables)" located at 104 Cane Hill Street in the city of Van Buren, and the property purchased was there then "more particularly described as follows:" and there follows an enumeration of the property purchased, which did not include the good-will of the Bohannon Canning Company. Had Peterson purchased all the assets of the Bohannon Canning Company he would have acquired, as

part of its assets, its good-will and the right to use its name; but, as has been said, he did not do so. Peterson did not proceed to use the name of the Bohannon Canning Company, but reincorporated under the name of Bohannon Canning Company, Inc.

We are confirmed in the view that Peterson did not purchase the name and good-will of the Bohannon Canning Company by the testimony recited, and additional testimony to the following effect. The Bohannon Canning Company had on hand a large amount of property belonging to it which Peterson admittedly did not buy. It had from twelve to twenty thousand dollars worth of supplies, consisting of cans, labels, boxes, salt, etc., and had on hand $150,000 worth of canned merchandise, most of which was stored in the canning factory at 104 Cane Hill Street. Bohannon testified that it was understood and agreed that he should have the right to dispose of this property, and the contract did not attempt to restrict that right. It was stipulated in the contract that "It is further agreed and understood that the party of the second part may use Bohannon Canning Company labels so long as he may desire." This is a meaningless stipulation if Peterson had acquired the sole right to use these labels. The undisputed testimony is to the effect that the Bohannon Canning Company had on hand when the contract of sale was executed $6,000 worth of labels, and $150,000 worth of canned goods on which to use them.

Now, it was recited that Peterson might purchase these supplies at an agreed price, but the right to purchase these supplies was optional, and not obligatory, and he declined to purchase any of the cans. Peterson did purchase and pay for some of the labels, but Bohannon explained that it was agreed that Peterson should have this right "so long as he (Peterson) may desire," and the contract so provides, but that Peterson, whose initials are E. L., prepared a label of his own after Peterson got started, and that Peterson began to work out his own label, using the initials E. L. and the first four letters of his surname, making "Elpete" his label.

There was confusion, but the confusion appears to have largely arisen from Peterson's failure to use his own

labels and his permissive use of the labels of the Bohannon Canning Company. Bohannon explained that this permissive use was given for the reason that he wanted to assist Peterson to begin operations without extensive capital outlay. The men were friends and each sold the other his canned products, and Bohannon sold such of the supplies of the Bohannon Canning Company as Peterson cared to buy.

We think it clear, and we find the fact to be, that each of these parties intended to continue in business and that neither would operate as Bohannon Canning Company, and neither did so. Bohannon did use letterheads and billheads on hand on which the name Bohannon Canning Company was printed, but in each instance of such use he had crossed out the words "Canning Company" and with a red rubber stamp stamped the letters "O. W." before the name "Bohannon" and the abbreviation "Inc." after the name "Bohannon," so that the letterheads and billheads always read "O. W. Bohannon, Inc."

This, we think, under the facts recited, did not constitute a violation of any contractual or common-law right of Peterson, and the decree, dismissing the complaint of Peterson as being without equity, is affirmed.

STARD *v.* STATE.

4258 161 S. W. 2d 756

Opinion delivered May 11, 1942.

Seth C. Reynolds, for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Little River county, Arkansas, for stealing a red jersey heifer, the property of Dave Coulter, in said county and state in the month of June, 1940. He was adjudged to serve one year in the state penitentiary as a punishment for the crime, from which judgment he has duly prosecuted an appeal to this court.

Appellant assigns as error for the reversal of the judgment the insufficiency of the evidence to sustain the verdict and the judgment.

The state introduced Dave Coulter who testified, in substance, that he raised the heifer, that he owned her mother; that she ran on the range near Ogden; that he saw them every week or two and was absolutely certain that the jersey heifer that he found in the possession of Dave Smith was the heifer he raised and which was stolen

from him in June or July of 1940; that when she was stolen she had no calf, but that at the time he found her at Dave Smith's she had a young calf; that Dave Smith told him he had bought the heifer from appellant and paid him $50 for her; that appellant lived about one and one-half miles from the range where the heifer was raised.

The state also introduced Enos McDowell who testified that he knew this particular heifer from the time she was a calf; that he saw her on the range once or twice a week and a short time before she disappeared; that she had no brands on her when she disappeared in 1940, but when he saw her at Dave Smith's she had a blotted up brand on her.

The state also introduced W. E. McDowell who testified, in substance, that he was acquainted with Dave Coulter's cattle on the range; that Dave Coulter owned the mother of the heifer; that they had run on the range until the heifer grew up and disappeared; that he saw her later with appellant's cattle and later with Dave Smith's cattle; that she had been branded when he saw her with Dave Smith's cattle.

The state also introduced George Smith who testified that he sold the mother of the heifer to Hale and Coulter; that the heifer in question was the fourth calf from the old cow; that she ran around his house and grew up on the range until it disappeared; that his son, Dave Smith, now has the heifer; that it is Dave Coulter's heifer.

The state also introduced Dave Smith who testified that he bought the heifer from appellant after she had a calf, and that he paid him $50 for her; that she was with appellant's cattle; that she had appellant's brand on her, and that appellant claimed he owned her.

Appellant testified himself and introduced ten or twelve witnesses who corroborated his testimony that he (appellant) raised the heifer he was accused of stealing from Dave Coulter.

There was a sharp conflict between the witnesses introduced on behalf of the state and appellant's witnesses as to whether Dave Coulter raised the heifer or whether appellant raised her.

The jury found that Dave Coulter raised her, and that appellant stole her from him. In other words, they believed the testimony of the witnesses for the state and disbelieved the testimony of appellant and his witnesses.

The jury was the sole and exclusive judge of the credibility of the witnesses and the weight to be attached to the testimony of each under a correct instruction defining their province to do so.

The jury was told by the court that: "You are the sole and exclusive judges of the evidence and of the credibility of the witnesses. If you believe that any witness has willfully sworn falsely in any part of his testimony, you may consider any part of his testimony you believe to be true and disregard such parts as you do not believe to be true, and in considering the weight that should be given to the testimony of any witness, you may take into consideration his manner of testifying, his intelligence, his means of knowing the facts to which he is testifying, his interest, if any, in the result of your verdict, the reasonableness or unreasonableness of his testimony and also if he is contradicted or corroborated by other facts proven in the case."

This instruction was a correct guide for the jury to follow in dealing with the testimony in the case and its verdict will not be disturbed by this court, on appeal, if the verdict is supported by any substantial evidence. This is the rule announced in many cases by this court, as may be seen by reading the cases of *Daniels* v. *State,* 182 Ark. 564, 32 S. W. 2d 169; *Walls & Mitchell* v. *State,* 194 Ark. 578, 109 S. W. 2d 143; *Brown* v. *State,* 203 Ark. 109, 155 S. W. 2d 722; *Burrell v. State,* 203 Ark. 1124, 160 S. W. 2d 218.

The evidence introduced by the state, the substance of which is set out above, is substantial and tends to show that appellant within three years next before the indictment was returned against him stole a red heifer, the property of Dave Coulter, in the county and state aforesaid. His defense to the charge was that he raised the particular heifer he was charged with stealing. The jury found that Dave Coulter raised and owned her, and that

appellant took her and sold her to Dave Smith. There is nothing in the record tending to show that appellant and Dave Coulter each raised a heifer just alike. All the testimony was directed as to which of them raised the particular heifer in question. Appellant either raised her himself or branded and took possession of her and sold her to Dave Smith. The jury, under conflicting testimony, found that appellant did not raise her, but that Dave Coulter raised her, so that the only reasonable inference is that he stole her. The undisputed fact that he put his brand upon her and sold her to Dave Smith is a strong circumstance from which the jury might reasonably infer that he stole her. A short time after she disappeared from the range, the undisputed evidence shows that she was in the possession of appellant. Bearing upon the question of the effect of the possession of recently stolen property the jury were told that:

"If you find by the evidence in this case that the appellant, Isiah Stard, had in his possession the cow as alleged in the indictment, the property of the prosecuting witness, Dave Coulter, then you will consider such possession, if unexplained, as a circumstance in determining the guilt or innocence of appellant."

We think the fact that the possession of the jersey heifer was traced to appellant a short time after she disappeared from the range was sufficient to warrant the court in giving the instruction. In the case of *Davis* v. *State,* 202 Ark. 948, 154 S. W. 2d 812, this court said: ". . . 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."

It is true that appellant and his witnesses attempted to explain his possession of the heifer on the theory that he had raised her and was entitled to her possession, but the explanation was not satisfactory to the jury. The jury found, as stated above, that Dave Coulter raised the heifer. There was no error in giving the instruction.

Appellant argues that all of the instructions defining the offense of grand larceny and the essential elements

necessary to constitute same had no place in the case because the testimony utterly fails to show an actual taking, or that appellant obtained possession of her against the will and consent of Dave Coulter. It is true the evidence does not show the exact time appellant obtained possession of her, but the evidence does tend to show that appellant branded the heifer and took possession of her soon after she disappeared from the range and does reflect without dispute that Dave Coulter never consented for him to take her or brand her. Appellant argues that even if it be conceded that the heifer owned by Coulter was the heifer that appellant sold to Smith the state's evidence fails to show that appellant had anything to do with taking the cow off the range, and for this reason appellant would not be guilty of anything except embezzlement, and that appellant is not indicted for embezzlement but for larceny which is a separate and distinct crime. The argument leaves out the equation that appellant branded the heifer. The branding of the heifer in appellant's own brand was a circumstance tending to show the asportation (*Reynolds* v. *State,* 199 Ark. 961, 136 S. W. 2d 1028, and *Anderson* v. *State,* 200 Ark. 516, 139 S. W. 2d 396) of her especially when he afterwards converted her to his own use by selling her. The crime of embezzlement could only exist in case appellant first came into the lawful possession of the animal and then wrongfully converted her to his own use. There is no evidence that he ever came into the lawful possession of the heifer unless he raised her. The jury has found under the conflicting evidence that he did not raise her.

Appellant objected to each and every instruction. Instructions numbers one and two as given to the jury followed the language of the statute defining larceny and are applicable to the facts revealed by the evidence. This court ruled in the case of *Gentry* v. *State,* 201 Ark. 729, 147 S. W. 2d 1, that instructions which follow the wording of the statute and are applicable to the facts in the particular case are proper and correct instructions.

The trial court correctly instructed the jury on reasonable doubt, the credibility of witnesses and the presumption of innocence.

Appellant argues and contends that the court erred in striking the word "knowingly" in its requested instruction number one. The word "knowingly" is not included in the definition of larceny in § 3129 of Pope's Digest. No prejudice resulted to appellant in striking the word "knowingly" out of the instruction because the instruction after striking the word out charged that they must find that he willfully stole the heifer and the word "willful" connotes knowledge on the part of one charged with crime.

Appellant also complains that the court improperly modified its requested instruction number four, but we do not think the modification in any way prejudiced appellant.

Upon the whole case no reversible error was committed, and the judgment is, therefore, affirmed.

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

4-6737 161 S. W. 2d 759

Opinion delivered May 11, 1942.

Henry Donham and *Pat Mehaffy,* for appellant.

G. W. Lookadoo and *J. H. Lookadoo,* for appellee.

McHaney, J. Appellee brought this action against appellants, the railroad company and its trustee in bankruptcy, to recover damages for personal injuries she alleges she sustained as a result of a collision between passenger train No. 18 of appellants and an automobile she was driving, on the Main street crossing, in the town of Gurdon, Arkansas, about 6:30 p. m., June 11, 1941. She had been driving south on highway 67, and when she came into Gurdon she turned east on highway 53, which crosses the railroad tracks and leads into the business district over the Main street crossing. A string of box cars was spotted on a passing or side track west of the main line and within four to six feet of the crossing, and it is alleged that these cars cut off her view of train No. 18, approaching from the south, until, while driving very slowly in second gear, she had reached a point too close to the main line track to stop before getting on the track in front of said train, so she gave it the gas in an unsuccessful effort to get across. The train was traveling at from 15 to 20 miles per hour and was in the act of coming to a stop for the station just north of the crossing. The train or some portion of it struck or caught the rear bumper of the car and pushed or knocked the back end of the car north some five or six feet without turning it over and, apparently, without doing it much damage, as appellee drove away from the scene of the accident.

Her brother-in-law, riding with her, later took the wheel and drove her to the office of a physician, where she was examined by Dr. McLain who testified she had not been injured in the accident. The negligence alleged was failure to give the statutory signals, failure to have a flagman on the crossing and failure to have other signals of the approach of said train, and that the trainmen operated said train up to and over said crossing without giving any signal, knowing said string of box cars would obstruct the view of persons going over said crossing from the west to the east. She alleged as damages that her "entire nervous system was greatly damaged and upset"; that she had "suffered great and excruciating pain and mental anguish" and will "for a long time to come"; and that her "injuries are permanent and lasting." She prayed for $3,000 damages. The answer was a general denial and a plea of her own carelessness and negligence. It alleged that the crossing was protected by a flagman who warned her of the approaching train, and that it was protected by an electric gong and wigwag signals which were sounding and working.

Trial to a jury resulted in a verdict and judgment for appellee for $1,000 and this appeal followed.

Appellee is not a new litigant in this court to recover damages for personal injuries. In *Mo. Pac. Transportation Co.* v. *Howard,* 201 Ark. 6, 143 S. W. 2d 538, she recovered a judgment for $12,000 against the transportation company in the Nevada circuit court for total and permanent disability. That case was reversed for the reasons there stated.

Appellee, Stockton and two other witnesses testified to the effect that the train gave no signals of its approach, by ringing the bell or blowing the whistle; that they saw no flasher signal lights, although it is undisputed that there are four such lights on that crossing; that such lights are red and work by electricity, when there is a train on the track within a half mile of the crossing, by automatic control; that these flasher lights were inspected by the signal man, Mr. Sandridge, on the 10th and were again inspected by him ten or fifteen min-

utes after the accident, and they were found to be in proper working condition; and that they saw no flagman on the crossing who tried to stop them. Of these four witnesses, one was the appellee; another was her brother-in-law, riding with her, who also sued for damages, but failed to recover; another was a discharged employee of appellants and the other was a man from Prescott who is well acquainted with appellee and Stockton and is a good friend of her brother. Only two of them may be said to be disinterested witnesses. In contradiction of the testimony of appellee, Stockton and her two other witnesses, appellants introduced 19 witnesses, seven of whom were employees, and 12 of whom were apparently wholly disinterested in the result of the lawsuit, who testified either that the bell was ringing or that the whistle was sounded for this particular crossing or that the flasher signals were working or that Sullenberger, the flagman, was flagging the crossing and attempted to stop appellee and Stockton to keep them from driving on the track in front of the oncoming train, and that they nearly ran over him, so desperate was his attempt to stop them. Twelve of these witnesses swear that the automatic bell was ringing, thirteen that the whistle blew for this crossing and the one south of it, eleven that the flasher signals were working, and seven, including Sullenberger, that he was on the crossing, attempted to flag appellee, and that he was nearly run over by her in attempting to get her to stop. One of these witnesses, Leon Woods, an employee of the Southern Ice Company at Gurdon, testified that he was about half way between the depot and the crossing when the accident happened; that he heard the bell ringing; that the flasher lights were working; that some one was out there flagging the crossing, but the car did not slow up, although it was flagged in plenty of time to stop and the car nearly ran over the flagman and he jumped to get out of the way; and that the whistle blew for both crossings. In addition to all this direct and positive testimony, the approaching train was making a lot of noise and the locomotive was emitting smoke. Stockton made a written statement shortly after the accident on the same day in which he said he saw the

smoke over the top of the box cars spotted near the crossing and called to appellee to stop, but she said she could not and attempted to get across ahead of the train.

The jury by its verdict has found that all this evidence by appellant's witnesses is false and that the preponderance of the evidence shows that the whistle was not blown, the bell not rung, the flasher signal lights not working, no flagman on the crossing and that the train was not making sufficient noise to warn appellee and Stockton of its approach. Just how this jury, or any other fair minded jury, could have reached such a verdict, or that the court could have refused to set it aside because clearly against the great preponderance of the evidence, is difficult to understand.

We think appellee and her passenger were clearly guilty of negligence, even though it be conceded that the signals were not given, the flasher lights not working and that the flagman was a mythical Mandrake man who could not be seen. The very fact that box cars were spotted so near the crossing, as to cut off the view to the south, made it her duty, in the exercise of due care, to approach the main line track in such a way as to permit her to get a clear view to the south after the box cars ceased to obstruct her view and to stop, if necessary, to avoid the danger. In other words, as the danger increases, the degree of care required to free one of contributory negligence in a crossing accident increases. As said in *L. & A. Ry. Co.* v. *Ratcliffe,* 88 Ark. 524, 115 S. W. 396: "There is no imperative duty resting upon him to stop and look and listen. The duty is to look and listen. If this cannot be properly discharged without stopping, then he must stop. If it can be, then there is no necessity of stopping. *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549, 33 S. W. 1070." See, also, *St. L. & S. F. Ry. Co.* v. *Stewart,* 137 Ark. 6, 207 S. W. 440; *St. L.-S. F. R. Co.* v. *Whitfield,* 155 Ark. 560, 245 S. W. 323; *Mo. Pac. Rd. Co.* v. *Hancock,* 195 Ark. 414, 113 S. W. 2d 489, and cases therein cited. Of course, under our statute, § 1213 of Pope's Digest, contributory negligence is not a complete defense, except where it equals or exceeds that of the carrier. The question is, Did this negligence of appellee

equal or exceed that of appellants, conceding their failure to give the signals? If appellee could not see to the south until it was too late to stop, it was her plain duty to stop and look and listen to determine whether danger was imminent. Had she stopped, before reaching the main line track, she could have heard the train, and had she looked after easing by the obstruction she could have seen it. It was there, making a loud noise, whether the whistle was blown or the bell rung, and signals cease to be factors where the presence of the train is plainly discoverable by other means. Thus her own negligence was the proximate cause of her injury, if any, which is doubtful.

We conclude, therefore, that appellee's negligence, under the circumstances here presented, equaled or exceeded that of appellant's, assuming that they were negligent in failing to give the signals, and that the judgment should be reversed and the cause dismissed.

It is so ordered.

MEHAFFY, J., not participating. HUMPHREYS, J., dissents.

BRUNDRETT *v.* HARGROVE, ADMINISTRATRIX.

4-6756 161 S. W. 2d 762

Opinion delivered May 11, 1942.

R. W. Tucker and *Arthur L. Adams,* for appellant.

Dene H. Coleman and *S. M. Casey,* for appellee.

McHaney, J. Appellant operates two buses, one of which he drives himself and one driven by his employee, Price, between Batesville and Oil Trough, for the transportation of passengers for hire, each making two round trips daily. Price lives about one mile from Oil Trough on the highway to Batesville over which the bus line operates. Appellant operates under a permit so to do from the Corporation Commission and carries liability insurance, as he is required to do as a common carrier. With the knowledge and consent of appellant, Price drives his bus to his home and keeps it there over night, after completing his runs, and returns to Oil Trough the following morning to begin his schedule of trips to Batesville and return. In addition to his regular trips as above stated, appellant made special trips, called "show trips," three nights per week, including Saturday nights, to the south and east of Oil Trough, for the purpose of trans-

porting patrons to and from the picture show in Oil Trough. He usually made these "show trips" himself, but occasionally he had Price make them.

On December 21, 1940, Price was directed to make the "show trip," and, as was customary, after completing his day runs, drove his bus to his home to get his dinner and to bring his wife and children to the picture show. On his return to Oil Trough after dinner, his bus collided with a bicycle on which appellee's adult son and intestate, M. M. Hargrove, was riding, resulting in the death of the latter.

This action was brought by appellee, now deceased, to recover damages for the death of his son, charging negligent operation of the bus. It was defended on the grounds, among others, that at the time of the accident Price was not on the business of appellant, but on a mission of his own, outside the scope of his employment; and that there could be no recovery for conscious pain and suffering because deceased was killed instantly.

Trial resulted in a verdict and judgment in favor of appellee for $5,000 for loss of contributions of his adult son and for $2,500 for the benefit of his son's estate for conscious pain and suffering. This appeal followed in due course.

The judgment was rendered October 21, 1941. On April 6, 1942, the death of appellee, Monroe Hargrove, was suggested and conceded as having occurred on March 23, 1942, and this court entered an order that the case be revived in the name of Lillian Hargrove as administratrix in succession. On April 4, 1942, after both parties had filed briefs, appellant filed in this court his petition and brief to abate the action as to contributions because of the death of Monroe Hargrove, and this is the first question we have for determination. It is conceded that, if Monroe Hargrove, the father, had died prior to the judgment, the action as to him for loss of contributions would have abated and we agree with this concession. Appellant cites and relies upon the case of *Jenkins* v. *Midland Valley R. Co.,* 134 Ark. 1, 203 S. W. 1, construing and applying what are now §§ 1273, 1277 and 1278 of Pope's

Digest. We think this case is not in point as it was held that the right of action of the widow for the death of her husband did not survive her death. She died before judgment. Here, the case proceeded to judgment and was appealed to this court and briefed, before the death of Monroe Hargrove. The general rule is stated in 1 Am. Jur. 62, as follows: "The general rule is that an action is not abated by death after judgment. The action ceases upon a judgment, and, subject to the right of review, cannot be affected by events happening thereafter. . . ." C. J. S., § 167, says: "It is well settled in most jurisdictions that an action is not abated by the death of a party after the cause of action has been merged in a final judgment and while the judgment stands, even though the judgment is based on a cause of action which would not survive the death of a party before judgment." The adjudicated cases appear to support the general rule, so the motion to abate is denied.

For a reversal of the judgment, appellant first contends the court erred in permitting one of counsel for appellee to ask the members of the jury panel, over his objections and exceptions, on *voir dire,* whether any of them were connected, "directly or indirectly with any insurance company that carries liability insurance on trucks or carriers for hire, such as buses." We see no objection to the form of the question, which seems to be appellant's principal objection to it. The statute, § 2025 of Pope's Digest, as amended by Act 203 of 1939, requires all such carriers to carry a surety policy or bond for the protection of all persons and property from damages caused by the negligent operation of the motor vehicle carrier. Conceding that the object of the question was to inform the jurors of the existence of insurance and that appellant would not have to pay any judgment they might render, the question did not give them any information they did not presumptively already have. We think this matter is ruled adversely to appellant by *Mo. Trans. Co.* v. *Talley,* 199 Ark. 835, 136 S. W. 2d 688. Nor can we say the question was asked in bad faith, even though the attorney knew all the jurors.

It is next urged that the court should have directed a verdict for appellant at his request, because Price was

not on his master's business at the time of the accident. This question was submitted to the jury in instructions that told them that if he were on an errand of his own, in which appellant had no interest and with which he was in no manner connected, their verdict should be for appellant. But, if Price was driving the "bus there (to Oil Trough) on a trip or with the expectation of going on business for the defendant, Brundrett, then he would be in the employ of defendant." As stated above, appellant knew that it was the practice of Price to take the bus home with him and keep it there at night. We cannot say, as a matter of law, that Price had departed from the master's service and was on a mission of his own. He went home to get his dinner, and, incidentally, to bring his family back with him. He was on his way to make the "show run," and the jury had a right to find he was on the master's business. The cases of *Helena Wholesale Grocery Co.* v. *Bell,* 195 Ark. 435, 112 S. W. 2d 416, and *Ball* v. *Hall,* 196 Ark. 491, 118 S. W. 2d 668, rule the question against appellant.

It is next insisted that the verdict and judgment for conscious pain and suffering is without evidence to support it, and that in favor of the father for contributions is excessive. We agree with these contentions. The undisputed proof is that, when the bus struck the bicycle, the boy was thrown against the sharp corner of the bus with such force and violence that his head was split open wide enough to lay the edge of the hand in the skull and that a portion of the brains was thrown out and spattered over the bus. Mr. Allie Crouch, the undertaker, described the nature of the injury as follows: "Something sharp had struck the head, beginning at the bridge of the nose and angling just at the corner of the right eyebrow, from the top of the head and to the base of the skull. The skull was entirely cleft or separated, with this side of it dropped back, I would say an inch or three quarters of an inch indented. In other words, just mashed back by a sharp cut. That joint of the jaw was all broken in two, and all of the lower jaw was shattered on both sides. One could have easily slipped their hand into the cranial cavity for a space of possibly eight inches, beginning at

the nose through the top of the head and to the back; you could have slid your hand in there any place. And the contents of the cranium were visible. You could see very easily over the brain. Aside from that, why, the body had no other bumps or bruises." No witness testified that the boy was conscious after the accident. Jack Stewart, the first to reach the scene, said: "He wasn't alive—his heart was still beating is all." Another witness stated he was alive when they loaded him in the car, that his heart was beating and that he snored through his nose two or three times. Another said the boy never opened his eyes and never spoke and he did not think he knew anything. Other testimony shows that he lived from 14 to 30 minutes, but there is no evidence that he groaned, or cried out or sobbed, only that he made some struggling movement and perhaps gasped or sighed once. We think the evidence shows such a terrible head injury as to preclude the possibility of consciousness from the moment of impact to death. As said in *St. L. S. W. Ry. Co.* v. *Braswell, Adm'r,* 198 Ark. 143, 127 S. W. 2d 637, "Appellee alleged conscious pain and suffering, and therefore had the burden of proving the fact, either by direct or circumstantial evidence. The question is, Was the requirement met? We do not think so." The finding of the jury to the contrary was based on speculation and conjecture, and was without any substantial evidence to support it. All the direct and circumstantial evidence is to the contrary, and the judgment therefor must be reversed and the cause, to this extent, be dismissed.

The recovery in favor of the father for loss of contributions in the sum of $5,000 is highly speculative. In *Mo. Pac. Trans. Co.* v. *Parker,* 200 Ark. 620, 140 S. W. 2d 997, in discussing the amount of recovery of a parent for loss of contributions by a minor, we said: "The amount of the recovery is necessarily speculative. No one can know or testify what the value of the services of a minor child, less its necessary expenses, will be. Generally, where the minor is of tender age, the speculation must be limited to its minority. No legal obligation rests on a child to support a parent after majority, except as provided in § 7603, Pope's Digest." The evidence shows

that the deceased had just reached his majority; that he was a young man of good habits, did not smoke or drink; that he was frugal, industrious; and that he did not keep company with girls or show any disposition to marry. It is also shown that he spent two six month periods in CCC camps and, from his earnings of $30 per month, sent home or caused to be sent to his father $22 per month. The fact of these remittances cannot be given much weight, for, under the statute, U.S.C.A. Tit. 16, § 548h, he was required to do so. It is there provided that "enrollees with dependent member or members of their families shall be required, under such regulations as may be prescribed by the director, to make allotments of pay to such dependents." In addition to this requirement and without reference to it, at the time he was such an enrollee, he was a minor and his father was legally entitled to the son's earnings. While this boy might have continued to give his earnings to his father after his majority, it appears to be pure speculation as to just how long he would continue to do so. We think the highest amount the evidence may be said to support is the sum of $2,500.

If appellee will enter a remittitur for the excess within 15 judicial days the judgment as to this item will be affirmed for $2,500, otherwise it will be reversed and the cause remanded for a new trial.

HUMPHREYS, J., dissents from both orders. MEHAFFY, J., dissents from order on pain and suffering.

WAGGONER *v.* ATKINS.

4-6744 162 S. W. 2d 55

Opinion delivered May 11, 1942.

W. W. Sharp, for appellant.

Lee & Moore and *Marvin B. Norfleet,* for appellee.

GRIFFIN SMITH, C. J. The complaint alleged, and the chancellor found, that F. R. Atkins was mentally incompetent May 19, 1932, when for $360 he sold to J. M. and Julia Waggoner a remainder in lands now estimated to be worth more than $12,000.[1]

[1] By his father's will, F. R. Atkins' estate was subject to the life tenure of the testator's wife. In the deed to the Waggoners there is this provision: "The said F. R. Atkins . . . makes this deed subject to the life estate of his mother, Mrs. Lillie M. Atkins Marston, and also subject to whatever right of dower, if any, his present wife, Mrs. Mabel W. Atkins, may have."

Suit was brought October 12, 1939. by Mabel Atkins as next friend of F. R. Atkins. Cancellation of the deed was asked.

Atkins married in 1902 and the two have lived together intermittently since that time. They have one child, a daughter twenty-eight years of age. As an evidence of her husband's mental attitude, Mrs. Atkins testified he threatened "to take poison" if she did not marry him. The husband's father was a wealthy planter, residing at Holly Grove, in Monroe county. The life tenant remarried and became Mrs. Lillie M. Marston. She was eighty-three years of age when death occurred May 14, 1939. The family home was built at a cost of $9,000. Mrs. Marston created a trust fund in favor of her son, from which he receives $300 per month. Other property inherited by Atkins produces revenue.

In 1929 or 1930, Atkins took his wife and daughter to Atlanta, where they resided temporarily. He secured employment with a collection agency and worked for several months. His discharge resulted from a controversy over accounts. Atkins then secured employment with a company compiling city directories, but lost the position on account of excessive drinking. Mrs. Atkins returned to Arkansas on business. Shortly thereafter, her husband went to North Carolina, and at a still later date the couple's daughter, Juanita, also went to North Carolina and remained about eighteen months. Atkins resided at Asheville and Winston-Salem; also at Salisbury, where he became acquainted with J. M. Waggoner, an attorney, whom he employed in connection with contemplated litigation.

There is testimony that while in North Carolina Atkins spent money rather freely on the young daughter of his landlady, and that in other instances he associated with the opposite sex. North Carolina witnesses affirmed his intellectual stability, while others thought excessive drinking and use of narcotics had dulled mental processes to such an extent that he was incapable of understanding the nature of business transactions. Some of those who gave depositions referred to Atkins as a pleas-

ant, intelligent conversationalist: a man who loved companionship and sought acquaintances and read a great deal; others regarded him as morose, habitually under the influence of drugs or liquor, and difficult to deal with.

During Atkins' stay in Atlanta, and while he was in North Carolina, Mrs. Marston made regular remittances. At one place in the record the allowance is referred to as $150 per month. Again, it is spoken of as $75.

It is indicated that the people with whom Atkins boarded were interested in procuring a sizeable portion of his surplus funds. Mrs. J. K. Campbell, Atkins' landlady, had known him a number of years before he lived in her home. Atkins, she testified, promised to do certain things for her daughter, Mary King: "Due to Mr. Atkins' liberal spending on Mary (and I, being unable to give my other daughter the same) there developed a feeling of discontent and jealousy between the sisters. I therefore objected to the expenditures Mr. Atkins was making."

J. M. Waggoner, a resident of Salisbury, says Atkins came to his office accompanied by L. M. Hart,[2] Mrs. Campbell's father, and Mary King's grandfather. Atkins crossing by automatic control; that these flasher lights asked Waggoner to prepare a will, "leaving everything" to Mary King. Waggoner testified Atkins said his wife had refused to live with him and had poisoned their daughter's mind against him. Circumstances surrounding execution of the deed, as related by Waggoner, are shown in the footnote.[3]

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[2] Hart died prior to the time Waggoner testified.

[3] "Sometime in April or first of May, 1932, Mr. Atkins came to me for legal advice, and after investigation, I advised him of his rights. Later he approached me about the sale of his interest in the land described in the deed, recorded Deed Book 36, page 123, records Monroe county, Arkansas. Mr. Atkins explained that his mother had a life interest in this land. He also wanted to sell it subject to the rights of dower his wife might have. I told Atkins I was not interested in buying any property that far from home. Atkins came back a number of times and finally said he was going to sell his interest in this property to someone; that his father's will covered property in Arkansas and Tennessee, and it was probated and on record in Memphis, Tennessee. I obtained a copy of the will and found Atkins did have an interest. Upon having some lawyer in Clarendon, whose name I do not recall, check the records to see if Atkins had ever sold the

In August or September, 1934, Atkins left North Carolina and went to Forrest City. In 1937 he moved to Holly Grove and boarded with a family named Kerr nearly a year. While the family home was being remodeled, Mrs. Atkins spent about half of her time with the Kerrs. Of her husband's conduct she says that "In addition to spending money for liquors and drugs, Mr. Atkins spent a great deal on young girls, . . . the object of his latest affection being a waitress at Holly Grove."

Two medical witnesses—Drs. N. E. Murphy and W. H. Martin—testified that in their opinion Atkins was not competent to transact business. Dr. Murphy, of Clarenden, 69 years of age, went to Clarksdale, Mississippi, in 1927, to see Atkins, "who was in bad mental condition. . . . He had been taking some kind of 'dope.' The case is chronic, and due to his condition from 1927 on, I do not think he had ordinary business judgment." Dr. Martin, of Holly Grove, who during a period of twelve or fifteen years had seen Atkins at intervals, characterized him as an alcoholic, "mentally unfit for the transaction of ordinary business affairs."

Dr. Chas. W. Gaskins, of Asheville, North Carolina, treated Atkins in 1924 from June, and for several months during 1935. The patient was an habitual user of alcoholic beverages and sedatives. Those who take allonal or veronal excessively become mentally deranged "at least

property, and receiving a reply that the records did not disclose that property had been disposed of, I then paid Atkins $360, the price he asked for his interest, and took his deed subject to any right of dower his wife might have. Mr. Atkins set his price for the land and refused to reduce it. Atkins did not say or do anything that indicated his mind was unbalanced or that he was incapable of making a contract, executing a deed, or appreciating the consequences of his acts. Atkins understood fully what he was doing. I did not ask Atkins to sell the land. He approached me about selling his interest. My impression of Atkins was that he was a very well-informed man and was a person with strong likes and dislikes and fully capable of taking care of himself. I did not conceal the fact of purchase; on the contrary, I wrote Mrs. Marston that I had purchased, and asked if she would be interested in disposing of her life estate. Atkins was very frank about the matter and told me that his mother was 70 years of age, and at that time in good health; that the land had been good, but was in rundown condition. When I purchased the land it practically had no market value whatsoever. It was during the worst of the depression and lands, stocks and bonds, and all commodities, were at low ebb. Many banks were closed and money was hard to get."

for the duration of period in which they are taken." When not under the influence of alcohol or drugs, Atkins' mental condition "was such as to enable him to understand an ordinary transaction and to know the consequences of his acts and deeds."

Dr. J. M. Neel, dentist, of Salisbury, had frequent opportunities to observe Atkins. At times he would appear nervous, at other times calm. When Atkins was sober and his nerves settled, he was capable of exercising judgment: could understand any ordinary business affair. He was not a man of dissipated appearances except when intoxicated.

There was other testimony that Atkins, while at Asheville, Salisbury, or Winston-Salem, would spend evenings in a hotel. His demeanor was that of a capable man of understanding who was interested in current events and eager for conversation and companionship.

In 1938 Atkins was elected justice of the peace for Duncan township, Monroe county, and has served since that time. The election was uncontested, Atkins having been chosen by voters who "wrote in" his name. Of his conduct as an officer, Carl J. Williamson, state game warden, testified:

"I see Mr. Atkins almost every day, and talk with him. He is of average intelligence and information on every-day affairs, and on national affairs. I have seen him try cases. He is one of the fairest justices of the peace they have ever had there. He takes an interest in the man who breaks the law as well as those who try to enforce it. He questions witnesses intelligently, knows how to look up the law; and his conduct at a trial indicates that he understands all he is doing. I think Mr. Atkins would be a little above the average—he is better educated than most people. As long as he is sober his mind is as good as it ever was. When drunk, like every one else, his mind is not clear. He is perfectly capable of trying cases and determining the guilt or innocence of those accused."

John W. Kornegay, county judge, testified regarding quorum court. In November, 1940, Atkins partici-

pated in that body's deliberations "as much or a little more than some of the others." This witness thought Atkins' questions were intelligent and to the point.

An abstract shows a dozen misdemeanor cases tried by Atkins.

Mayo and Mayo, largest supply merchants at Holly Grove, deal with Atkins regularly. They advanced $500 for his use in paying miscellaneous bills and were given an order directing that $50 monthly be withheld from the item of $300 per month sent by the trustee. Mrs. Atkins admitted her husband attended to his business affairs, at least in part, such as collecting certain rents, paying bills, making purchases, and in dealing with matters generally. The Holly Grove marshal testified he saw Atkins regularly and regarded him as a sane, normal man, although addicted to the drink habit.

As argument supporting the claim of mental incompetency, Mrs. Atkins told of her husband's action in surrendering a life insurance policy and collecting $1,800 in cash. Proceeds were used to defray expenses of a trip to the San Francisco World Fair. Atkins started with his wife and her two sisters. At Kansas City Mrs. Atkins became ill and returned home, but her husband and two sisters went on and were gone three weeks. Shortly prior to this time Atkins' mother had died and left an estate of "something over $100,000."

More than seven years intervened between execution of the deed and Mrs. Atkins' suit. The deed was recorded four days after its date.

Appellants rely upon § 8918 of Pope's Digest, and insist the action is barred. Appellee thinks she is protected by § 8939, which gives to insane persons three years after removal of disability to disaffirm.

Perhaps no branch of jurisprudence is more elusive than that dealing with one's mental capacity to contract. Law books are replete with comments by text- and opinion-writers who have sought, figuratively, to ascertain where the strip of herbage lies ". . . that just divides the desert from the sown"; yet all too often have their labors been in vain.

If the brain has become so affected, irrespective of cause, as to appreciably contracept a person's power to reason, and in consequence the ordinary affairs of life are but dimly reflected on that mirror called mind, it is generally agreed that the impulse to act is not a result of intellectual motivation; hence, the attendant infirmity intervenes and protects one so afflicted from the penalty of conduct in respect of which the power to think and to plan according to accepted formulas is non-existent. See *Pulaski County* v. *Hill,* 97 Ark. 450, 134 S. W. 973.

We are confronted with a situation where a rich man's son had for many years yielded to the urge for physical satisfaction, yet interwoven in the social pattern there are evidences of finer impulses and an obvious desire to compose antagonistic natures. Whether Atkins was sane or insane when the land was sold is unimportant if there was failure to sue within three years from restoration of his mental faculties. It is our view that in 1932 he was capable of understanding; nor has there been a prolonged period within three years when he has been incompetent to such an extent as to justify a court in holding that he did not have capacity to reason regarding business matters and to appreciate their significance.

It should be remembered that when the remainder was sold, values everywhere were depressed. Lands could be bought for a fraction of their former worth. Persons who had ready money for investment were timid. Atkins' mother was living, and although she was past seventy and life expectancy was short, there was a possibility she might live many years; and she did survive until 1939. There is nothing to indicate a plan on Waggoner's part to overreach. The rule that frank disclosure must characterize transactions between lawyer and client is not applicable because the only evidence is that Atkins suggested selling the land. No fiduciary relationship existed.

That Atkins drank to excess and used drugs is evidential, but not controlling. Many witnesses who have not been quoted testified, some asserting incapacity, others expressing belief in Atkins' ability to understand the nature of business transactions and to appreciate

consequences of his acts. With an inheritance in expectancy of more than a hundred thousand dollars; with his needs constantly met by parental solicitude as a result of which money's value was seldom appraised or weighed against desire, it is not strange that Atkins should have made a bargain on impulse in order to satisfy temporary whims. But this does not necessarily point to insanity; nor are other circumstances and acts sufficient to overcome the presumption that one who contracts intends the natural consequences of his conduct, and that he had the capacity to elect.

The decree is reversed, and the cause is dismissed.

KAHRE *v.* MCCOURTNEY.

4-6730 162 S. W. 2d 41

Opinion delivered May 11, 1942.

Foster Clarke and *Roy Penix,* for appellant.

Bon McCourtney and *Claude B. Brinton,* for appellee.

MEHAFFY, J. On April 25, 1934, the appellee, Bon McCourtney, sued appellant, L. H. Kahre, in the circuit court of Craighead county for $350 for professional services as a lawyer.

On March 22, 1935, the appellee filed allegations in garnishment against appellant L. H. Kahre and H. F. Schroeder, a groceryman. On March 25, 1935, L. H. Kahre filed schedule setting out his exemption, claiming in such schedule that the amount of money due from Schroeder was not subject to payment of his debts because it belonged to his wife, Mrs. Elizabeth Kahre. On April 1, 1935, L. H. Kahre executed a deed conveying lot 3, block 0 in Nesbitt's First Addition to Jonesboro, Arkansas, to his wife, Elizabeth Kahre, stating in the deed that the consideration for same was because the separate money of the wife had been used to purchase the property, and that Elizabeth Kahre was the equitable owner and entitled under the law to have the legal title to the lands in her name.

On September 3, 1935, appellant, Elizabeth M. Kahre, filed intervention in the circuit court setting up her claim to the above described real estate. On the same date Schroeder answered the garnishment denying that he was indebted to L. H. Kahre. Appellee answered the intervention and the cause was transferred to chancery court, but on September 29, 1935, the cause was transferred back to the circuit court and judgment for $150 was rendered against L. H. Kahre in favor of appellee.

On January 24, 1941, appellee brought the present suit in chancery court against appellants and against the Home Owners' Loan Corporation in which he alleged the filing of the original suit in the circuit court in April, 1935, alleged the filing of allegations and interrogatories in garnishment against Kahre and Schroeder and alleged the execution and delivery of the deed from L. H. Kahre

to Elizabeth Kahre on April 4, 1935. L. H. Kahre and his wife had executed a mortgage to the Home Owners' Loan Corporation to secure a loan of $1,786 prior to the execution and delivery of the deed by L. H. Kahre to his wife on the same land. Appellee alleged that the deed from Kahre to his wife was fraudulently given for the purpose of delaying and hindering the collection of the debt due appellee, and alleged that the property was urban property located on a corner lot 125 by 170 feet. There was a residence, a store building and a five-room bungalow on the property. He alleged that the residence was worth $2,500, that the rest of the property was worth $1,800 and prayed that the deed from L. H. Kahre to his wife be set aside, and that a lien be declared upon the property to satisfy appellee's judgment for $161.25.

Elizabeth M. Kahre filed separate answer alleging that she was the owner of the real estate; admitted that the lands were mortgaged to the Home Owners' Loan Corporation; alleged that the land described was purchased with her own separate money, no part of which belonged to her husband, and that the deed from her husband to herself was made for the purpose of making the record and the legal title to the property reflect the true ownership of appellant, which had existed for long years prior thereto and was made to do equity.

The chancellor entered a decree holding, in effect: (1) that on March 1, 1934, the Kahres executed a mortgage conveying the real estate involved to the Home Owners' Loan Corporation to secure a loan of $1,786.70; (2) that on April 25, 1934, appellee, McCourtney, sued appellant, L. H. Kahre, for legal services which resulted in a judgment for $150 on February 17, 1935; (3) that on April 4, 1935, L. H. Kahre executed and delivered a deed purporting to convey the real estate involved to his wife, Elizabeth M. Kahre; (4) that the unpaid balance due the Home Owners' Loan Corporation on April 1, 1935, was $1,783.33; (5) that the unpaid balance due the Home Owners' Loan Corporation on April 1, 1941, is $1,200.62; (6) that the mortgage to the Home Owners' Loan Corporation constitutes a first lien on the lands involved; (7) that Elizabeth M. Kahre was the equitable owner of the

lands involved as to all persons on April 4, 1935, excepting creditors of L. H. Kahre existing at that time, of which the plaintiff, McCourtney, was one; (8) that the deed executed by L. H. Kahre to Elizabeth M. Kahre was executed for the purpose of defrauding the appellee, in the collection of his debt, and should be set aside and held for naught so far as the appellee was concerned, but should remain in full force and effect as between the grantor, L. H. Kahre, and the grantee, Elizabeth M. Kahre, as to all other persons excepting the creditors of L. H. Kahre existing at the time of the execution of said deed; and (9) ordering and decreeing that the deed from L. H. Kahre on April 4, 1935, be canceled and set aside in so far as it affected the rights of appellee, but should remain in full force and effect as between L. H. Kahre, grantor, and Elizabeth M. Kahre, grantee; that in so far as the rights of appellee were concerned, the title to the lands was declared to be in the appellant, L. H. Kahre, subject to the prior lien of the Home Owners' Loan Corporation.

Appellants excepted to the findings and decree of the court and exceptions being noted and overruled, the appellants prayed an appeal to the Supreme Court which was granted. The case is here on appeal.

The evidence shows that the deed to this property had been in the husband's name for a long while; that he managed it as his own, and that he mortgaged it to the Home Owners' Loan Corporation, his wife joining in the mortgage; that before he made the deed to his wife, he had contracted this debt to the appellee. The deed to the property involved was made by Dr. Jackson on July 18, 1919, and the husband, L. H. Kahre, was the grantee.

Appellants cite and rely on 27 C. J. 433, 434. It will be observed, however, that the authority cited provides that the deed to the property cannot, in the absence of the elements of estoppel, be reached subject to the payment of his debts, and for that reason a conveyance by him to the equitable owner is not fraudlent as against his creditors.

Appellants also, in connection with the above cited authority, cite *Fairhurst* v. *Lewis*, 23 Ark. 435. In that

case the son furnished the money with a distinct understanding that the deed should be made in his name, but by mistake it was made to his father. When the son came to Little Rock and was shown the deed, he at once expressed surprise and dissatisfaction at its being made to his father. This deed was made to the father on May 15, 1855, and the son procured a deed from his father and one from the original grantee, both of which were put on record. There was no delay on the part of the son, and no elements of estoppel, nor any evidence at all indicating that the father owned the land, except that the deed was in his name, and as soon as the son learned of this, he immediately took steps to correct it.

The facts in this case are very different from the facts in the above case. In the instant case the husband not only had title to the land, but he mortgaged it as his property. In this case the husband was insolvent after deeding the property to his wife.

This court quoted with approval the following from *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913: "It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care, and when they are voluntary they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck they are presumed conclusively to be fraudulent as to existing creditors." *Gavin* v. *Scott,* 172 Ark. 234, 288 S. W. 391. Other cases cited are *McConnell* v. *Hopkins,* 86 Ark. 225, 110 S. W. 1039; *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054; *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107; *Simon* v. *Reynolds-Davis Gro. Co.,* 108 Ark. 164, 156 S. W. 1015; *Burke* v. *New England National Bank,* 132 Ark. 268, 200 S. W. 1018; *Farmers' State Bank* v. *Foshee,* 170 Ark. 445, 280 S. W. 380.

Voluntary conveyances, however, are frequently presumed to be fraudulent, at least in the case of existing creditors and purchasers for value, regardless of the actual intent with which they are made. The cases are not harmonious as to the strength of this presumption.

Some hold that when the conveyance is shown to be voluntary, the presumption of fraud is conclusive as to existing creditors, regardless of the actual intent of the parties or the financial condition of the grantor. In short, the mere existence of debts renders the voluntary conveyance fraudulent *per se* as to those creditors, and subsequent *bona fide* purchasers. The claims of creditors rest on legal obligations, higher than the demands of affection or generosity, and a man must be just before he is generous.

There is no dispute about the appellee being an existing creditor at the time the transfer was made by Kahre to his wife.

"If the plaintiffs' debt was in existence when the transfer was made, there could not be any doubt of their right to impeach it. For every voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency." *Driggs & Co.s' Bank* v. *Norwood,* 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Goodrich* v. *Bagnell Timber Co.,* 105 Ark. 90, 150 S. W. 406.

While there is some conflict in authority, this court is thoroughly committed to the doctrine that voluntary conveyances when made to members of the household and near relatives of an embarrassed debtor are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors.

Appellants contend that the transfer was not fraudulent because it was a homestead. The chancellor found that lot 3 in block 0 above referred to contains over one-quarter of an acre in area and has a value in excess of $2,500 and is urban property.

The finding of the chancellor on all questions of fact is supported by a preponderance of the evidence.

The decree is affirmed.

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

4-6736 162 S. W. 2d 38

Opinion delivered May 11, 1942.

Henry Donham and *Pat Mehaffy,* for appellant.

John H. Wright and *J. H. Lookadoo,* for appellee.

GREENHAW, J. Appellee sued appellant to recover damages for personal injuries which he claims to have received at Okolona, Arkansas, April 3, 1940, while alighting from a mixed freight and passenger train operated by appellant. Appellee, a passenger on the train, claims that after the train stopped and while he was descending the steps the train gave a sudden jerk or lunge, causing him to fall down the steps and onto the station platform, resulting in injuries hereinafter described.

This is the second appeal in this case, the first appeal having been decided by this court April 28, 1941. *Jones* v. *Missouri Pacific Railroad Company, Thompson, Trustee,* 202 Ark. 333, 150 S. W. 2d 742. Reference is made to the opinion of this court on the first appeal for a statement of the facts with reference to the cause of appellee's alleged injury, since appellee's evidence on the second trial of the case is practically the same as that set forth in the first opinion. In it this court held that appellee had made a *prima facie* showing of negligence, and the cause was reversed and remanded for a new trial, the lower court having directed a verdict for defendant at the conclusion of plaintiff's testimony.

Appellant offered evidence in the second trial to the effect that there was no sudden jerking or lunging of the train which caused appellee to be thrown down the steps, and also offered evidence by the train crew that the brakes and other equipment of the train were in good condition at the time of the alleged injury. Evidence of appellant and appellee as to whether the train gave a sudden lunge or jerk was in direct conflict. This was a question of fact for the jury, and since there was substantial testimony that there was a sudden movement of the train as appellee was alighting, the verdict of the jury is conclusive as to the question of negligence.

A verdict for $2,000 was rendered in favor of appellee, upon which judgment was entered and from which is this appeal. Appellant has cited a number of errors as grounds for reversal of this cause. We do not think that any of the assignments of error are tenable except that the verdict is excessive.

The evidence shows that appellee at the time of his alleged injury was 27 years of age and was a day laborer and farmer. He testified that when he fell he landed on his shoulder and hip, and was unconscious for a few minutes; that he suffered a great deal of pain and that his left leg has caused him considerable trouble. He used two crutches for about three weeks, and one for about seven weeks. After the accident he farmed until he laid by his crop, and he worked in the timber business during 1941.

H. B. Stitt, who was with appellee and who left the train immediately before appellee fell, testified substantially as did appellee, and stated that appellee bled after the fall.

Appellee was taken to the office of Dr. J. C. Alford, a practicing physician in Okolona, who examined him and administered treatment. Dr. Alford testified that he did not find anything in the nature of an injury except a small skinned place on appellee's knee, and the muscles of his back seemed to be contracted. No bones were broken, and there was nothing in his condition that would disable him from working. The doctor further testified that appellee

had varicose veins in both legs, those in his right leg being larger than those in the left leg which appellee claimed was injured. He gave appellee a hypodermic because appellee said he was in pain.

The day after the accident appellee consulted Dr. R. L. Bryant of Arkadelphia, who examined him and thereafter treated him a few times. Dr. Bryant testified that there was a bruise or contusion on the left shoulder and hip, with abrasions of the left knee. He found that appellee's left leg was smaller than his right. He X-rayed the pelvis and small of the back, and the X-rays showed a disturbance in the left sacro-iliac joint. He further testified that he could not tell from the X-ray pictures when the plaintiff was injured, or whether it was an old or a new injury, and that the varicose veins and other injuries complained of could have been caused from heavy lifting. He testified that appellee had probably had varicose veins for a number of years.

Dr. Bryant did not see appellee for a period of several months. A short time before the trial he again examined him, and stated that appellee's condition had improved, but that there was some paralysis in the left knee and leg, and in his opinion he would never again be able to do hard manual labor.

Dr. Bryant was asked to give appellee the reflex test on both legs in the presence of the jury, and when this was done it was shown, and the doctor so testified, that the reflex of the left leg was more pronounced than that of the right. He admitted that paralysis of the nerve of the left leg would cause the reaction of that leg to be less than the reaction of the right leg.

Dr. Alford further testified that he saw appellee walk the day of the trial, and in his opinion he was not hurt at all.

According to the testimony of appellee and others, for some months prior to the trial appellee had been engaged in performing manual labor incident to the timber business which no doubt he could not have done had he sustained the serious and enduring injuries which it was contended he received.

We have carefully considered all of the evidence pertaining to the nature of appellee's injury, and have concluded that the verdict was excessive, and that the evidence in this case does not sustain a judgment for more than $500.

The judgment is, therefore, modified by reducing it to $500, and as thus modified is affirmed.

MEHAFFY, J., not participating. HUMPHREYS, J., dissents from the reduction.

COCA-COLA BOTTLING COMPANY OF SOUTHEAST ARKANSAS *v.* MOONEY.

4-6751 161 S. W. 2d 753

Opinion delivered May 11, 1942.

Ed F. McDonald and *Rowell, Rowell & Dickey,* for appellant.

W. H. Glover and *D. D. Glover,* for appellee.

SMITH, J. Appellee recovered a judgment for $500 to compensate an injury which, according to the testimony offered in her behalf, was occasioned by drinking a part of a bottle of Coca-Cola in which there were particles of chipped glass.

Several errors are assigned and discussed for the reversal of this judgment; but only one of these appears

to be of importance. This assignment relates to the giving of an instruction numbered 7, which reads as follows: "If you find from a preponderance of the evidence in this case that the said Carmon Mooney drank the Coca-Cola as alleged, and that there was glass in said Coca-Cola as alleged, and that she became sick or injured by reason of having drunk and swallowed said glass, or cut her mouth, as alleged, then you are instructed that this evidence is sufficient to make a *prima facie* case of negligence against the defendant company, and shifts the burden of proof on the defendant company to prove that it was not negligent in cleansing, refilling and inspecting the bottle, and if you find that the most modern machinery was used in the cleansing and refilling and inspecting the bottle this is not sufficient alone to meet the burden of proof cast upon the defendant company and overcome the *prima facie* case."

We have recently condemned similar instructions as constituting a charge upon the weight to be given testimony. The instruction told the jury that the presence of glass in the bottle made a *prima facie* case of negligence and shifted the burden of proof on the defendant. Numerous cases have approved instructions to that effect. But the instruction proceeds to say that proof of the use of the most modern machinery in cleansing, refilling and inspecting the bottles is not sufficient alone to meet the burden of proof cast upon the defendant and overcome the *prima facie* case.

This, we think, was a question of fact for the jury, and not one of law for the court.

In condemning a similar instruction in the recent case of *Coca-Cola Bottling Company of Southeast Arkansas* v. *Bell,* 194 Ark. 671, 109 S. W. 2d 115, we said: "This instruction declares as a matter of law what should have been submitted to the jury as a question of fact, that is, whether the testimony as to the care used by the manufacturer had overcome the *prima facie* presumption arising from the presence of the fly in the bottle. This instruction tells the jury as a matter of law that this testimony as to care in bottling and inspecting 'is not alone

sufficient to meet the burden of proof cast upon the defendant and overcome the *prima facie* case.' It was for the jury to find, and not for the court to say, whether the testimony had overcome the *prima facie* case of negligence arising from the presence of the fly in the bottle."

For the error in not permitting the jury to decide the question of fact whether the testimony offered by defendant had overcome this presumption the judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

YOUNG, ADMINISTRATOR, *v.* G. L. TARLTON, CONTRACTOR, INC.

4-6709 162 S. W. 2d 477

Opinion delivered May 11, 1942.

Coulter & Coulter, for appellant.

Buzbee, Harrison & Wright, for appellee.

SMITH, J. Appellant, Cole Young, as administrator of the estate of Thomas E. Young, brought this suit to recover damages for the alleged negligent killing of his intestate against defendants in whose service the intestate was employed at the time of his death. It was alleged that on December 10, 1940, intestate was run over by a truck driven by another employee of defendants, the circumstances of which are detailed and are alleged to constitute actionable negligence.

A motion to dismiss the complaint was filed, which averred that the provisions of § 9130, Pope's Digest, pursuant to which the suit was brought, were inapplicable, for the reason that Act 319 of the Acts of 1939, p. 777, known as the Workmen's Compensation Law, was in effect on December 10, 1940, and that defendants had fully complied with the provisions of said act, so as to bring plaintiff's intestate under the exclusive remedies contained in said act, and it was, therefore, alleged that the Arkansas Workmen's Compensation Commission had sole jurisdiction to hear and determine any question relative to the payment of money benefits arising from the death of the intestate.

A response to this motion was filed, which alleged that defendants were not, on December 10, 1940, subject to nor protected by the Workmen's Compensation Law, for the reasons: (1) defendants were engaged in performing labor and doing work within the confines of a United States military post; (2) defendants were foreign corporations and not authorized to transact business in Arkansas, and were not subject to the Arkansas Workmen's Compensation Law, and had not complied with the provisions of §§ 7 and 8 of that act; (3) defendants had not secured the payment of compensation as required by the provisions of the compensation act or posted or given the notice required by law that they had done so; (4) that the policy of compensation insurance had not been properly approved; (5) the law is unconstitutional and void, in that, pursuant to the provisions of § 25 thereof, it deprives the claimant of his right to a trial of facts by a jury, contrary to the provisions of § 7 of art. 2 of

the Constitution of Arkansas, and of art. 7 of the Amendments to the Constitution of the United States.

Interrogatories were attached to this response requiring defendants to answer in what manner they had complied with the provisions of the act, thereby bringing themselves within its protection.

A verified answer was filed in response to these interrogatories, the truth of which was not questioned, showing full and proper compliance with the act.

The motion to dismiss was overruled, whereupon defendants filed an answer, in which, after reserving their prayer that the cause of action be dismissed, all the material allegations of the complaint in regard to negligence were denied, and it was alleged that the intestate's death was due solely to his own negligence. The case proceeded to a trial. At the conclusion of the introduction of the testimony the court charged the jury as follows: "Ladies and gentlemen of the jury, the plaintiff having rested on the question of liability, the defendant has moved for an instructed verdict, which motion is by the court granted. The court feels in this case that under the most favorable testimony, and giving all the weight and credit to the testimony the court in its discretion can give to the testimony of the witnesses for the plaintiff, the plaintiff has not made out a case of negligence. The testimony might show that the truck driver in this case may have violated some regulation they had with reference to starting of trucks without the employees on them. Here the testimony is undisputed the employee had gone on some sort of errand and came out and saw the truck moving and attempted to climb onto the truck while it was moving and fell under it and was killed. The court rules as a matter of law that under the testimony there is nothing for the jury to determine because his negligence was the proximate cause of his injury and the sole cause of his injury and death and for those reasons the court directs you to return this verdict: 'We, the jury, under direction of the court, find for the defendants.' "

Judgment for defendants was pronounced upon the verdict returned under this direction of the court, and from that judgment is this appeal.

It was shown in the testimony that intestate's employer was engaged in construction work at Camp Robinson, a United States military post; but that fact does not render the provisions of the act inapplicable. Section 290, Title 40, USCA, reads as follows: "Section 290. State workmen's compensation laws; extension to buildings and works of United States.

"Whatsoever constituted authority of each of the several states is charged with the enforcement of and requiring compliance with the state workmen's compensation laws of said states and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said states shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any state, and to all projects, buildings, constructions, improvements and property belonging to the United States of America, which is within the exterior boundaries of any state, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the state within whose exterior boundaries such place may be.

"For the purposes set out in this section, the United States of America hereby vests in the several states within whose exterior boundaries such place may be, in so far as the enforcement of state workmen's compensation laws are affected, the right, power and authority aforesaid; provided, however, that by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several states within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their state workmen's compensation laws as herein designated; provided further, that nothing in

this section shall be construed to modify or amend §§ 751 to 796 of Title 5. June 25, 1936, c. 822, §§ 1, 2, 49 Stat. 1938, 1939."

The laws of this state relative to the domestication of foreign corporations have no application, for the reason that appellees were engaged in construction work for the United States at a military post under the jurisdiction of the United States. In the case of *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091, it was held, in reversing the opinion of this court reported in *Haynie* v. *Surplus Trading Company,* 174 Ark. 507, 297 S. W. 822, that (to quote a headnote) "Under art. 1, § 8, cl. 17, of the Constitution, land purchased by the United States for an army station, with the consent of the legislature of the state in which it lies, comes under the exclusive jurisdiction of the United States, and private personal property there situate can not be taxed by the state." The camp there called Camp Pike is now called Camp Robinson.

Section 4 of Act 319, *supra,* provides that "The rights and remedies herein granted to an employee subject to the provisions of this act, on account of personal injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representatives, dependents, or next of kin, or anyone otherwise entitled to recover damages from such employer on account of such injury or death, except that if an employer fails to secure the payment of compensation as required by the act, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under this act or to maintain an action in the courts for damages on account of such injury or death. . . ."

As has been said, the employers had not failed "to secure the payment of compensation as required by the act," and the remedies provided by it are, therefore, exclusive, and the motion to dismiss the complaint should have been sustained.

That legislation similar to our Act 319 is not violative of the Federal Constitution is definitely settled by the

opinion of the Supreme Court of the United States in the case of *Mountain Timber Co.* v. *State of Washington,* 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. Nor does Act 319 violate our own Constitution, for full authority for its enactment was given by Amendment No. 26 to the Constitution, adopted at the 1938 general election. This amendment reads as follows: "The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted."

This amendment confers upon the General Assembly the power to enact legislation prescribing the amount of compensation to be paid employees for injury or death, and to whom such payments shall be made. It confers power to prescribe the means, methods and forum for the adjudication of such claims, and for securing the payment thereof. It was pursuant to this amendment, and under the authority there conferred, that Act 319 was passed and became a law. The amendment provides that otherwise, that is, except in cases arising between employer and employee, no law shall be passed limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property. The effect of this amendment is to amend both § 7 of art. 2 and § 32 of art. 5 of the Constitution in the respects indicated.

It appears that every state in the Union, save only the state of Mississippi, now has legislation more or less similar to our Act 319, all of which have the same general purpose, and that such legislation has been uniformly upheld. The legislation has been attacked upon almost every ground which the ingenuity of learned counsel could conceive. At § 14, p. 64, vol. 1, Honnold on Work-

men's Compensation, it is said: "Every conceivable constitutional objection has been made to the various acts. They have been quite uniformly upheld as against general objections that they are unconstitutional, and as against the objections that they are class legislation and make unreasonable classifications, deny equal protection and due process of law, impair the obligation of existing contracts, though applying to such contracts, and interfere with the right to contract, the right to jury trial, and vested rights by abolishing existing statutory and common-law remedies, and that they abridge privileges and immunities."

Many cases from various states are cited in support of the text quoted, but it would be a work of supererogation to review them. Nearly all the states have constitutional provisions similar to, and, in some states, identical with, our constitution in regard to trial by jury.

The case of *Hunter* v. *Colfax Consolidated Coal Co.*, decided by the Supreme Court of Iowa, November 24, 1915, 175 Iowa 245, 154 N. W. 1037, 1917E, Ann. Cas. 803, L. R. A. 1917D, 15, is one which has been cited and approved by many courts, and contains an exhaustive discussion of the subject.

In vol. 1 (Permanent Edition) Schneider's Workmen's Compensation Text (§§ 27 to 76) appears a summary of the holdings of all the states, arranged alphabetically from Alabama to Wyoming, on the constitutionality of such legislation. Mississippi, which has no such law, was not included, nor was this state, as our own law had not been passed upon by this court when the text was written.

Alaska was one of the few jurisdictions in which such legislation was held invalid for any reason, and the legislation of that territory was held invalid for the reason that it required employers to make payments to the territory for the benefit of aged residents, and this was held a tax rather than compensation.

Generally, this legislation was upheld as a valid exercise of the state's police power, and the reasoning of many of these cases is similar to that of the Supreme

Court of Illinois in the case of *Grand Trunk Western Ry. Co.* v. *Industrial Commission,* 291 Ill. 167, 125 N. E. 748, where it was said: "The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the state, then the right of trial by jury is therefore no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the latter is to leave the former nothing upon which to operate."

The major part of Vol. 71, Corpus Juris, is devoted to the chapter on Workmen's Compensation Acts, where an indefinite number of cases are cited.

Our own case of *McKinley, Commissioner of Labor,* v. *R. L. Payne & Son Lbr. Co.,* 200 Ark. 1114, 143 S. W. 2d 38, upholding our Unemployment Compensation Act (§§ 8549 to 8569, Pope's Digest) as constitutional, while not directly in point, is not wholly inapplicable.

We conclude, therefore, that the motion to dismiss the cause should have been sustained, as the exclusive jurisdiction was vested in the Workmen's Compensation Commission, whose findings are subject to the review provided by § 25 of the act, and the judgment of the court below will, therefore, be reversed, and the cause remanded with directions to sustain the motion to dismiss and to abate the suit.

HARMON *v.* BELL.

4-6740 161 S. W. 2d 744

Opinion delivered May 11, 1942.

Jameson & Jameson, for appellant.

Mayes & Mayes, for appellee.

HOLT, J. May 1, 1941, L. F. Bell, appellee, sued L. L. Tate in the municipal court of Fayetteville, Arkansas, to recover $50 alleged due on a note, and appellant, John F. Harmon, was made garnishee. Tate being a nonresident, constructive service by publication was had upon him and writ of garnishment was served on appellant Harmon personally. The writ was made returnable on June 3, 1941, and the cause set for trial on that date.

June 3, 1941, prior to the hour of trial, appellant appeared and informed the court orally that he was not indebted to the defendant, L. L. Tate, in any sum, but he did not reply to, or answer in writing, and under oath, the allegations and interrogatories propounded to him in the writ of garnishment. The court did not enter appellant's oral answer to the writ on the docket. Later in the same day judgment was entered against appellant in the following form: "Judgment as per precedent."

September 5, thereafter, appellee's attorney filed with the municipal court precedent for judgment reciting

judgment against garnishee, appellant, for $50 and costs. October 6, 1941, execution was issued against appellant.

October 20, 1941, appellant filed petition in the circuit court for certiorari and prayed that the proceedings in the municipal court be brought up for review and that the judgment and execution against him be quashed.

October 27, 1941, appellant's motion was granted and on November 3 the circuit court of Washington county, upon a trial, found, among other things, that: "John F. Harmon, plaintiff herein and garnishee in the municipal court action, appeared in the municipal court as such garnishee on the 3rd day of June, 1941, and orally stated to the court that he was not indebted to the defendant, L. L. Tate, in any sum and had not been so indebted at any time. The court finds that said denial was not written and was not made under oath. . . .

"The court declares the law as follows: The law requires that garnishee's answer in this case must be in writing and sworn to, and since the oral denial of garnishee was not in writing and sworn to, the judgment and proceedings should be affirmed. The court declares the law to be that the record judgment and docket entries in said action show a valid judgment against the garnishee therein, John F. Harmon, and the said judgment should be affirmed." This appeal followed.

The primary contention of appellant is stated here in his brief in the following language: "Appellant contends that the answer of a garnishee is a pleading, and that the same may be oral and without verification in the municipal courts, and that it is the duty of the court to enter the same upon his docket. When a denial or answer is so entered or made by garnishee, the same discharges the garnishee unless controverted by denial by the plaintiff, which must also be entered upon the docket. If the court fails to enter the garnishee's answer this failure does not prejudice the rights of the garnishee."

As a general rule pleadings in the court of a justice of the peace may be either in writing or oral and if oral, it is the duty of the justice of the peace to record the substance thereof on his docket. Section 8389 of Pope's Di-

gest. The same rule which governs pleadings in the justice court applies to municipal courts. *Upson* v. *Robison,* 179 Ark. 600, 17 S. W. 2d 305. An exception to this general rule, however, has been clearly made in this state by statute, in garnishment proceedings, such as we have in the instant case. Whether the garnishment be issued in proceedings before a municipal court or a circuit court, the garnishee is required to answer the interrogatories propounded to him in writing and under oath, and upon his failure to answer, within the time provided, the court or justice before whom the action is pending, must enter judgment against such garnishee for the full amount specified in the plaintiff's judgment against the original defendant with costs.

Our statutes seem to be perfectly plain on this proposition. Section 6119 of Pope's Digest provides: "In all cases where any plaintiff may begin an action in any court of record, or before any justice of the peace, . . . and such plaintiff shall have reason to believe that any other person is indebted to the defendant, . . . such plaintiff may sue out a writ of garnishment, setting forth such claim, . . . and commanding the officer charged with the execution thereof to summon the person therein named, as garnishee, to appear at the return day of such writ, and answer what chattels, moneys, . . . he may have in his hands or possession belonging to such defendant to satisfy said judgment and answer such further interrogatories as may be exhibited against him . . ."

Section 6123 provides: "The plaintiff shall, on the day on which he sues out his writ of garnishment, prepare and file all the allegations and interrogatories, in writing, with the clerk or justice issuing such writ, upon which he may be desirous of obtaining the answer of such garnishee, . . ."

Section 6124 provides: "Such garnishee shall, on the return day named in such writ, exhibit and file, under his oath, full direct and true answers to all such allegations and interrogatories as may have been exhibited against him by the plaintiff."

And § 6129 provides: "If any garnishee, after having been served with a writ of garnishment ten days

before the return day thereof, shall neglect or refuse to answer interrogatories exhibited against him on or before the return date of such writ, the court or justice before whom such matter is pending shall enter judgment against such garnishee for the full amount specified in the plaintiff's judgment against the original defendant together with his costs."

It is conceded here that appellant's answer to the allegations contained in the writ of garnishment were oral. This amounted to a failure to answer and judgment by default was properly taken against him.

In *Wilson* v. *Phillips,* 5 Ark. 183, this court held: "Where a garnishee fails to answer, no proof is necessary to charge him. The default admits his liability to the full extent of the plaintiff's demands."

Appellant also contends that there was no valid judgment entered against him in the municipal court. We cannot agree to this contention. As has been indicated, the cause was tried in the municipal court on June 3, 1941, and "judgment as per precedent" entered against appellant on that date. Appellant testified (quoting from appellant's brief): "I did not make a written answer under oath denying owing anything. I did not know I had to do that. I was in the municipal court on the day the case was tried. I was there with Mr. Mayes and plaintiff Bell. I remember the note was introduced. I knew a suit was going on because I had been served with a garnishment and the reason I was there that day was because I had been made a party garnishee."

Municipal Judge James Ptak, before whom the cause was tried, testified: "Q. On the same day of the trial did you pronounce judgment? A. That is right." He further testified that he rendered judgment against appellant and "an extensive judgment couldn't go on the docket," and it was agreed that precedent for the judgment be prepared.

We think it clear on the record before us that judgment was entered against appellant on June 3, 1941, the court record reciting "judgment as per precedent." September 5, following, appellee's attorney filed precedent

for judgment reciting judgment against garnishee, appellant, for $50 and costs and further that garnishee failed to answer, plead or demur, and made default. While this precedent for judgment was not actually spread upon the court docket for lack of space, it was filed, and we think was sufficient.

We conclude, therefore, that the judgment should be affirmed, and it is so ordered.

CAPITAL TRANSPORTATION COMPANY *v.* CARTER.

4-6733 161 S. W. 2d 746

Opinion delivered May 11, 1942.

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

McDaniel & Crow and *W. R. Donham,* for appellee.

GRIFFIN SMITH, C. J. The appeal is from a judgment awarding J. E. Carter $2,500 to compensate personal

injuries received December 6, 1940, when his truck and a street car collided in Little Rock. Error assigned is the court's action in refusing to direct a verdict for the defendant.

Carter, driving an International truck loaded with cattle, was proceeding east on East Ninth street. It is conceded that if the collision occurred on the east side of Hanger street, where Hanger intersects East Ninth, Carter was guilty of contributory negligence and should not recover. *Contra,* if the motorman in charge of the street car negligently continued west across Hanger and thereby closed Carter's avenue of escape, recovery should be sustained. It is not alleged that the verdict is excessive.

Carter's explanation is that automobiles were parked on the south side of Ninth street, blocking from six to eight feet of paving which ordinarily would have been available to traffic. This compelled appellee to utilize the car tracks. Time was 5:50 p. m. Rain had been falling, and there was some mist or haze. Lights were being used on the truck; also on the street car. Appellee was driving at fifteen miles per hour and first observed the trolley car when it stopped on the east side of Hanger. Distance at that time was approximately 130 feet. Appellee's testimony is that the street car struck him just as he went into the intersection—"between the west side and the middle of Hanger street."

After having stopped at the intersection, the motorman started at a time when appellee's position on the tracks was such that a collision was inevitable if the trolley car kept moving. Appellee "took it for granted" the motorman, who was looking directly at him, would realize the peril and stop before proceeding far enough into Hanger to prevent the truck from "clearing" the last automobile parked on the south side of Hanger and turning to the right. Appellee's comment on cross-examination was: "I figured he would surely let me get off of that street car track." When asked why he did not stop his truck, appellee replied:—"I knew if I did, and he didn't stop, he would run over me."

After entering Hanger, appellee apparently "sideswiped" the trolley car with his left front fender,

careened, and continued fifteen or twenty feet before being upset immediately in front of Davis' store.

J. T. Henry, witness for the plaintiff, testified he saw the impact, and "Hanger street didn't have anything to do with the collision. It happened before [Carter] got there." Appellee asserted that one of the parked automobiles was "awfully close" to the Hanger street intersection.

It is difficult to understand how Carter could have driven between the street car and the parked automobile he says was near the intersection, and at the same time avoid the automobile and strike the street car as lightly as he did. From street car rail to the south curb, Ninth street is eleven feet eight inches. The parked automobile near the Hanger street intersection occupied more than half this space, and if in fact the street car was near the west side of Hanger when the impact occurred, it seems highly improbable from a physical standpoint that the truck could have negotiated the closing space, and after striking the street car or being struck by it continue to the Davis store. However, unless impossible, or so highly improbable that no reasonable mind would accept the explanation, a question was presented for the jury.

To hold, as a matter of law, that appellee was contributively negligent would require judicial deductions and harmonizations from the result of which it would be necessary to eliminate certain testimony we regard as substantial. This we do not have the right to do. Attitude of the witnesses, their manner of testifying, and explanations as to distances indicated by gestures, but not appearing clearly in the record, were heard by a judge of the highest integrity who no doubt would have set the verdict aside had he not believed a preponderance of the testimony absolved appellee of blame. In these circumstances the judgment will not be disturbed.

Affirmed.

ST. LOUIS UNION TRUST COMPANY, EXECUTOR, *v.* HAMMANS.

4-6752 161 S. W. 2d 950

Opinion delivered May 11, 1942.

[redacted]

John L. Ingram, for appellant.

M. F. Elms, for appellee.

HUMPHREYS, J. This suit was brought by appellants on June 1, 1937, against appellees in the circuit court of Arkansas county, northern district, to recover an alleged balance due on a $2,500 note executed by appellees to

Robert M. Foster, referred to in the testimony and briefs as Judge Foster, on April 14, 1928, payable on January 1, 1930, bearing interest at the rate of eight per cent. per annum from date until paid. The admitted payments and credits on the note evidencing same did not include a $500 payment claimed by appellees as a set-off in their answer to the complaint as follows:

"That they (appellees) aided and assisted the said Robert M. Foster in making a sale of a piece of land in Prairie county, Arkansas, to Steve Shimek and that for their (appellees') services in assisting and making sale of said land the said Robert M. Foster agreed and bound himself to place to their credit the sum of $500 upon said note, but that no part of same has ever been credited to them (appellees)."

Appellants filed the following reply to the set-off: "They deny that Robert M. Foster ever entered into a contract with the defendants (appellees) or either of them with regard to the sale of any land whatsoever, and deny that defendants (appellees) or either of them are entitled to a credit of $500 and deny that the said Robert M. Foster is indebted to the defendants (appellees) in said sum of $500 or any other sum whatever. Further answering the plaintiffs (appellants) plead the three years statute of limitations as a bar to defendants' (appellees) right to recover herein.

Appellants introduced the note sued on and also the following stipulation, and rested:

"1. That Robert M. Foster died testate on November 1, 1930, and that the St. Louis Union Trust Company of St. Louis, Missouri, was duly appointed executor under the will of the said Robert M. Foster on November 7, 1930, and is the duly qualified and acting executor under said will and estate.

"2. That Lizzie L. Foster is the owner and holder of the note sued on."

"3. Appellees then offered to prove by C. E. Hammans an oral contract and agreement they had with Robert M. Foster relative to the set-off claimed by appellees

to the note sued on, over the objection and exception of appellants on the specific ground that the evidence was not admissible or competent under § 5154 of Pope's Digest, which is as follows: "In civil action, no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. . . ."

On account of the stipulation to the effect that Lizzie L. Foster is the owner and holder of the note the court ruled that the statute was not applicable, permitted the witness to testify and thereafter tried the suit as one brought by her to recover on the note.

The testimony of C. E. Hammans on direct and cross-examination is quite lengthy and to set it out in full would unduly extend this opinion, but the substance thereof, stated in the most favorable light to appellees, is to the effect that Judge Foster owned a farm near a farm owned by appellees. Judge Foster wanted to sell the farm to appellees, but appellees did not want to buy same. Appellee, C. E. Hammans, undertook to help Judge Foster make a sale of his farm. He was not a real estate agent and did not have the farm listed with him, but for his assistance in making the sale of the farm Judge Foster told Hammans he would pay him $500 if he succeeded in selling it for the price he wanted. Judge Foster stated what he wanted for the farm, and appellee saw Steve Shimek who wanted to buy the farm. Appellee took Judge Foster up to see Shimek several times and they completed the deal. The contract for the sale and purchase of the farm was entered into in the summer of 1929 and the deed was made by Judge Foster's wife, Lizzie L. Foster, after Judge Foster's death. The deed bears date March 14, 1936. After the contract for the sale and purchase of the land was made Judge Foster offered to pay appellee, C. E. Hammans, $500 and offered to pay it in cash, but appellee, C. E. Hammans, said to

him, "No, dad and I owe you a note and you just credit it on the note," which Foster agreed to do, notwithstanding C. E. Hammans had made no charge against him for assisting him in making the deal. Judge Foster overlooked entering the credit on the note like he had done with reference to several other payments, for example, a cash payment of $394.44 and lumber in the amount of $240.47 which had been delivered to him.

The cash and credit payments referred to above were entered on the note by the executor, St. Louis Union Trust Company, after Judge Foster's death, upon proof by appellees that payments had been made.

In addition to the testimony of C. E. Hammans, the will of Foster was introduced in which he gave all his property to his wife, Lizzie L. Foster, for and during her lifetime to use the income therefrom with the right to sell, exchange, lease or reinvest as she might deem best.

Other testimony was introduced to the effect that after Judge Foster died appellees had considerable correspondence with the St. Louis Union Trust Company relative to credits which should have been entered upon the note, but none of the letters or any of the correspondence contained the claim by appellee for the $500 credit in question. The original note was introduced showing that same had been assigned to Lizzie L. Foster by the St. Louis Trust Company without recourse on it and also showing a large number of credits which had been entered subsequent to the death of Judge Foster who had died on November 1, 1930, and according to the statement made by the St. Louis Union Trust Company as of date January 15, 1941, the balance due on same, total interest and principal, was $1,661.27, but no credit appeared for the $500 claimed by appellees for assisting him in selling his farm to Shimek.

At the conclusion of the testimony, appellant, Lizzie L. Foster, requested the court for a peremptory instruction for judgment in her favor for $1,661.27.

The court refused to instruct a verdict for that amount and submitted the cause to the jury upon the pleadings, the testimony introduced and the following

instruction, over the objection and exception of appellant, Mrs. Lizzie L. Foster, to-wit:

"Gentlemen of the jury, the only question is the item of $500. If you find from the testimony that this note is in the hands of the administrator, then the plaintiffs would be entitled to recover the full amount sued for, because they cannot offer testimony against the administrator, but if you find from the testimony that the note is owned and in the possession of Lizzie L. Foster, then the evidence would be competent. They set up a plea of the statute of limitations in this case—that is they contend that the amount Mr. Hammans claims is barred by the three-year statute of limitations; that it was not credited on the note—that they did not make any agreement with Mr. Hammans to pay him $500. Those are questions of fact for you to determine under the testimony in this case. If you are convinced, by a preponderance of the testimony in this case that Mr. Foster did agree to pay $500 and that it should have been credited within the time equal to three years from the time of this agreement, and he failed to credit it; then the defendants would be entitled to that credit. The burden is upon the defendants to show that by a preponderance of the evidence; if you find for the plaintiff or the plaintiffs, there are two plaintiffs, Union Trust Company, administrator, and the wife of the deceased, Mrs. Foster, you can find for both plaintiffs or you can find for Mrs. Foster, one or the other, or both for such sum as you think defendants owe. The only question involved is whether or not the defendants are entitled to this $500 credit on this note. If nine of you agree upon a verdict, you will all nine sign the same, but if all twelve of you agree upon a verdict, only one of you will sign same as foreman."

After consideration and deliberation the jury returned the following verdict: "We, the jury, find for the defendant in the following sum, credit for the $500 claimed plus interest at 8 per cent. from January 1, 1932. We also find that the note in question is the property of Mrs. Robt. M. Foster, and she is entitled to recover the amount sued for less credits shown on the note and the $500 with 8 per cent. interest from January 1, 1932. Louis K. Buerkle, Foreman."

Pursuant to the verdict the court rendered the following judgment: "It is, therefore, considered, ordered and adjudged by the court that the plaintiff, Lizzie L. Foster, do have and recover of and from the defendants, G. E. Hammans and C. E. Hammans, and either of them and each of them the sum of $884.42, same being the amount due her after deducting the sum of $500 mentioned in said verdict, plus interest thereon at 8 per cent. from January 1, 1932.

"It is further adjudged that the said sum of $882.42 bear interest from this date at the rate of eight per cent. per annum until paid.

"It is further adjudged that said plaintiff have and recover of and from said defendants and each or either of them all costs herein expended and further ordered that execution issue for said sums."

From the judgment an appeal has been duly prosecuted to this court.

Appellant, Lizzie L. Foster, contends for a reversal of the judgment on the ground that the court erroneously admitted the testimony of C. E. Hammans for the reason that under § 5154 of Pope's Digest one is not permitted to testify to any transactions with or statements of a testator, claiming that the instant suit is a suit by the executor or administrator of the estate of Robert M. Foster, deceased. The undisputed testimony in the case is to the contrary. It is true the St. Louis Union Trust Company, as executor of the last will and testament of Robert M. Foster, deceased, was made a party plaintiff in the original suit, but the undisputed testimony shows that the St. Louis Union Trust Company as executor has no further interest whatever in the note sued upon and did not have at the time this suit was instituted. The note was assigned by it without recourse to Lizzie L. Foster and under the stipulation entered into by the attorneys for the parties it was agreed, "that Lizzie L. Foster is the owner and holder of the note sued on." Since the St. Louis Union Trust Company had no interest either in the note or in the lawsuit and was only a nominal party and could not be affected by the litigation,

the court properly admitted the testimony of C. E. Hammans with reference to the contract he had with Judge Foster in his lifetime. We think the ruling of the court that the testimony of C. E. Hammans was admissible under the facts in this case is supported by the cases of *Walden* v. *Blassingame,* 130 Ark. 448, 197 S. W. 477; *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009; *Swinton* v. *Cuffman,* 139 Ark. 121, 213 S. W. 409; and the later case of *Robb* v. *Woolsey,* 175 Ark. 43, 295 S. W. 13.

Appellants also contend that the judgment should be reversed because even if the testimony was admissible it does not show that there was any consideration to support the claim of $500 for assistance rendered Judge Foster in making the sale of his land to Steve Shimek.

Judge Foster told C. E. Hammans that if he would sell the property for him he would give him $500. We do not think this meant that he would make him a present for selling it. Appellants argue that the offer to pay $500 was in the nature of and amounted to no more than the promise of a gift and that in order for a gift to be good it must be an executed gift. It is true that delivery is an essential both in law and in equity to the validity of a gift and cases are cited by learned counsel for appellants to that effect. Of course, if the testimony only showed the promise of a gift to be delivered in the future, it would be uninforceable, but we think the jury was warranted in finding that this was not a promise for $500 in the way of a gift to be delivered in the future. The testimony is susceptible of the construction that Judge Foster absolutely agreed to pay him $500 in case he found a purchaser and sold the farm for the amount he wanted for it. According to the testimony C. E. Hammans did find a purchaser and did take Judge Foster to the purchaser and they did enter into a contract for the sale and purchase of the farm. It also appears from the evidence that Steve Shimek paid all the purchase money and in 1936 received a deed to the farm from the wife of Judge Foster who acquired the right to make the deed under the provisions of the will of Judge Foster. This was not all, after the contract for the sale and purchase of the farm was executed Judge Foster offered to pay C. E.

Hammans $500 in cash and would have done so, but C. E. Hammans told him that he and his dad owed Judge Foster a note and to credit the amount of $500 on the note, which Judge Foster agreed to do. We do not think the failure of Judge Foster to enter the credit on the note in any way invalidated the payment of $500 thereon, the consideration constituting the payment on the note for services which C. E. Hammans had rendered to Judge Foster. The transaction was completed when the services were rendered and Judge Foster offered to pay C. E. Hammans $500 in cash and was told instead of paying it over to credit it on a note. It is said in 3 R. C. L., p. 1284, par. 517, that: "A memorandum of a partial payment indorsed by the holder on the back of a promissory note is neither a contract nor any part of a contract, but a mere acknowledgment, in the nature of a receipt. . . ."

Appellant, Lizzie L. Foster, also contends that C. E. Hammans, in assisting Robert M. Foster in the sale of his farm, was acting as a real estate agent and not entitled to charge Judge Foster any commission because he, C. E. Hammans, had not complied with the provisions of Act 148 of the Acts of the General Assembly of 1929. This act was in effect at the time the transaction occurred between C. E. Hammans and Judge Foster and § 1 of the act is as follows: "It shall be unlawful for any person, firm, partnership, copartnership, association or corporation to act as a real estate broker or real estate salesman in Arkansas or to advertise or to assume to act as such real estate broker or real estate salesman without first having complied with every provision of this act and having secured a regular, valid license issued by the Arkansas Real Estate Commission authorizing the performance of such acts." Act 148 also contains the following provision: "No recovery may be had by any broker or salesman in any court in this state on a suit to collect a commission due him unless he is licensed under the provisions of this act and unless such fact is stated in his complaint."

The statute referred to above was not invoked by appellants as a defense in the court below. In other words, it is raised as a defense for the first time in this

court. This court ruled in the case of *Bolen* v. *Farmers' Bonded Warehouse,* 172 Ark. 975, 291 S. W. 62, (quoting syllabus 3) that: "Issues not raised by the pleadings nor by requested instructions will not be considered on appeal."

We cannot agree with the learned attorney for appellants that he raised this question in the lower court by asking for a peremptory instruction.

No such issue was raised below either by the pleadings or by request for instruction and appellant is precluded from raising it upon appeal to this court.

Lastly, appellants contend that the judgment should be reversed because the set-off is barred by the three-year statute of limitations. Pope's Dig., § 8928. This is not a separate suit for a commission on the sale of real estate earned in 1929, but it is pleaded as a set-off against a note which appellees owe to appellant, Lizzie L. Foster, which is permissible under the rule announced in *Missouri & N. A. Ry. Co.* v. *Bridewell,* 178 Ark. 37, 9 S. W. 2d 781, and *Stephens* v. *Springfield Business College,* 144 Ark. 641, 215 S. W. 622.

Further, we do not regard the plea of the statute of limitations as applicable in closed transactions. We think the transaction in question was closed when Judge Foster accepted the services of C. E. Hammans in effecting the sale of his farm and when Judge Foster agreed to pay and offered to pay C. E. Hammans $500 for assisting him in making the deal. Being a closed and completed transaction, there was no outstanding claim for the statute to run against.

Finding no error, the judgment is in all things affirmed.

4-6750 162 S. W. 2d 480

Opinion delivered May 18, 1942.

Hill, Fitzhugh & Brizzolara, for appellant.

Warner & Warner, for appellee.

SMITH, J. Appellee Johnston brought this suit to recover on two accident insurance policies issued to him by appellant insurance company. Each policy insured him against loss resulting from bodily injury effected directly and independently of any other cause through external, violent and accidental means, subject to the provisions and limitations in the policies. One of these provisions was that the policies did not cover accident, injury, disability, or death caused, directly or indirectly, wholly or partly, by bodily or mental infirmity or any other kind of disease. On February 11, 1941, about 7:30

p. m., appellee was seriously injured when he fell out of a taxicab in Memphis. It is admitted that his left hip was broken by the fall, and that he has since been totally and continuously disabled.

About two weeks before his injury appellee began to suffer pain in his left hip while bearing weight thereon, and upon advice of his physician he commenced to use crutches. His right leg was not affected. Appellee's physician advised him to go to the Campbell Clinic in Memphis for examination and treatment, and on February 10th he acted upon this advice. He left Fort Smith, accompanied by his wife, in his car about 2:30 p. m. Mrs. Johnston drove from Fort Smith to Paris, when appellee took the wheel and drove the remaining distance, about 260 miles, to Memphis, where they arrived about 10:30 p. m. On the next day, after spending the night at a hotel, appellee drove out to the clinic, where he was examined and X-rayed, and about noon was advised that he had Paget's disease, which the doctors testifying in the case defined as a chronic degenerative condition of the bones, in which there is an overgrowth of part of the bones and degenerative changes in other parts of the bones, the exact cause of which is not known. The medical testimony was to the further effect that the disease varies with the individual cases, but that persons afflicted with it ordinarily live their usual expectancy, and that the disease does not ordinarily cause the afflicted person to fall.

After this first examination appellee was told to return to the clinic the following day for further examination and treatment. The afternoon was spent in shopping, and appellee was fitted for a suit of clothes, and that night he and his wife started to a show. They went to the theater in a taxicab, and it was upon leaving the cab that appellee sustained his injury, which he testified occurred in the following manner: He and his wife were on the back seat of the cab, he being on the right side. The cab stopped about 1½ or 2 feet from the curb; the driver opened the rear door, and appellee got up from his seat and put his crutches on the pavement to alight, and he then tripped or stumbled in some manner, falling

head first out of the cab, down on the pavement between the curb and the cab. He was in the act of getting out of the cab when the accident occurred; the driver opened the door and he fell out of the cab on the pavement, falling forward out of the cab through the open door. He thought that when the cab stopped he probably put his weight on the right foot and a little on his left and stood up inside the cab, putting the crutches down on the pavement between the cab and the curb, and he then pitched or fell forward from the cab, striking his head in falling against an advertising sign on the edge of the curb. He thought he probably hooked his heel on the edge of the cab and tripped or stumbled, causing him to fall head first out of the cab.

With the assistance of his wife, appellee walked into the lobby of the theater, where he fainted. After regaining consciousness he was taken to the clinic, where his left hip was again X-rayed and found to have been broken. The X-ray pictures demonstrate that appellee's injury resulted from the fall; the pictures taken before the fall did not show a fracture; those taken after the fall did disclose a fracture.

In contradiction of this version of the manner in which appellee was injured, given by him at the trial from which is this appeal, there was offered in evidence a statement signed by appellee, and also the complaint filed in his behalf against the taxicab company. This statement contradicts materially the testimony given by appellee at the trial; but the complaint does not. The complaint was predicated upon the proposition that the chauffeur driving the cab failed to give appellee the assistance in alighting from the cab which he should have done, and that the chauffeur was negligent in the manner in which he had parked the cab. These conflicts, such as they are, presented a question for the jury. Evidently, the jury attached but little weight to the statement, in view of its inaccuracy and the circumstances under which it was obtained.

An operation was performed during the morning of the 13th, at which time a Smith-Peterson nail was introduced across the fracture of the neck of the femur to hold

it in position. Both of appellee's legs were placed in casts, extending from the middle of his body down to and over his feet, and weights were placed on his feet to maintain proper position. Opiates were constantly used to make the pain endurable, and for ten days appellee slept the major part of the time. He remained in the hospital until April 14th. There developed an extreme case of nausea, caused by the use of the opiates and the shock from the injury.

Appellant's claim agent, who prepared the statement, called upon appellee on February 20th, which was just a week after the operation, and he remained there about an hour and a half, during which time he wrote the answers given by appellee to the questions asked, and from the notes thus made the statement was prepared which appellee signed the following day. Appellee's wife was in the hospital room intermittently during this interview, and she told the claim agent her husband was in no condition to make a statement, and that appellee would fall asleep between questions asked him, when he would be aroused by another question.

We conclude, therefore, that the jury had the right to accept as true appellee's version of the manner in which he sustained the injury, disregarding the statement which he had signed.

In this connection, it may be said that the testimony does not show that appellee had become disabled. He had no trouble with his right leg, and used crutches to avoid the pain caused by placing weight on his left leg. During the two weeks he used crutches before going to Memphis he continued to perform his usual and customary duties, going back and forth to his office and getting in and out of his car two or three times every day without assistance, and he drove his car to and from the clinic on the day of his injury.

There was a verdict and judgment for the benefits provided for in the policies, with statutory penalties and attorney's fees, from which is this appeal.

It is provided in each of the policies that "This insurance shall not cover accidents, injury, disability,

death or other loss caused directly or indirectly, wholly or partly, by bodily or mental infirmity. . . . or by any other kind of disease." And it is earnestly insisted that under this exemption from liability a verdict should have been directed in favor of the appellant insurance company, for the reason that appellee's disease was a contributing, if not the sole, cause of his injury.

Two physicians testifying in appellant's behalf expressed opinions supporting that contention; but their opinion is not conclusive of this issue, which was, at last, a question of fact to be determined by the jury. The basis of their opinion appears to have been that appellee had a diseased leg, and used crutches, which made him less agile. The surgeon at the clinic who performed the operation testified that it would not be anticipated that appellee would fall in getting out of the cab merely because he had Paget's disease and was using crutches, and that even though appellee did not have normal agility there was no reason why he would fall under ordinary circumstances, and that while a person using crutches moves slower he moves with greater care, and it was not to be expected that appellee would fall in getting out of the cab.

The court gave of its own motion all the instructions given in the case, and refused to give any other, to which action exceptions were duly saved. These instructions read as follows:

"1. If you find from a preponderance of the evidence that the plaintiff in alighting from the taxicab suffered a hip injury therefrom, then the question for you to determine is whether the injury was approximately caused through external violent and accidental means directly and independently of other causes, or that said injury was caused by the physical condition of the plaintiff at the time.

"2. If you find from a preponderance of the evidence that he sustained a broken hip while attempting to alight from the taxicab, and you further find that said injury was the proximate cause of his disability, then you are instructed to find for the plaintiff, unless you

find that he was afflicted with Paget's disease, and that said disease wholly or in part directly or indirectly contributed or concurred in causing him to fall.

"3. The fact that plaintiff had Paget's disease might have been a necessary element in producing the fall, yet such disease alone does not deprive the plaintiff of the right to recover if you further find from a preponderance of the evidence that the proximate cause of the fall was an accident.

"4. If you find from the evidence in this case that the plaintiff's physical condition at the time he was riding in the taxicab contributed or concurred either directly or indirectly, wholly or in part to his fall, then in such event the plaintiff is not entitled to recover and you must find for the defendant. In other words, if the fall sustained by the plaintiff was not the direct and proximate cause of the injury, but that the same resulted in whole or in part from his physical infirmities, to-wit, Paget's disease, then you are instructed that the plaintiff would not be entitled to recover.

"A. Proximate cause as is used in these instructions means the immediate, efficient cause without which the result could not and would not have happened."

After giving these instructions the court gave orally the usual instructions on burden of proof, etc., to which no objection was made.

In our opinion, these instructions declared the law as favorably to appellant's defense as it had the right to ask.

Many cases from other jurisdictions, and all of our own cases, on the subject, are cited in the briefs of opposing counsel. We find it unnecessary to go beyond our own cases, and we cite only one other case, that of *Clay County Cotton Co.* v. *Home Life Ins. Co. of New York,* 113 Fed. 2d 856, for the reason that it cites our cases bearing directly on the issue under consideration. These are: *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A., N. S., 493; *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174, 167 S. W. 845; *Pacific Mutual*

Life Ins. Co. v. *Smith,* 166 Ark. 403, 266 S. W. 279; *Missouri State Life Ins. Co.* v. *Barron,* 186 Ark. 46, 52 S. W. 2d 733; *National Life & Accident Ins. Co.* v. *Shibley,* 192 Ark. 53, 90 S. W. 2d 766; *Prudential Ins. Co.* v. *Croley,* 199 Ark. 630, 135 S. W. 2d 322.

Counsel for appellant cite cases which conflict with these, but we adhere to the rule which our own cases have declared. These all follow and approve the case of *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A., N. S., 493. This Meyer case has been cited and approved by so many cases in our and other jurisdictions that counsel for appellee say it is now in accord with the weight of authority.

In the Clay county case, *supra,* the facts were that the insured was afflicted with a number of diseases, all of a serious nature, and the opinion quotes from one of the briefs the statement that the insured was a "frail physical shell, slowly dying upon his feet." The insured mounted and rode a horse, whose cavortings accentuated and precipitated the heart trouble from which the insured suffered, resulting in his death. The opinion states that "The question presented is whether death resulted solely from bodily injury caused by external means of an accidental or violent nature." The district court had directed a verdict in favor of the insurance company, which was reversed on appeal, it being said that "Under the liberal rule of the Arkansas decisions, the case should have been submitted to the jury."

Our latest case on the subject is that of *Prudential Insurance Co.* v. *Croley,* 199 Ark. 630, 135 S. W. 2d 322, which reaffirms the holding in the Meyer case, *supra,* and repeats the quotation there appearing from the case of *Freeman* v. *Mercantile Mutual Accident Ass'n,* 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, reading as follows: "The law will not go further back in the line of causation than to find the active, efficient, procuring cause of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions."

In the Croley case, just cited, the policy sued on contained this clause: "Accidental death benefit shall be

payable upon receipt of due proof that the death of the insured occurred . . . as a result, directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means, of which . . . there is a visible contusion or wound on the exterior of the body. Provided, however, that no accidental benefit shall be payable if the death of the insured resulted . . . directly or indirectly from bodily or mental infirmity or disease in any form."

The insured in that case was injured as a result of an automobile accident on a cold rainy day. He was taken to the hospital, where, in violation of instructions, he exposed himself to the elements a second time, and as a result of this imprudence contracted pneumonia, from which he died. The testimony of the attending physician was that the exposure, which included getting wet on the day of the injury, had some bearing on the later development of pneumonia, as did also a pre-existing asthmatic bronchitis from which the insured was a sufferer. Yet, notwithstanding this undisputed testimony, we held that the trial judge, sitting as a jury, was warranted in finding that the cause of death was the injury received in the automobile accident.

So, here, we think the testimony warranted the giving of the instructions herein set out and the finding of the jury, based thereon, that appellee's fall from the cab was an accident for the consequences of which the insurer was liable; and this is true although the jury might have found that appellee's hip would not have been fractured if he had not been afflicted with Paget's disease. However, the testimony of the surgeon who attended appellee is to the effect that a fall such as appellee sustained might have broken the hip even though appellee had not been afflicted with Paget's disease.

It is argued that the policies sued on do not insure against accidents, but only against bodily injuries caused through accidental means. This contention is decided adversely to appellant's contention in the case of *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. 2d 364. The opinion in that case recites the contention there made, "that there is a technical difference between

the term 'accident' and the term 'accidental means,' as used in the policy sued on and in the constitution and by-laws of the association.'' The question arose over an instruction which told the jury that the terms ''accident'' and ''accidental means'' were synonymous, each meaning happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected. In approving this instruction it was there said: ''It would be unreasonable for the court to give a construction to the contract which it is manifest was not contemplated by the parties when the policy was issued and which would defeat the evident object of the contract of insurance. If the association had wished that the terms 'accident' and 'accidental means' should have had different meanings, the contract of insurance should have given the insured warning of that fact. The court correctly instructed the jury in accordance with the principles of law above announced. If the association used the terms 'accident' and 'accidental means' as synonymous, it cannot now complain that the court gave them the same construction.''

We conclude that the testimony, under the instructions set out above, sustains the finding that appellee's injury was the result of an accident within the meaning of the policies, and the judgment will, therefore, be affirmed.

GREGSON *v.* THE PEOPLES EXCHANGE COMPANY.

4-6760 162 S. W. 2d 485

Opinion delivered May 18, 1942.

Horace Sloan and *Frank Sloan,* for appellant.

Lamb & Barrett and *Frierson & Frierson,* for appellee.

HUMPHREYS, J. On November 18, 1941, one of the appellees, W. H. Smith, brought suit in the chancery court of Craighead county, western district, against appellants on $1,000 note and against appellant, B. F. Gregson, for the balance due upon a $5,815 note. It was alleged in the first count of the complaint that on May 9, 1939, appellants executed their note to the Citizens Bank of Jonesboro, Arkansas, for $1,000 due December 1, 1939, with interest from maturity at 10 per cent. per annum until paid; that said note was assigned to appellees and is unpaid; that appellants executed on the same date a second mortgage on certain lots in Bono, Arkansas, which was their homestead and a first mortgage on their automobile to secure said note and prayed for a judgment against them on the note and a foreclosure on the mortgage to pay same.

And he alleged in the second count of his complaint that appellant, B. F. Gregson, executed another note for $5,815 to the Citizens Bank of Jonesboro, Arkansas, payable on demand, or if no demand be made, on the 15th day of October, 1939, with interest from maturity until paid at 6 per cent. per annum; that, with the exception of certain credits, the note is unpaid and that appellee, W. H. Smith, is the owner of same; and he prayed judgment against B. F. Gregson for $4,577.25, with interest. There was a prayer for costs and all other proper relief, and for consideration of the two others in the complaint as one suit.

On December 4, 1940, appellants answered the complaint denying all the material allegations thereof, and alleged that appellee, W. H. Smith, was not the owner of the note and mortgage set out in count one; that said instruments never became operative, that they were not supported by consideration; that there was a failure of consideration therefor and they incorporated in their answer the allegations of the cross-complaint hereinafter set out. The answer further alleged that appellee, W. H. Smith, was not the owner of the note described in count two of the complaint, incorporated therein the allegations of the cross-complaint hereafter set out, and averred that the note was intended to express the correct amount of an overdraft due by appellant, B. F. Gregson, to Peoples Exchange Company, Bono, Arkansas; that the said note was illegal; that said note had been paid by 1939 and 1940 operations of a gin known as the Caraway Gin by H. H. Smith and by other payments. There was a prayer for judgment and costs in the answer.

For counter claim against appellee, W. H. Smith, and cross-complaint against Peoples Exchange Company, H. H. Smith, Teresa J. Smith, his wife, and S. V. McKinney, as cross-defendants, the appellants alleged:

1. That Peoples Bank Company of Bono, Arkansas, had no power to loan money; that its corporate name was changed on June 6, 1939, to Peoples Exchange Company; that H. H. Smith was president and Ray L. Stevens secretary of said banking company.

2. That H. H. Smith is the son of W. H. Smith and Teresa J. Smith the wife of H. H. Smith, joined because of possible dower interest in property involved.

3. That J. L. Craft contracted in writing to sell a certain described cotton gin, referred to as the Caraway Gin Co., to B. F. Gregson, in 1938, subject to the $5,000 deed of trust to Buckeye Cotton Oil Company, for a total purchase price of $10,000 ($5,000 thereof by assumption of said deed of trust, and balance of $5,000 to be paid to Craft), payments to be made as bales were ginned at said gin at rate of $2.50 per bale, deed of trust to be paid before Craft was to receive any payment.

4. That Gregson paid about $1,400 during 1938 on said deed of trust; that the original contract of purchase by Gregson had been lost; that Gregson spent several hundreds of dollars repairing the said Caraway Gin; that Gregson had, by permission of Peoples Bank Company of Bono, Arkansas, created during the 1938 ginning season an overdraft of around $4,000; that said bank had no power to loan its deposits; that Gregson had never been returned his checks or statements and did not know the exact amount of the overdraft. Demand that original records be produced by said bank.

5. That about May 9, 1939, H. H. Smith, president, and Ray Stevens, secretary, demanded that Gregson pay at least $1,000 on his overdraft; that said parties went to Citizens Bank of Jonesboro and applied for a $1,000 loan; that S. V. McKinney, vice-president of Citizens Bank, advised that loan papers be executed and he would try to get the said bank's loan committee to approve such a loan; that the notes and mortgage were made and delivered to Citizens Bank; that Citizens Bank did not make the loan; that no consideration was paid for the note and there was a complete failure of consideration.

6. That later H. H. Smith presented to Gregson a printed note form and asked him to sign it, stating that he was going to fill it in for the exact amount of the overdraft to keep the bank examiners from getting on him; that it was filled in by Smith for an incorrect

amount; demand that cross-defendants produce original records to establish correct amount; that note was illegal.

7. That, in the spring of 1939, H. H. Smith, as president, and Ray L. Stevens, as secretary of Peoples Bank Company, asked Gregson in presence of J. L. Craft to turn over the Caraway Gin to be operated by H. H. Smith for the said bank, all profits to be applied to overdraft until it was paid, and then the gin to be returned to Gregson; Gregson agreed with consent of Craft, his vendor; that H. H. Smith took charge of the said gin, operating it during 1939 and 1940, making during 1939 about $4,000, and during 1940, about $5,000; that no profits were applied to the said overdraft, but were instead wrongfully converted to his own use by H. H. Smith in violation of his agency.

8. That before July 3, 1939, but after the foregoing agreement, J. L. Craft traded to S. V. McKinney the balance due upon the purchase price by Gregson, McKinney thereby becoming the owner of the said balance.

9. That Craft and wife made a deed of the gin to H. H. Smith, without Gregson's knowledge, on July 3, 1939, making correction deed to same on January 2, 1940. Smith made notes to McKinney totaling $12,000 for McKinney's advances of money to pay Buckeye Cotton Oil Company debt, new improvements and assumption of purchase money debt assigned by Craft to McKinney with 6 per cent. interest per annum, H. H. Smith and wife, Teresa J. Smith, making mortgage to secure said notes on July 3, 1939, and correction mortgage on January 13, 1940; that all of this was done without Gregson's knowledge.

10. That W. H. Smith, under certain parol agreement, paid off deposit claims of Peoples Exchange Company and assumed control of assets of Peoples Exchange Company.

11. That the $1,000 note in suit never became an asset of said bank; that H. H. Smith, as agent for W. H. Smith, told S. V. McKinney in August or September, 1940, that the note belonged to his father, and McKinney,

in reliance thereon, indorsed it without recourse; that W. H. Smith was not a holder in due course and there was complete failure of consideration.

12. That the correct amount of the overdraft, if it is held recoverable, should be ascertained by the court; that Peoples Exchange Company, W. H. Smith and H. H. Smith should be required to credit the profits from operation of Caraway Gin on the overdraft, and pay over any balance to B. F. Gregson; or, in the alternative, that all of the profits should be paid to B. F. Gregson.

13. That H. H. Smith be found to have violated his duty by taking Caraway Gin deed to himself and be declared a trustee for Gregson; that legal title be divested from him and vested in B. F. Gregson; that, since H. H. Smith has converted the equity in the gin property to his own use, a receiver should be appointed.

The prayer of the cross-complaint was: (1) that note and mortgage in count one of complaint be canceled as having no legal effect, and for the reason that appellee, W. H. Smith, was never the owner of same; (2) that note in count two of complaint be canceled; that overdraft be held illegal and not recoverable, but if recoverable that its exact amount be determined; that Peoples Exchange, W. H. Smith and H. H. Smith be required to account for and credit the overdraft, not only the payments thereon, but also the 1939 and 1940 gin profits from operation of the Caraway Gin; that the cross-complainants have judgment against them with interest for excess of said profits over the overdraft; or, in the alternative, judgment for full amount of profits with interest; (3) that cross-complainant, B. F. Gregson, be declared equitable owner of Caraway Gin and H. H. Smith constructive trustee of same; that title be divested out of H. H. Smith, with possible dower of Teresa J. Smith, and vested in cross-complainant, B. F. Gregson; (4) that S. V. McKinney be required to answer and state balance remaining unpaid on his mortgage to determine its status; (5) that a receiver be appointed; (6) that cross-complainants have decree for costs and all other proper relief.

An answer was filed to the cross-complaint denying each and every material allegation thereof.

The cause was submitted to the court upon the complaint, answer, counterclaim and cross-complaint, the answer to the cross-complaint, the testimony introduced in the form of depositions by the respective parties and the exhibits to the pleadings and testimony.

Exhibit "A," appearing in the record, relates to a sale of the Caraway Gin by J. L. Craft to B. F. Gregson and is as follows:

"Exhibit A. Contract entered into on July 28, 1938, between J. L. Craft, first party, and B. F. Gregson, second party.

"First party, upon payment of consideration hereinafter set out, agrees to transfer gin premises referred to as P. S. Osborne Gin (specifically described) to second party. In consideration of such sale, second party promises to pay first party the sum of $10,000, payable as follows:

" 'The entire sum of $10,000 shall be payable weekly during the ginning season at the rate of $2.50 per bale for each and every bale of cotton ginned at said gin premises. The deferred portion of the purchase price shall bear interest from this date until paid at the rate of 8 per cent. per annum and said payments shall continue for such period as will be required for paying said $10,000 with interest at the rate of $2.50 per bale for all cotton ginned on said premises. Default in the payment of said $2.50 per bale as herein provided shall entitle first party or his assigns to declare the remaining portion of the purchase price due and payable immediately and to take possession of the premises. Receipt of $1 of the above referred to purchase price is this day acknowledged.'

"Second party agrees to pay taxes and to insure gin and equipment with whatever company and for whatever amount is agreeable to both parties.

"It is understood that there is a first mortgage on said gin equipment to the Buckeye Cotton Oil Company, in the sum of $5,000, which first party agrees to pay. If first party fails to pay as agreed, second party shall be credited upon the purchase price for any sum he may be

required to pay. The Buckeye Cotton Oil Company to have the refusal of any cotton seed sold from the gin.

"While possession is this day delivered to second party, he to have exclusive control, management, and direction of said gin property in the future, title shall not become absolute in him until the purchase price is paid in full, but shall be and remain in first party.

"Should second party fail to keep premises insured, to pay premiums or to pay taxes, such default shall entitle first party to accelerate due date of remaining portion of the purchase price, or pay such insurance and taxes, or either, and apply net proceeds paid by second party towards reimbursement.

"Witness our hands and seals in duplicate the date hereinabove mentioned.

"J. L. Craft, First Party.

"B. F. Gregson, Second Party."

Exhibit "B," appearing in the record, is a modification of the contract, which is as follows:

"This contract today made and entered into by and between J. L. Craft, as first party, and B. F. Gregson, as second party, witnesseth:

"Whereas, on July 28, 1938, the parties entered into a written contract pertaining to one acre of land and a cotton gin and equipment located at Caraway in Craighead county, Arkansas, and in which contract it is provided . . . that the second party shall pay to the first party, weekly, $2.50 per bale for each and every bale of cotton ginned at said gin, same to be applied to the payment of an indebtedness of $10,000 owing by the second party to the first party, and

"Whereas, it is recited in said contract that said property is subject to a deed of trust executed by the first party and his wife to Leslie Gardner as trustee for the Buckeye Cotton Oil Company for the sum of $5,000, and which indebtedness remains unpaid, and

"Whereas, the parties hereto now desire to modify the provisions of said contract to such effect that instead of the second party paying to the first party $2.50 per

bale weekly for each and every bale of cotton ginned, the second party will sell and ship to said Buckeye Cotton Oil Company at Memphis, Tennessee, all cotton seed originating and accumulating at said gin and that the net proceeds thereof sufficient to pay to said Buckeye Cotton Oil Company two notes for $1,000 each due in the fall of 1938 owing by the first party to said Buckeye Cotton Oil Company, and that after the full payment of said two $1,000 notes and interest out of the proceeds of the sale of said cotton seed then the second party will pay to the first party $2.50 weekly per bale for each and every bale of cotton ginned by the second party at said gin, provided, it is understood by the parties hereto that if the second party do not gin as many as 800 bales of cotton at said gin during the ginning season of 1938, then the above payments shall be reduced proportionately as between said 800 bales and the number of bales actually ginned.

"It is agreed that said contract dated July 28, 1938, is not modified or amended to greater extent than as herein specifically stated, and that in all other respects said contract shall continue and remain as written.

"Witness our hands this 6th day of August, 1938.

"J. L. Craft, First Party.

"B. F. Gregson, Second Party."

Based upon the pleadings, testimony and exhibits to both, the trial court on January 6, 1942, found:

"That appellee, W. H. Smith, should recover $1,000 with interest at ten per cent per annum from December 1, 1939, from appellants, B. F. Gregson and Vada Gregson; that said sum is a lien, subject only to a first lien of Citizens Bank of Jonesboro, upon certain lots in Bono, Arkansas; that said lien should be foreclosed and the property sold subject to the first lien; that said judgment is also a lien upon a certain Chevrolet sedan, which should be foreclosed."

The court then rendered a decree in favor of appellee, W. H. Smith, against appellants, B. F. Gregson and Vada Gregson, for the sum of $1,000 with interest from

December 1, 1939, until paid, at 10 per cent. per annum; that said sum is declared a lien upon certain lots in Bono, Arkansas, and upon a certain Chevrolet sedan, which is hereby foreclosed, including dower and homestead rights of Vada Gregson.

The decree then provided for a sale of the mortgaged property subject to a first mortgage thereon, in favor of the Citizens Bank of Jonesboro, to satisfy the judgment if same were not paid in 20 days and also provided the manner of sale in detail.

The court further found that B. F. Gregson is indebted to the appellee in the sum of $4,577.25 with interest at 6 per cent. per annum from October 15, 1939, being the balance due upon a certain promissory note made by B. F. Gregson on April 1, 1939, to the Citizens Bank of Jonesboro, and decreed that appellee, W. H. Smith, have and recover from appellant, B. F. Gregson, the sum of $4,577.25 with 6 per cent. interest from October 15, 1939, until paid.

Appeal has been duly prosecuted to this court from the findings and decree of the trial court.

Testimony, in the form of depositions, was introduced responsive to practically every issue joined in the pleadings except the issue joined as to whether the Peoples Exchange Company, W. H. Smith and H. H. Smith should be required to account for and credit the overdraft with profits from the operation of the Caraway Gin in the year 1939 and subsequent years and whether the title to the Caraway Gin be divested out of H. H. Smith and vested in B. F. Gregson. Upon these issues the testimony was not fully developed until the issue of liability upon the counterclaim and cross-complaint was finally determined by the court.

The record in this case reflects that the "Peoples Bank of Bono," Arkansas, was a cooperative bank, organized under the Act of 1921. The act was amended in 1937 by the legislature so as to require the bank to change its name and the name was accordingly changed to the "Peoples Exchange Company." All the stock in the Peoples Bank of Bono, the name of which was subsequently

changed to that of the Peoples Exchange Company of Bono, was acquired by Ray L. Stevens who operated the institution individually for quite a while. He then sold one-half interest in the institution to H. H. Smith in 1937, and it was operated after that time by the two of them. During the operation of the institution appellant, B. F. Gregson, who had purchased the Caraway Gin in his own name and an undivided interest in what was known as the Shady Grove Gin, became indebted to the institution by overdrafts and executed a note to the Citizens Bank of Jonesboro on blanks of the Citizens Bank of Jonesboro in the sum of $5,815, which note matured October 15, 1939. This note was intended for and delivered to the Peoples Exchange Company and became in fact one of its assets. The institution was in need of ready money and B. F. Gregson, who was very friendly to the institution and desired to help it out, agreed that he and his wife would execute a second mortgage on their homestead in Bono and their Chevrolet sedan to the Citizens Bank of Jonesboro who indicated that they would lend them $1,000 to pay upon the note covering the overdraft. This note and mortgage was executed on May 9, 1939, by B. F. Gregson and Vada Gregson, his wife, to the Citizens Bank of Jonesboro, maturing December 1, 1939, and same was delivered to Ray Stevens for the purpose of getting $1,000 in cash from the Citizens Bank of Jonesboro and applying the same on the overdraft note. When Stevens offered the note to the Citizens Bank of Jonesboro the directors refused to make the loan on the ground that it was a second mortgage on real estate and Stevens then took the note to his own institution and placed it in a box and entered a credit on the overdraft note for $1,000.

Appellants contend that since the Citizens Bank of Jonesboro would not accept the note and mortgage and pay Stevens the actual money for same, Stevens or his institution had no right to treat it as the property of his institution and credit the overdraft note with the amount. The sole purpose on the part of B. F. Gregson and Vada Gregson in executing the note and mortgage was to obtain a credit on the overdraft note for $1,000. After

the note and mortgage were executed they were turned over to Stevens and as the Citizens Bank of Jonesboro would not lend the money he placed the note and mortgage in his bank as an asset thereof and gave the credit on the overdraft note for the entire amount. No fraud was practiced on B. F. Gregson and Vada Gregson, his wife, and no injury done to them. They received the consideration for which the note and mortgage were executed when the credit of $1,000 was entered upon Gregson's note covering the overdraft, so we cannot agree with learned counsel for appellants that appellants received no consideration for the note and mortgage. We think that appellants are clearly estopped from interposing no consideration as a defense to the note and mortgage. To hold otherwise would put form above substance. Again, there would be no equity in canceling the note and mortgage as the undisputed evidence shows that at least $600 of the money constituting the overdraft was used to build the dwelling claimed as the homestead.

The trial court did not, therefore, err in refusing to cancel the note and mortgage and in rendering a judgment for the amount and a decree of foreclosure against the homestead subject to another mortgage thereon and in foreclosing the lien against the automobile.

Appellants next contend that the trial court erred in rendering a judgment for the balance due on the overdraft note for a number of reasons. One reason assigned is that the note was executed to the Citizens Bank of Jonesboro and not to the Peoples Exchange Company. This is a technical defense without merit to sustain it. All the evidence shows that the overdraft note was the property of the Peoples Exchange Company. The record reflects that the error occurred on account of using blanks of the Citizens Bank of Jonesboro. The Citizens Bank of Jonesboro was very friendly to the Peoples Exchange Company and assisted it in many ways. Although the two institutions operated independently of each other it would not be an unreasonable inference under the record made in this case to denominate the Peoples Exchange Company as an adopted child of the Citizens Bank of Jonesboro. Another reason assigned is that the note

was executed in blank with the understanding that the correct amount of the overdraft would be inserted in same. Our conclusion, after reading the evidence very carefully, is that it was completely executed when delivered, including the correct amount of the overdraft. It is true that a representative of the banking department, at the request or demand of appellants, examined the books of the Peoples Exchange Company and found several small errors in arriving at the amount of the overdraft of which B. F. Gregson should have a credit of $321.30. The representative of the banking department, Mr. Winters, explained how these errors were made, none of which indicate that any fraud was practiced upon Gregson in determining the amount of the overdraft covered by the overdraft note. Attorneys for appellees state in their brief, on page 51, that: "If this court deems it proper to accept the testimony of the accountant and give Gregson credit for the trifling difference we will not complain, but by this concession we certainly do not concede that the amount of the note really is subject to attack, in view of all the various elements of ratification and estoppel shown in this case."

It may be the accountant is correct and, since attorneys for appellees do not object, we will modify the decree by allowing a credit of $321.30 with interest thereon at 6 per cent. per annum from the date of the overdraft note. We do not think under the record made in this case that the court erred in giving W. H. Smith judgment for the balance due on the overdraft note on the theory that the Peoples Exchange Company did not own the note. Of course, if the Peoples Exchange did not own this note, W. H. Smith was not entitled to a judgment on same. He was not an innocent purchaser of the note for value before maturity. He took the note as well as the $1,000 note subject to all the defenses appellants had to the note or notes against the Peoples Exchange Company. There is no question under the record made that W. H. Smith paid a complete and adequate consideration for the assets of the Peoples Exchange Company. The representative of the bank commissioner had listed the two notes as assets for the Peoples Exchange Company and

W. H. Smith paid $7,573.84 with which to pay off the depositors of the bank except his own deposit and that of the Stevens family. He refused to pay this amount over until all parties interested in the Peoples Exchange Company waived any and all interest they might have in the bank. Appellants argue that W. H. Smith got nothing for the reason that the bank commissioner did not take over the Peoples Exchange Company and administer same through the chancery court. The Peoples Exchange Company was not taken over by the bank commissioner for the reason that W. H. Smith paid all the depositors and obtained waivers from all parties interested in the Peoples Exchange Company and there was no necessity for an administration of the affairs of the Peoples Exchange Company. In fact this institution was never declared insolvent. The affairs of the bank were settled with the aid and assistance of the bank commissioner and everyone interested therein, so we do not think appellants could interpose the defense against the collection of the note or notes the manner in which the affairs of the Peoples Exchange Company were wound up.

The only other contention of appellant, B. F. Gregson, that the trial court erred in rendering judgment on the overdraft note against him is that it was the duty of the Peoples Exchange Company under his agreement with it or its two owners that it would take over and manage the Caraway Gin and apply the profits thereon to the payment of the overdraft, and that if it had applied the profits earned by H. H. Smith to the payment of the overdraft it would have more than liquidated same. In other words, it is the claim of B. F. Gregson that he owned an equity in the Caraway Gin under his purchase contract thereof from J. L. Craft at the time he delivered the Caraway Gin to H. H. Smith, which had never been foreclosed against him. The record is so conflicting upon how this equity in the Caraway Gin got out of B. F. Gregson and how his interests or equity got into H. H. Smith that it is impossible to draw any correct conclusion relative to the matter. The record reflects that B. F. Gregson's management of the Caraway Gin, after he purchased it from J. L. Craft, was a losing proposition

in its operation. B. F. Gregson never paid any part of the purchase money and only about $1,500 on the $5,000 mortgage to the Buckeye Cotton Oil Company and during his management accumulated or became responsible for an overdraft to the Peoples Exchange Company for about $5,815 and a few hundred dollars in the way of repairs. The Caraway Gin was more or less an elephant on his hands so it is not surprising that he got rid of it. This contract of purchase and modification thereof was not in the nature of a deed and was not on the record. He could have voluntarily surrendered it to J. L. Craft in satisfaction of the purchase money he owed. According to the record the legal title to the Caraway Gin is in H. H. Smith by deed from J. L. Craft and Teresa Craft, his wife. That deed incorrectly described the property and another was made on January 2, 1940, by J. L. Craft and his wife, correcting the description. According to the record, J. L. Craft owned the legal title to the property by deed from P. S. Osborne and wife to Craft, dated January 11, 1937, which deed contained a vendor's lien, but this lien seems to have been paid on March 8, 1938. The gin property was subject to a deed of trust from J. L. Craft and wife for the benefit of the Buckeye Cotton Oil Company for $5,000. On July 3, 1939, H. H. Smith executed a mortgage to S. V. McKinney for $12,000 on the gin. The proceeds of this mortgage or a part of the proceeds was used to satisfy the mortgage to the Buckeye Cotton Oil Company and to make valuable improvements on the Caraway Gin. We have concluded that B. F. Gregson voluntarily surrendered all his equitable rights in the Caraway Gin under purchase from J. L. Craft and that it was then sold to H. H. Smith. We do not think it was turned over to H. H. Smith for the purpose of operating it and applying the net profits on the overdraft and then to turn the Caraway Gin back to Gregson. If this had been the understanding certainly Gregson would not have executed a mortgage on his homestead towards the liquidation of the overdraft, and certainly H. H. Smith would not have expended a large sum of money in making extensive improvements on the gin and most certainly would not have given a mortgage for $12,000 upon the

gin. If H. H. Smith had taken the Caraway Gin over to operate it for the benefit of B. F. Gregson and apply the net earnings on the overdraft, it is quite certain he would have demanded that they be credited on the overdraft before he executed a note to cover the entire amount of the overdraft and before he executed a note for $1,000 and mortgage on his homestead to apply upon the overdraft. On the contrary, immediately after turning the possession of the Caraway Gin over to H. H. Smith he left the community to seek employment and took no further interest in the operation of the Caraway Gin and no interest in whether it made money or lost money. It seemingly never occurred to him to claim that he turned the Caraway Gin over to H. H. Smith for the purpose of running it and paying the net proceeds on his overdraft until after he was sued upon the notes by W. H. Smith. Four or five disinterested witnesses testified that about the time Gregson turned the Caraway Gin over to H. H. Smith they were told by B. F. Gregson that he had sold his interest in the Caraway Gin and that anyone desiring employment at the gin would have to see H. H. Smith. It is true that the trial court in his opinion found that B. F. Gregson had forfeited his rights or equity under his purchase contract of the gin from J. L. Craft. Of course, equity abhors forfeitures and there is nothing in the contract and modification thereof providing for a forfeiture. Rather than to have found that B. F. Gregson had forfeited his equity under the contracts he should have found and said that B. F. Gregson voluntarily surrendered his contract in settlement of the purchase money and to relieve himself from the payment of the outstanding debts he had assumed in the contract against the Caraway Gin.

We think, after a thorough consideration of all the testimony, that the trial court reached the correct result and rendered a decree in keeping with the preponderance of the evidence. The judgment and foreclosure decree against B. F. Gregson and Vada Gregson, his wife, is in all things affirmed and the judgment against B. F. Gregson is modified by allowing a credit of $321.30, and as modified, is affirmed, and otherwise in all things affirmed.

JERNIGAN, BANK COMMISSIONER, *v.* TEXARKANA-FOREST PARK PAVING, WATER, SEWER & GAS DISTRICT NO. 1 OF MILLER COUNTY.

4-6746 162 S. W. 2d 492

Opinion delivered May 18, 1942.

[redacted]

Wallace Townsend and *Willis Townsend,* for appellant.

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

Wallace Townsend, for eight school districts owning bonds issued by appellee.

GREENHAW, J. This suit was brought to compel appellee district to levy and collect betterment assessments for the purpose of paying bonds which the district had issued.

Appellant candidly admits that this relief cannot be awarded unless the opinion in the case of *Texarkana-Forest Park Paving, Water, Sewer & Gas District No. 1* v. *State, use Miller County,* 189 Ark. 617, 74 S. W. 2d 784, is overruled. The parties refer to this case as the Texarkana case, and we will designate it by the same name.

That was a case in which the district and its receiver were attempting to secure state aid under the provisions of act 63 of the Acts of 1931. The relief prayed was denied upon the ground that the district had been organized under and by authority of act 183 of the Acts of 1927, which act was amendatory of act 126 of the Acts of 1923, as amended by act 645 of the Acts of 1923, which said act 183 was invalid for the reasons stated in the opinion above cited.

Act 63 of the Acts of 1931, under which state aid was sought, provided for a levy of six cents per gallon gasoline tax, one-sixth of which was to constitute a "county road fund," and provided that the State Treasurer, prior to disbursing such funds to the respective counties, should deduct the amount required to pay 75 per cent. of the maturing bonds issued by certain road improvement districts which had been organized under valid legislation.

The county judge of Miller county, in that capacity and as a citizen and taxpayer of that county, brought suit to restrain the State Treasurer from making any deductions from Miller county's allotments under act 63 of the Acts of 1931 for the appellant district, for the reason that the district had been organized under invalid legislation.

This contention was sustained, it being held that the district had no legal existence and was not, therefore, entitled to participate in benefits intended only for districts validly organized. An elaborate opinion was written by the Chief Justice, from which three members of the court dissented, and it is not thought that any useful purpose would now be subserved by repeating here the arguments leading to the conclusion stated. The question was further considered in an additional opinion, in which a motion for rehearing was denied. The present appeal partakes of the nature of an additional and belated motion for a rehearing; but it does not appear that any questions are now presented which were not there considered, save only the contention now made that the former opinion has, in effect, been overruled by the later opinion in the case of *Hollis & Co.* v. *McCarroll, Commissioner,* 200 Ark. 523, 140 S. W. 2d 420.

The argument in this respect is to the following effect. In the Texarkana case it was held that act 183 of the Acts of 1927 offends § 23 of article 5 of the Constitution, which provides that "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

The insistence is that the legislation upheld in the Hollis case, *supra,* (the extension of the state's right to collect the sales tax), was enacted in the same manner as was act 183, but was upheld notwithstanding the provisions of the section of the Constitution just quoted.

It is pointed out in the briefs of opposing counsel that the Texarkana case was cited in the briefs in the Hollis case to sustain the contention that the act extending the time for the collection of the sales tax—act 364 of the Acts of 1939—was invalid as offending against § 23 of article 5 of the Constitution. It was not thought so, and the Texarkana case was not referred to in the Hollis case, and we would not overrule the Texarkana case without indicating the intention to do so. But if we should now admit that we were in error in holding, in the Texarkana case, that § 23 of article 5 of the Constitution had been violated, that case (the Texarkana case) would still be controlling here, because it was there also held that the act under which appellant district was organized was invalid as being in contravention of Amendment No. 14 to the Constitution, which inhibits the enactment of local legislation.

A demurrer to appellant's complaint was sustained, and inasmuch as it is conceded that this decree must be affirmed unless the Texarkana case is overruled, we affirm that decision, being unwilling to overrule the Texarkana case.

McKINDLEY *v.* HUMPHREY.

4-6742 161 S. W. 2d 962

Opinion delivered May 18, 1942.

Hibbler & Hibbler, for appellant.

Paul L. Barnard and *J. S. Abercrombie,* for appellee.

HOLT, J. Eliza James (colored) died intestate January 6, 1941, at approximately eighty years of age. She left surviving eight adult children. Her husband died July 12, 1939.

In 1926, she purchased lot 7, block 7, Davis Addition to North Little Rock, Arkansas. The consideration for this property was $1,500, of which $400 was paid by Eliza James in cash and the remainder was evidenced by fifty-five notes in the amount of $20 each. September 7, 1940, Eliza James executed a deed conveying this property to her daughter, Carrie Humphrey, one of the appellees here.

May 26, 1941, complaint was filed in the Pulaski chancery court in which seven of the surviving children were named plaintiffs and Carrie Humphrey was named defendant. In the complaint it was sought to set aside and cancel the deed which Eliza James had executed in favor of her daughter, Carrie Humphrey, on the grounds: (1) That Eliza James at the time she executed

the deed was mentally incompetent; (2) that appellee, Carrie Humphrey, obtained the execution of the deed through fraud, imposition and duress; and (3) that plaintiffs bought said property "by their individual contributions, paid for the same, with the understanding and agreement among all of the heirs that Eliza James, the mother, and Lida James, the sister, who was to make her home with Eliza James and care for the mother, should have a home and the use of the property so long as each should live and, after the death of Eliza James, Lida James was to hold the property as trustee for the heirs and the property should then become the joint estate and property of the heirs and subject to their ownership and disposition."

Hattie Wilson and Flake James, at their request, were permitted to withdraw as plaintiffs and as defendants filed separate verified answers to the complaint in which they admitted that their mother executed the deed in question to their sister, Carrie Humphrey, appellee, denied all other allegations in the complaint, and specifically alleged that their mother was mentally competent when she executed the deed in question; that she was not influenced by fraud, imposition, or duress, but understood fully what she was doing and that she desired "to deed this property to her daughter, Carrie Humphrey, because of the financial assistance and personal attention rendered by Carrie Humphrey to her mother, Eliza James."

Appellee, Carrie Humphrey, filed separate answer admitting the execution of the deed conveying the property to her, but denied all other material allegations.

Upon a trial, at which the testimony of nineteen witnesses was heard, the court found the issues in favor of appellees and this appeal followed.

Appellants first argue that Eliza James was mentally incompetent, due to advanced age and physical infirmities, to execute the deed in which she conveyed the property in question to her daughter, Carrie Humphrey, and that Carrie obtained the deed through fraud, imposition and duress.

The rule governing in cases of this nature has been many times announced by this court. In *Atwood* v. *Ballard,* 172 Ark. 176, 287 S. W. 1001, the rule is clearly stated in this language: "If the maker of a deed, will or other instrument, has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting his own interests in dealing with another is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress, or undue influence, mental weakness whether produced by old age or through physical infirmities will not invalidate an instrument executed by him."

This court in the recent cases of *Johnson* v. *Foster,* 201 Ark. 518, 146 S. W. 681, and *Pierce, Guardian,* v. *McDaniel,* 201 Ark. 1097, 148 S. W. 2d 154, reannounced this rule.

On the record before us, while the testimony as to Eliza James' mental capacity is in conflict, we think the preponderance thereof supports the chancellor's finding. Two disinterested witnesses (both white) testified on behalf of appellees. W. M. Hudson, in the real estate business in Little Rock for the past thirty years, prepared the deed in question and was present along with F. E. Sutton, another real estate man, when Eliza James executed the deed. Quoting from his testimony: "A. She seemed to be all right; I didn't see anything wrong with her. Of course, she was feeble—more or less feeble, of course—what you would expect of anyone as old as she. I didn't think she was as old as they are talking about; I thought she was about seventy-five or eighty years old. Q. But you judged her to be thoroughly capable, mentally, of signing a deed when you attested it as a notary public? A. Yes, sir, I did. I am very careful about old people, especially. I want them to know what they are doing when they sign a deed."

F. E. Sutton testified that he was present along with W. M. Hudson at the home of Eliza James at the time she executed the deed; that "he (Mr. Hudson) read the deed over to her and she said, 'That is exactly what I wanted,' and signed it. She had as much sense at that time as I've got, and she wasn't any more feeble than any woman of her age; she knew exactly what she was doing."

The testimony of Carrie Humphrey, Hattie Wilson, two daughters, and Dr. Atkinson corroborated the testimony of Hudson and Sutton as to the mental competence of Eliza James. There were two other witnesses unrelated to appellee—Carrie Humphrey—whose testimony also tended strongly to corroborate appellees.

Twelve witnesses, including the five interested appellants, gave testimony which tended to show that Eliza James was mentally incompetent when the deed in question was executed. We think it unnecessary to attempt to abstract this testimony here for to do so would unduly extend this opinion. It suffices to say, however, that we find much of appellants' testimony conflicting within itself and not convincing. To illustrate, appellant, Ellie James, who contends that the property in question was to be divided equally among all the heirs upon the death of Eliza James, testified: "Q. Who is living in the house now? A. Lida McKindley and her two little girls that she promised to give the home to."

It is also our view that most, if not all, of the evidence supports the chancellor's finding that no fraud or imposition was practiced upon Eliza James by Carrie Humphrey in procuring the deed. We quote from the decree as follows:

". . . Eliza James was an elderly colored woman and, although at times weak and forgetful, she was ordinarily possessed of the average health, strength and mentality and judgment of a person of her age; that she had, for several years prior to September 7, 1940, declared it her desire that the above mentioned property be deeded to the defendant, Carrie Humphrey; that, on September 7, 1940, Eliza James, while in full possession

of her mental faculties and fully retaining in her memory without prompting, the extent and condition of her property and fully comprehending how she was disposing of same and to whom and upon what consideration, and being mindful of all of her children and her obligations to them, and their services for her and acting without the presence of any fraud, duress or undue influence, did execute a warranty deed to lot 7, block 7, Davis Addition to North Little Rock, Pulaski county, Arkansas, to Carrie Humphrey, conveying the fee simple title to said property to said Carrie Humphrey."

Appellant's final contention is that they bought the property in question with their own contributions, taking title in the name of their mother and with the understanding that their mother and Lida James McKindley (a sister) should have the use of the property so long as each should live and after the death of the mother, Lida James McKindley, was to hold the property as trustee for all the heirs. We cannot agree with this contention.

The record reflects that at the time Eliza James purchased this property a part of the consideration, amounting to $400, was paid by her in cash, and she executed fifty-five $20 notes to cover the balance of the purchase price.

Two of the boys, McCoy James and Ellie James, testified that they paid the fifty-five notes, which their mother had executed, as they became due. Carrie Humphrey denied that these notes were paid by McCoy and Ellie, but testified that they were paid by her mother.

Appellants contend that the evidence is sufficient to establish an implied or resulting trust by reason of the fact that by agreement between them and their mother they were to pay, and did pay, part of the purchase price of the property in question. There is no contention that the evidence is sufficient to establish an express trust, there being nothing in writing to evidence it.

In *Marrable* v. *Hamilton,* 169 Ark. 1079, 277 S. W. 876, this court said: "It has become the settled doctrine of this court that, in order to constitute a result-

ing trust by reason of the payment of purchase money, the payment must be made at the same time or previous to the purchase and must be a part of the transaction. In other words, the payment must be prior to, or contemporaneous with, the purchase so as to make it a part of the same transaction, and a trust will not result from payments subsequent to the consummation of the purchase. *Sale* v. *McLean,* 29 Ark. 612; *Red Bud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; *Hunter* v. *Feild,* 114 Ark. 128, 169 S. W. 813."

And in *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, fails within the statute of frauds, and cannot give birth to a resulting trust. *Bland* v. *Talley,* 50 Ark. 71, 6 S. W. 234."

And in *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 338, it is said: "It is a well settled principle that, while trusts resulting by operation of law may be proved by parol evidence, yet the courts uniformly require that such evidence be received with great caution, and that it be full, free and convincing. *Colgrove* v. *Colgrove,* 89 Ark. 182, 116 S. W. 190, 131 Am. St. Rep. 82; *Hunter* v. *Feild,* 114 Ark. 128, 169 S. W. 813. See, also, *Nevill* v. *Union Trust Co.,* 111 Ark. 45, 163 S. W. 162."

When all the testimony before us is considered, we think it falls far short of establishing a trust relationship, as contended by appellants, by that degree of clearness and certainty of proof required under the rules announced in the decisions of this court.

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

STATE, EX REL. ATTORNEY GENERAL, *v.* SEBASTIAN BRIDGE DISTRICT.

4-6697 161 S. W. 2d 955

Opinion delivered May 18, 1942.

Jack Holt, Attorney General, and *Millard Alford,* Assistant Attorney General, for appellant.

James B. McDonough, for appellee.

Neill Bohlinger, amicus curiae.

McHANEY, J. In *Sebastian Bridge District* v. *State Refunding Board,* 197 Ark. 790, 124 S. W. 2d 960, this court said: "Since taxpayers of the Fort Smith area have paid more than fourteen hundred thousand dollars

for a public bridge, and since acts 9 and 10 (of Special Session of 1938) were obviously intended as measures of relief to property owners, we think all bonds and interest maturing in 1938 should have been paid by the state." And we further said: "It is our view that the language in act No. 10 (of 1938) pledging the state to pay 'all such principal and interest when due,' was expressive of the legislative intent to assume the 1938 bond obligations, and the fact that some of the districts had funds on hand is immaterial." We there reversed the judgment of the Pulaski circuit court and directed that a writ of mandamus issue to the State Treasurer to pay a sum to appellee not to exceed $29,309.20, in addition to an outstanding state voucher for $14,765.80, the sum of which equaled the outstanding bonded indebtedness and interest of appellee, maturing in 1938, and also the whole amount of its outstanding bonded indebtedness, as this payment retired all of its bonds.

In *State Refunding Board* v. *Sebastian Bridge District,* 199 Ark. 944, 136 S. W. 2d 480, we held that, because the state did not pay the bond maturities of appellee on October 1, 1938, and did not pay same until January 27, 1939, during which time the bonds continued to bear interest amounting to $895.84, and costs of $105.40 were incurred by appellee in the former litigation, the state should pay the interest and costs incurred by its refusal to pay the amount due October 1, 1938.

This present action is one by the state to recover one-half the sum the appellee has on hand, resulting from the amounts collected by it from the sale of lands which it had acquired for delinquent taxes and from delinquent tax payments made to it, under the provisions of § 4 of act 330 of 1939, which reads as follows: "After all of the valid bonds and interest of any bridge improvement district have been paid in full, then all amounts collected from the sale of lands and from delinquent taxes shall be paid into the State Bridge Bond Retirement Fund. Provided, however, that bridge districts which have constructed bridges that are located within the corporate limits of towns of more than 2,500 inhabitants, shall only pay into the State Bridge Bond

Retirement Fund fifty per cent. of all amounts collected from the sale of lands and from delinquent taxes and shall retain the remaining fifty per cent. for maintenance and repairs of said bridges, as the State Highway Department maintains no roads or bridges within the corporate limits of towns with a population of 2,500."

The state has not paid the $1,001.24 adjudged against it for interest and costs in the case next above mentioned, and it seeks a credit for said amount against the amount to be here recovered. To a complaint praying this relief, a demurrer was interposed on numerous grounds and sustained. Appellant declined to plead further and its complaint was dismissed for want of equity.

We think the court correctly sustained the demurrer. The act above quoted is no authority for this action. One of the conditions of the act is "that bridge districts which have constructed bridges that are located within the corporate limits of towns of more than 2,500 inhabitants, shall," etc. Of course we judicially know that Fort Smith is a city of more than 2,500 inhabitants. We also know that appellee built a bridge across the Arkansas River, more than half of which is in Oklahoma and which part is not in Fort Smith. Therefore, it cannot be said that the bridge is "located within the corporate limits" of Fort Smith, and said act has no application to appellee district.

Another reason why said act 330 has no application here is that a reading of its title and the context of the body of the act shows that it is intended to apply prospectively and not retroactively. There is no express provision making it retroactive. The title of the act says it shall amend said act 9 of 1938 "and to provide for the payment of the maturing bonds and interest of bridge improvement districts, and to make appropriations therefor." The act could not affect appellee district in these particulars as the state had already paid all its bonds and interest on January 27, 1939, long before act 330 was enacted or became effective. It was approved March 15, 1939, but had no emergency clause, and became effective 90 days after adjournment of the legislature. A mere casual reading of the act shows it was to operate pros-

pectively, but if it did not, the rule is that statutes should be construed as having prospective operation only, unless a contrary intent is definitely expressed or necessarily implied from the language used. *Am. Refrig. Transit Co.* v. *Stroope,* 191 Ark. 955, 88 S. W. 2d 840; *S. R. Thomas Auto Co.* v. *Wiseman,* 192 Ark. 584, 93 S. W. 2d 138; *Roberson* v. *Roberson,* 193 Ark. 669, 101 S. W. 2d 961. Generally, the legislature is presumed not to have intended retroactive operation of a statute. *Coco* v. *Miller,* 193 Ark. 999, 104 S. W. 2d 209.

Therefore, the statute relied upon does not authorize the state to recover the surplus funds in the hands of appellee, realized from the sale of land or the collection of delinquent taxes, and the court correctly sustained the demurrer and dismissed the complaint as being without equity.

Affirmed.

NAKDIMEN *v.* BROWNFIELD, ADMINISTRATRIX.

4-6727 162 S. W. 2d 566

Opinion delivered May 25, 1942.

Martin L. Green and *Cleveland Holland,* for appellant.

G. Byron Dobbs, Pryor & Pryor and *Harper & Harper,* for appellee.

GRIFFIN SMITH, C. J. V. R. Brownfield died July 19, 1935. His wife (appellee here) was made administratrix of his estate.

Brownfield was vice-president and cashier of First National Bank at Greenwood, and became associated with I. H. Nakdimen. In 1921 Browning and Nakdimen orally contracted to operate Greenwood Motor Company, a Ford agency. Later a writing was executed, the two partners to share equally in profits. Brownfield agreed to make annual reports. Nakdimen's connection with the business was not generally known until July, 1935.

Brownfield, in 1932, borrowed $4,273.80 from Mrs. E. R. Bruton for partnership purposes. He executed a note signed "Greenwood Motor Company, by V. R. Brownfield." Eight thousand six hundred dollars was similarly borrowed from Dr. R. O. Bruton. Payments aggregating $722.50 were made on the note in favor of Mrs. Bruton, in eight installments from September 14, 1933, to April 27, 1934. From January 4, 1933, to June 28, 1935, forty-one payments amounting to $6,721.58 were made on the obligation due Dr. Bruton.

March 5, 1937, judgments were rendered by Sebastian circuit court against Nakdimen in favor of Mrs. Bruton for $5,353.86, and in favor of Dr. Bruton for $4,496.99. On appeal Nakdimen contended the trial court erred in overruling his motion to require the administratrix of Brownfield's estate to be made a party to the Bruton suits. The judgments were affirmed. *Nakdimen* v. *Bruton et al.,* 196 Ark. 1179, 112 S. W. 2d 974.

August 13, 1937, Nakdimen sued Margaret Brownfield as administratrix, alleging that V. R. Brownfield, until his death, had conducted the partnership business, having exercised supervision of account books and all financial transactions. It was asserted that when Brownfield died, the administratrix took charge of all records and assets. Nakdimen averred he had no personal knowledge of the manner in which the business had been conducted, except such information as had been gained through conversations with Brownfield, and that Brownfield had personally withdrawn $16,343.24, while payments of only $5,000 had been made to him. It was asserted the difference in Nakdimen's favor was $5,671.62, for which judgment was asked. An accounting was prayed.

A demurrer was sustained April 20, 1938, on the ground that the court was without jurisdiction.

In an amended complaint of April 29, 1938, Nakdimen omitted his prayer for judgment in a specific amount, but repeated the demand for an accounting. He alleged the partnership was indebted to him in a sum unknown.

The defendant's answer of October 10, 1938, was a general denial, coupled with the assertion that when Brownfield died the partnership was indebted to him in an unknown sum. Books, papers, all records and assets, were delivered to Nakdimen. Limitation was pleaded. The answer contained a petition that Nakdimen, as surviving partner, be required to account.

In a substituted answer of July 15, 1941, laches was pleaded, in addition to limitation and want of jurisdiction. There was an allegation that after Brownfield's death the administratrix made demand upon Nakdimen for $10,000, represented by note. It was paid without question.[1] Insistence is that when Nakdimen made this payment in 1935 he had full information regarding partnership accounts.

A final amendment to Nakdimen's complaint was filed July 25, 1941. Regarding the Bruton judgments, Nakdimen alleged that all assets of the partnership in his hands had been paid in satisfaction of obligations. In addition, he was compelled to advance $1,306 from private funds. Contribution for half this amount was demanded. Still another allegation was that Brownfield paid C. E. Osborn $1,401 from partnership funds for a lot in Greenwood, purchased for the firm. The administratrix had listed this property as an asset of Brownfield's estate. The property forfeited for taxes and was purchased by H. S. Nakdimen (appellant's son) as trustee.

J. C. Davis was employed by Nakdimen to make an audit of the motor company's business. He found all can-

[1] Profits of $20,000 had accrued to the partnership business. Nakdimen took his half in cash and borrowed Brownfield's $10,000 share.

celled checks, but no ledger, journal, or cash book. Davis testified that when the cancelled checks were found he did not look for additional data ". . . because assets of the company could be more accurately determined from the checks than from anything else."

Davis testified he received fullest coöperation from the administratrix, and added: "Even if I had found journals and ledgers, I would have taken the cancelled checks in preference to book entries any time." There was nothing, he said, to prevent Nakdimen from ascertaining the true status. In September, 1935, he showed Nakdimen what the partnership owed him, "to the penny." When asked if there were other books or records that would be of value in ascertaining the facts, Davis replied, "I don't think there are any."

In 1933 or 1934 the Greenwood Motor Company was sold to Bud Williamson, but it continued in business under the old name. This occurred about eighteen months before Brownfield died. Appellee insists that all records pertaining to the partnership business were delivered to Kagy, First National Bank cashier, who represented Nakdimen.

There is no evidence that Nakdimen presented an account to the administratrix. The first action seems to have been a proceeding for debt, based upon the Davis audit. Thereafter the complaint was amended in an effort to confer chancery jurisdiction by the demand for an accounting.

As a matter of law, Nakdimen, as surviving partner, was charged with the duty of accounting to Brownfield's estate. Death dissolved the partnership. *Luke* v. *Rhodes*, 117 Ark. 600, 176 S. W. 111.

In view of testimony given by Davis as auditor and witness for Nakdimen, to the effect that all existing records were in the surviving partner's hands and had been for several years, there is no information the administratrix can give. It is not alleged that Mrs. Brownfield had personal knowledge regarding any of the transactions. The demand for an accounting, therefore, is designed to procure chancery court approval of the audit Davis made

for Nakdimen. Jurisdiction could not be invoked for this purpose alone. Nor is it sufficient to say that title to the lot should be quieted. H. S. Nakdimen is admittedly his father's agent. The lot was sold on execution to satisfy a partnership debt, and is held by H. S. Nakdimen as trustee. No claim to it has been made on behalf of Brownfield's estate.

The decree is affirmed.

HUMPHREYS, J., (dissenting). This suit was brought in the chancery court of Sebastian county, Greenwood district, by appellant, surviving partner, against appellee, the administratrix of the estate of the deceased partner, V. R. Brownfield, for the adjustment and settlement of the partnership affairs between the partners themselves during the time they conducted the partnership business. It was not a suit to wind up the partnership after the death of V. R. Brownfield. It was the privilege and duty of the surviving partner, I. H. Nakdimen, to do that, and he did so by collecting the debts due the partnership and applying the proceeds thereof and the other assets of the partnership toward the partnership indebtedness. The assets of the partnership were not sufficient to pay all the partnership debts, so the unpaid creditors sued I. H. Nakdimen individually and compelled him to pay them. He then brought this suit not only for contribution from the estate of his deceased partner, but alleged and offered to prove that in the conduct of the partnership business by his deceased partner, he, his deceased partner, drew out of the partnership assets much more than appellant and prayed for an accounting between them. It was alleged that his deceased partner bought certain real estate with partnership assets and took the title thereto in his individual name, and that appellee as administratrix included in her inventory of the estate of deceased certain property whereas said property was purchased with partnership funds and was an asset of the partnership, and that the value of the real estate should be taken into account in a partnership settlement between them. It was also alleged that no partnership books were kept by the deceased partner as

it was his duty to do under the written contract of partnership between them, and that a partnership adjustment between them would have to be ascertained from an examination of bills receivable and bills payable, check stubs and returned checks covering a long period of time and prayed for a complete accounting and settlement between appellant and his deceased partner.

The trial court took the view that appellant as surviving partner should wind up the partnership and sue the administratrix of the estate of the deceased partner in a court of law for whatever amount he might conclude was due him. In other words, the court dismissed the complaint for want of equity.

I am of the opinion that the chancery court was the only court that had the jurisdiction to adjust the partnership affairs between the partners, and that no other court has jurisdiction to do so. This court said in the case of *Holloway* v. *Morris,* 182 Ark. 1096, 34 S. W. 2d 750, that: "No specific money claim or demand can exist in favor of one partner against another growing out of the partnership affairs until there has been a settlement and some amount found to be due from one to another. Hence, until the affairs of the partnership are wound up, the state of the account between the partners is inchoate and continuous." To the same effect is the case of *Evans* v. *Hoyt,* 153 Ark. 334, 240 S. W. 409.

In the case of *Luke* v. *Rhodes,* 117 Ark. 600, 176 S. W. 111, this court said: "The adjustment of partnership affairs is inherently a matter for the intervention of a court of equity, although a resort thereto is not necessary where the parties can adjust such matters themselves."

This court also said in the case of *Short* v. *Thompson,* 170 Ark. 931, 282 S. W. 14, quoting from page 933, that: "Equity jurisdiction is practically exclusive in proceedings for an account and a settlement of partnership affairs, and this includes for an accounting between the partners themselves."

This court also said in the case of *Tankersley* v. *Patterson,* 176 Ark. 1013, 5 S. W. 2d 309: "In a suit for

accounting and settlement of partnership affairs, the jurisdiction of equity is practically exclusive."

I think the trial court instead of dismissing appellant's complaint for want of jurisdiction should have tried the case upon its merits, and for that reason I am dissenting from the majority opinion in this case.

Mr. Justice SMITH and Mr. Justice MEHAFFY join me in this dissent.

PORTMAN *v.* STATE, EX. REL. WOOD, PROSECUTING ATTORNEY.

4-6823 162 S. W. 2d 67

Opinion delivered May 25, 1942.

House, Moses & Holmes, J. Paul Ward, Shouse & Shouse and *H. J. Denton,* for appellant.

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

MEHAFFY, J. This case was begun in the Baxter circuit court by the prosecuting attorney of the Sixteenth Judicial District, filing information charging Ben Portman, Mrs. Ben Portman, and Steve Highers with being engaged in the operation of an establishment in the town of Ellis, Arkansas, known as "The Chef." It charged that in said establishment public dancing was allowed, beer and wine sold, and gambling has been carried on; that in said establishment unlawful drinking of intoxicating liquors has been repeatedly carried on, quarrels have repeatedly arisen in and about the premises, affrays, fights and breaches of the peace have repeatedly taken place, in violation of the law of the State of Arkansas, by reason of which said establishment is a public nuisance.

The prayer of the petition was that the establishment be adjudged a public nuisance, and the court issue a temporary injunction ordering such establishment to be closed until such time as a trial may be held and upon a final hearing of this petition the temporary injunction be made permanent.

A copy was served on the appellants and a temporary order granted.

Appellants filed a demurrer alleging that the petition did not state facts sufficient to constitute a cause of action against said defendants, or either of them, or against the Chef Cafe or facts that would entitle the State of Arkansas, or authorize or entitle the court to grant or make an order adjudging said Chef Cafe to be a public nuisance, and the granting of such injunction and the closing of same as a public nuisance.

The court overruled the demurrer and defendants saved their exceptions.

Appellants then filed the following answer: "Now, come the defendants, Ben Portman, Mrs. Ben Portman, and Steve Highers, and each of them, and without waiving their demurrer, or their rights, and the rights of each of them, thereunder, but still insisting upon the same, and saving their rights thereunder, for their joint and separate answer and answers state:

"They deny, specifically, each and all, the allegations of the petition for temporary and permanent injunction for the closing of the 'Chef Cafe,' as a public nuisance. They, and each of them, deny that they, or either of them, have been guilty of the acts of misconduct alleged in the operation of said cafe or that any unlawful operation of same has been permitted by them, or that said cafe has become, or is, a public nuisance, as alleged by said petition."

The court made a finding of facts and entered judgment declaring that in said establishment beer and wine are sold and public dancing permitted; that gambling has been carried on and has been permitted to be carried on with cards, dice and punchboards; that the selling of beer and wine, together with the unlawful gambling, constitutes said establishment a public nuisance. The court ordered said nuisance to be abated for the period of one year; enjoined and restrained defendants from selling beer and wine or any other intoxicants in or about said establishment for a period of one year. The court enjoined and restrained defendant, Steve Highers, from occupying any part of said building and from having ingress or egress to any part of said building other than the cafe, which is accessible to the general public; that this order shall extend to any agent, attorney, employee, lessee or assignee of any and all of the defendants. The court ordered that defendants, Ben Portman and Mrs. Ben Portman, be allowed to continue the operation of the cafe business, but that no gambling be carried on; that they be allowed a period of two weeks in which to dispose of such stocks of wine and beer as might be on hand, but enjoined and restrained them from selling beer and wine and any other intoxicant in or about said building after the two weeks. The court further ordered that the basement room, which has been occupied by Steve Highers be by the sheriff padlocked and barred from ingress and egress of any and all persons save officers of the court, acting under authority of the court.

Motion for new trial was filed and overruled by the court, to which ruling defendants excepted. Defendants prayed and were granted an appeal to the supreme court, and the case is now here on appeal.

The law under which appellants were prosecuted in this case has been construed several times, and it would serve no useful purpose to review all those decisions. But in the case of *Foley* v. *State,* 200 Ark. 521, 139 S. W. 2d 673, the act under which the prosecution was had and the decisions of this court were reviewed. The constitutionality of the act was discussed, and the act was upheld. In that case the appellants contended that act 118 of 1937 was unconstitutional, first, because jurisdiction is therein conferred on the circuit and chancery courts to enforce the act, whereas chancery courts alone have such power. The court said that this court sustained act 109 of 1915, which conferred jurisdiction upon circuit and chancery courts to abate nuisances, as defined in said act.

The appellants in this case say that the state showed, and appellants, admitted, that certain punchboards and an Indian board were exhibited at the Chef Cafe three months prior to the date of the filing of the petition, but none thereafter. The officers took charge of the punchboards and Indian board and took them away, and of course they were not there afterwards.

It is also contended by appellants that the testimony of Rudolph Mallonee and his wife is unworthy of belief. But the credibility of witnesses was passed on by the court below, and we do not pass on their credibility nor the weight of their testimony. There is, however, sufficient evidence, without the testimony of the Mallonees, to justify the finding of the court.

The evidence shows that Mrs. Portman, one of appellants, owned the building, and that Ben Portman, her husband, owned the cafe. He testified that he had three punchboards for about a month before they were taken up, and that he and his wife punched most of the punches that are gone, as a matter of amusement. He did not say who punched the others, but he testified that the deputy prosecuting attorney had told him that the boards were all right, and that most every place in the county was operating them, and that it would be all right to shake dice for merchandise, punches on punchboards, or meals, and that he could see nothing wrong in it. This evidence

was denied by the deputy prosecuting attorney. Portman further testified that he gave a free punch with each dollar purchase and a shake of the dice, if they wanted it, to see whether they got two punches or none. If they got a punch that called for anything, they were paid in merchandise, no money changed hands.

It would make no difference whether they gambled in money or merchandise, it would certainly be gambling, if they did what appellants say they did. He further testified that he had a permit to sell beer and wine; that he had a nickelodian which furnished the music for dancing; that couples were permitted to dance as long as their conduct was proper.

It is true that appellants testified that there was no gambling, but they also testified that customers would shake dice and gamble for meals; that is, if the customer won he received his meal without paying for it, and if he lost, he paid for two meals.

The evidence, we think, is ample to show that there was gambling and dancing and drinking at the restaurant. Appellants kept an instrument to make music for customers to dance by. Moreover, it was the province of the lower court to pass on the credibility and the weight to be given to their testimony.

The order of the court permitted Mr. and Mrs. Portman to continue the operation of the cafe business, but prohibited gambling in said building. They were allowed two weeks within which to sell and dispose of such stocks of wine and beer as they had on hand, and they were enjoined from selling and allowing to be sold beer and wine or any other intoxicant in and about said building.

The court stated in his finding of facts that he was going to make an order closing the establishment for the period of one year and going to make an *addenda* to this order that the establishment be operated as a restaurant, and that the social dancing may go on as long as it is carried on right and lawfully, and the *addenda* will be to the further effect that while this building can be used for a restaurant, the basement and this gambling room will

be locked and closed for one year. The court further stated: "It is possible that the court will consider a motion to modify the order as to this particular room, if satisfied gambling will not go on, or be permitted, in it."

We have carefully examined all of the testimony, and we are of the opinion that there was ample evidence to authorize the court to find that gambling, dancing and the sale of intoxicating liquors was going on in the restaurant and to justify the order of the court.

The judgment of the court is, therefore, affirmed.

WALNUT GROVE SCHOOL DISTRICT NO. 6 *v.* COUNTY BOARD OF EDUCATION.

4-6770 162 S. W. 2d 64

Opinion delivered May 25, 1942.

Eugene W. Moore, Ben C. Henley and *J. Smith Henley,* for appellant.

Shouse & Shouse, for appellee.

SMITH, J. On October 17, 1941, the Boone County Board of Education, upon its own initiative and against the will of the directors and patrons of Walnut Grove School District No. 6, dissolved that district and annexed its territory to Harrison School District No. 1, and ordered the county treasurer to transfer its funds to Harrison School District No. 1, all pursuant to the provisions of § 1 of act 144 of the Acts of 1927.

This order of the Board of Education reflects the finding, which is not questioned, that "all conditions expressed in said act (144) had previously been carried out in detail. . . . and that the average daily attendance was below 15 during the last five-year period, during last year and during three months taught this year."

It is not questioned that the order of the Board of Education is valid, provided act 144 of the Acts of 1927 is now the law, and the sole question raised on this appeal is whether act 144 was repealed by subsequent legislation.

To reverse the order and judgment of the circuit court upholding the order of the County Board of Education it is insisted that act 144 was repealed by act 169 of the Acts of 1931, but, if not, that act 279 of the Acts of 1941 had that effect.

The chief insistence for the reversal of the judgment here appealed from is that act 169 of the Acts of 1931 repealed act 144 of the Acts of 1927.

Act 144 is entitled, "An act to establish a minimum length of school term, and for other purposes."

This act was considered and construed in the case of *Stobaugh* v. *County Board of Education*, 182 Ark. 675, 32 S. W. 2d 306, and headnotes to that case reflect that it was construed as follows:

"1. Schools and School Districts—Dissolution.—Under Acts 1927, No. 144, § 1, school districts may be dissolved without petition where their term has been less than 120 days in any school year, or where their average daily attendance does not exceed fifteen pupils; provided if the limit of school tax shall have been levied and the proceeds therefrom together with the available school funds are not sufficient to maintain such a length of school term and the children affected are so isolated that they will be deprived of school advantages by such dissolution, the county board can abolish only by a petition of a majority of the qualified voters.

"2. Schools and School Districts—Dissolution.—The county board may, without a petition, dissolve a school district which has not been having school for one hundred and twenty days in any school year and where the children affected had convenient access to school after consolidation of the districts."

This opinion was delivered prior to the passage of act 169 of the Acts of 1931, and as has been said the insistence is that act 169 repealed act 144, and that, therefore, the Stobaugh case is without effect and the act which it construed conferred no authority on the county board of education.

It is conceded that act 169 did not expressly repeal act 144, but the insistence is that act 169 was a codification of the school laws, which invalidated all school laws not included in it. It is also urged that §§ 34 and 44 of act 169 so directly conflict with act 144 that the repeal of the latter by implication necessarily follows. Counsel quotes from the case of *Standley* v. *County Board of Ed-*

ucation, 170 Ark. 1, 277 S. W. 559, as follows: "In the case of *Mays* v. *Phillips County,* 168 Ark. 829, 274 S. W. 5, 279 S. W. 366, we said: 'When there are two acts on the same subject, the rule is to give effect to both if possible. But, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and, even where two acts are not in express terms repugnant, yet if the latter covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first, it will operate as a repeal of that act.' "

The case from which we have just quoted cites a number of our own cases to the same effect; and we do not intend to impair this rule, which has been reaffirmed in later cases.

Sections 34 and 44 of act 169 of 1931 read as follows:

"Section 34. The county board of education shall have power to form school districts, change boundary lines thereof, transfer children from one district to another, dissolve school districts where the best interests of the school children justify it, and annex the territory of such dissolved district to another district or districts, and transfer funds from one school district to another, all in the manner and under the conditions provided in this act, and shall appoint all school directors in all school districts where the authority to do so has heretofore been conferred on any county judge of any county.

"Section 44. The several county boards of education shall have full power and exclusive right within their respective counties to form new school districts, dissolve existing school districts, add territory to or take territory from one or more districts and add it to other districts, or form it into a new district, consolidate school districts into another and new district, change the boundary lines of school districts, and do any and all matters and things pertaining to the creation, formation, consolidation, dissolution, and changing boundary lines of the school districts of their counties on the consent of a majority of the electors in each school district affected

as shown by petitions or elections as herein provided. No existing district shall be included in a new district under the provisions of this section unless a majority of the qualified electors of the district to be included, sign the petition, or, in case of an election, a majority of the voters in the election in the district, on the question shall favor it; provided, that said boards may, in their discretion, take a portion of one district and add it to another upon the petition of a majority of the qualified electors residing in such district from which the same is taken, leaving the remainder of such district intact as a school district; provided that territory not contiguous may be included in any district and a district or districts not adjoining may be added to or consolidated with another district or districts."

The insistence is that these two sections so completely cover the field that no circumstance is left in which act 144 may be operative.

The State Board of Education has not and does not so construe the legislation; the position of that department is that there has been and yet remains a field for the operation of act 144. The records of this department show that for the school year 1940-1941, 100 school districts enumerated less than 15 pupils; that 576 districts had an average daily attendance of 15 or less pupils; that 35 districts had an average daily attendance of from one to five; that 191 districts had an average daily attendance of from six to nine; and that 350 districts had an average daily attendance of from 11 to 15.

The position of the State Department of Education has been, and is, that act 169 applies to all districts at all times; whereas act 144 applies only to districts falling within its special provisions and which cannot or will not, through its electors, annex to another district for the benefit of its school children.

This administrative interpretation of the legislation is not, of course, conclusive; but it is not to be disregarded. At § 219 of Crawford's Interpretation of Laws it is said that "As a general rule executive and administrative officers will be called upon to interpret certain stat-

utes long before the courts may have an occasion to construe them. Inasmuch as the interpretation of statutes is a judicial function, naturally the construction placed upon a statute by an executive or administrative official will not be binding upon the court. Yet where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative officers, who are charged with executing the statute, and especially if such construction has been observed and acted upon for a long period of time, and generally or uniformly acquiesced in, it will not be disregarded by the courts, except for the most satisfactory, cogent or impelling reasons. In other words, the administrative construction generally should be clearly wrong before it is overturned. Such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight. It is highly persuasive." Among the numerous cases cited in support of this statement of the law is our own case of *Moore* v. *Tillman,* 170 Ark. 895, 282 S. W. 9.

It is a very close question whether act 169 repeals act 144; but we must keep in mind the strong presumption of law that repeals by implication are not favored. This presumption is reenforced by the following facts: section 196 of act 169 specifically repeals a large number of sections of Crawford & Moses' Digest, the digest then current. It repeals eight sections of Kirby's Digest, and then repeals nineteen acts passed at various sessions, seven of which were passed at the 1927 session of the General Assembly. Among the Acts of 1927 thus repealed is act 143, which fronts the page on which act 144 appears. Act 144 could hardly have been overlooked if the General Assembly had intended to repeal it also.

It was said in the case of *Pace* v. *State, use Saline County,* 189 Ark. 1104, 76 S. W. 2d 294, that "Where a statute expressly repeals specific acts there is a presumption that it was not intended to repeal others not specified. In such cases there is an implied approval of the statutes not specified as well as of an intention to leave them undisturbed." We conclude, therefore, that act 169 did not repeal act 144.

Was act 144 repealed by act 279 of the acts of 1941? This latter act, exclusive of its emergency clause, reads as follows: "Section 1. Hereafter no school district shall be consolidated with any other district or merged into a new district without consent of its electors, such consent to be ascertained in a manner now provided by law. This act shall apply whether or not the territory concerned in such consolidation or merger lies wholly within one county or whether it is in different counties; Provided, this act shall not affect any suit with reference to consolidation, merger or formation of new school districts, where an appeal is now pending in any of the courts of this state."

This act 279 very clearly forbids the consolidation of any district with any other district or its merger into a new district without the consent of its electors, which consent shall be ascertained in a manner now provided by law, and act 169, supra, provides how this may be done, a procedure not necessary here to recite.

But the primary and express purpose of act 144 is to dissolve any school district whose length of school term shall not be 120 days in any school year, or whose average daily attendance does not exceed 15 pupils. Act 279 does not profess to deprive the county board of education of this power. The board still has that power, and where, in the exercise of this power, a district has been dissolved, it ceases to exist. It is no longer a district. Act 279 applies to school districts that are *in esse*—to districts that are functioning. Such districts may not be consolidated or merged into a new district without the consent of its electors. Act 279 has no application to the territory of a district which has been dissolved and has ceased to exist. As to such territory the provisions of act 144 remain applicable, and under the provisions of that act the county board of education may "attach the territory so dissolved to adjacent school district or districts," with a proviso not applicable here.

It is true the action of the county board of education here questioned is reflected in a single order; but we perceive no reason why there should have been separate

orders, one dissolving the district and another attaching the territory of the dissolved district to another district. This was the action of the county board of education, although its action is reflected in a single order. Appellant district was first dissolved; thereafter its territory was attached to another district. Act 144 authorized this action, and act 279 does not inhibit that action, for the reason that its provisions apply only to districts whose identity and existence have not been destroyed by dissolution.

It follows, therefore, that the action of the circuit court, in upholding the orders of the county board of education, must be affirmed, and it is so ordered.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* HARRISON.

4-6758 162 S. W. 2d 62

Opinion delivered May 25, 1942.

Thos. S. Buzbee and *John M. Harrison,* for appellant.

L. Weems Trussell and *Ed F. McDonald,* for appellee.

HOLT, J. Appellee, Mrs. Bessie Harrison, sued appellants to recover for personal injuries alleged to have

been received by her when she fell while walking along a footpath on appellants' right-of-way near Leola, Arkansas. She alleged in her complaint that while walking in said footpath she "tripped over the rubbish which had been placed in the path by the agents, servants and employees of the defendant company, and was thrown violently to the bottom of a deep ditch along said right-of-way, breaking her left leg" and otherwise sustaining injuries, all due to the negligent acts of appellants.

Appellants answered with a general denial and affirmatively pleaded contributory negligence and assumption of risk on the part of appellee.

A jury awarded Mrs. Harrison damage in the amount of $500. This appeal followed.

The evidence stated in its most favorable light to appellee, as we must do, is to the effect that at the time of the injuries complained of she lived about two miles from Leola, Arkansas. At about ten o'clock at night appellee, in company with five of her children and some neighbors, was returning to her home from a political meeting in the town of Leola. As she walked along a footpath on appellants' roadbed and right-of-way, and a few feet from the edge of its crossties, she stumbled upon a piece of metal partly buried in the edge of the footpath and fell some twenty-five feet down the embankment, breaking her left leg and otherwise sustaining injuries. It was a bright night and she could see where she was walking. Those in her party were walking single file, some in front of and some behind her, when she fell. Her husband discovered the piece of metal in the footpath the following morning. This path had been used by her and the public for about twenty years. Subsequent to her injuries, and about two weeks before the cause was brought to trial, appellants erected signs along this path warning the public that the path was on the private property of the railroad company and to "keep off." There was other testimony tending to corroborate appellee.

For reversal appellants earnestly argue that the court erred in refusing to direct a verdict in their favor

as requested in their instruction No. 1. This challenges the sufficiency of the evidence to support the verdict. It is our view that the court erred in refusing, at the conclusion of the testimony, to instruct a verdict for appellants.

Under the undisputed testimony in this case appellee was a bare licensee at the time she was injured and comes clearly within the rule announced in the case of *Chicago, R. I. & P. Ry. Co.* v. *Payne,* 103 Ark. 226, 146 S. W. 487, 39 L. R. A., N. S., 217. In that case the facts are, in effect, similar to those presented here. The footpath in that case had been used for more than ten years by the public. There this court said:

"The undisputed evidence shows that appellee was a mere or bare licensee. She was using the footpath upon appellant's right-of-way for her own convenience, and not for any purpose connected with the business of appellants or for the common interest or mutual benefit of appellant and appellee. Appellant did no affirmative act to compel or induce appellee to use the footpath upon its right-of-way. It merely acquiesced in such use by appellee and the public. Under such circumstances it cannot be said that there was any implied invitation upon the part of appellant for the use of its right-of-way by appellee. Appellant therefore did not have to exercise ordinary care to make the pathway safe for appellee. . . .

"In *St. Louis, I. M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561, 92 S. W. 789, we said: 'The bare permission of the owner of private grounds to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises.' In *Arkansas & Louisiana Ry. Co.* v. *Sain,* 90 Ark. 278, 119 S. W. 659, 22 L. R. A., N. S., 910, we said: 'To bare licensees railroad companies owe no affirmative duty of care, for such licensees take their license with its concomitant perils.' *St. Louis, I. M. & S. Ry. Co.* v. *Ferguson,* 57 Ark. 16, 20 S. W. 545, 18 L. R. A. 110, 38 Am. St. Rep. 217; *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 69 Ark. 489, 64 S. W. 347; *Hobart-Lee Tie Company* v. *Keck,* 89 Ark. 122,

89 S. W. 112, 116 S. W. 183; *Little Rock & Fort Smith Ry. Co.* v. *Parkhurst,* 36 Ark. 371. See *Wright* v. *Boston & Albany Rd.,* 142 Mass. 296, 7 N. E. 866; *Plummer* v. *Dill,* 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; Elliott on Railroads, § 1249; *Galveston Oil Company* v. *Morton,* 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611."

And in the recent case of *Chicago, R. I. & Pac. Ry. Co.* v. *McCauley,* 112 S. W. 2d 625 (not reported in the Arkansas Reports), this court again reaffirmed the rule announced in the Payne case. There this court said: "Appellant had nothing to do with making the pathway, and did no affirmative act inviting her and the others to do so. The duty, therefore, did not rest upon appellant to exercise ordinary care to make the pathway safe for the use of appellee and others who made it. The most that appellant did was to acquiesce in the use of the pathway by appellee and others."

Appellee relies strongly for affirmance of the judgment on the Dooley case, *supra,* and *Missouri Pacific Railroad Company* v. *English,* 187 Ark. 557, 61 S. W. 2d 445. An examination of these cases discloses a clear distinction between them and the instant case. In the Dooley case the railroad company had constructed and maintained some steps over a fence along its right-of-way, which were used by the public, and which had been allowed to become defective. In the English case the facts disclose that there was a footbridge more than thirty years old that had been maintained by the railroad company on its premises and which had fallen into disrepair. In these two cases, upon which appellee relies, there was an implied invitation to the public to use the property of the railroad company. Therefore, the duty was imposed on the railroad company to use ordinary care in maintaining the steps and bridge in question.

In the instant case, as has been indicated, the facts are entirely different. Here there was no implied invitation to appellee to use the footpath in question. She was using this footpath on appellants' right-of-way for her own convenience and for no purpose connected with the business of appellant or for the mutual benefit of her-

self and appellant. There is absent any affirmative act on the part of appellant to induce appellee to use the footpath in question.

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

MEHAFFY and HUMPHREYS, JJ., dissent.

The Chief Justice concurs.

WALLS, ADMINISTRATOR *v.* PHILLIPS.

4-6738 162 S. W. 2d 59

Opinion delivered May 25, 1942.

Culbert L. Pearce, for appellant.

Roth & Taylor, for appellee.

McHaney, J. Appellant Walls is the administrator in succession of the T. J. Phillips estate, and the other appellant is Alpha Phillips, the widow of T. J. Phillips. Appellees are his collateral heirs and the widows of two deceased brothers and the wife of appellee J. D. Phillips.

In *Phillips* v. *Phillips,* 203 Ark. 481, 158 S. W. 2d 20, appellant, Alpha Phillips, hereinafter referred to as appellant, "sought to have her dower rights in certain lands, belonging to her deceased husband, awarded to her and also for an accounting for her share of the rents and income derived from said lands subsequent to her husband's death." A decree denying her the relief sought was affirmed in said case.

T. J. Phillips died intestate January 12, 1938, without issue. Two days later his brother, A. B. Phillips, was appointed, qualified and served as administrator of his estate until his death on November 14, 1939. Two other brothers, Theo Phillips and J. D. Phillips, signed the administrator's bond. Theo Phillips died November 30, 1936. Appellant Walls was appointed administrator in succession March 1, 1940, and, on April 4, 1940, he and appellant brought this action against the estate of A. B. Phillips, first administrator, his bondsmen or their heirs,

alleging mismanagement of said estate and failure to account to appellant for the statutory allowances and dower due her. The prayer was for an accounting and for judgment for such amount as may be found to be due her. The answer was a general denial and pleas of the statute of limitations, of estoppel, laches, and *res adjudicata.* Trial resulted in a decree for appellees, with the exception that the court found, from reports of the administrator, A. B. Phillips, that he had received $236.99 more than he had accounted for, which amount was adjudged against appellees, with interest from April 19, 1937, at six per cent., and each side was taxed with one-half the costs. The complaint as to all other matters was dismissed for want of equity. The court found: "That as to all other assets and funds received and disbursed by the Administrator, as shown by said reports, the plaintiffs are not entitled to demand judgment—because of their long delay and laches in asserting said claims and demands, and that plaintiff Alpha Phillips is estopped from claiming dower for the reason that she participated, acquiesced in and had knowledge of the acts and conduct of the Administrator in the disposition of the personal estate."

In effect, this is a suit brought by appellants in the chancery court to falsify and surcharge the accounts of A. D. Phillips, first administrator of the estate of T. J. Phillips, deceased, and for judgment against his estate and against his bondsmen or their estates. A. D. Phillips and Theo Phillips are now both dead. For more than twelve years appellant permitted the estate of her husband to be administered by operation, management, sale, payment of expenses of administration, payment of debts for last illness and burial expenses, mortgaging of property to satisfy a judgment had against her husband in his lifetime, and the mortgage foreclosed to satisfy same, without ever demanding or receiving any part thereof as dower. Her right to dower in the real estate of her husband was decided against her in *Phillips* v. *Phillips, supra.*

The record here shows the personal estate of her husband at the time of his death to have amounted to

$283.98 cash in banks and one saw mill rig that sold, under a proper petition and order of the probate court, for $55.50, and the household furniture in the home in which they lived, and of which appellant has, at all times, been in possession and now is. The value of the furniture and house furnishings is not shown, but whatever it is, she has received the benefit of it. Therefore, the total personal estate amounted to $339.48, and the record shows that he was heavily indebted, to the extent of insolvency. At the time of his death, T. J. Phillips owed a judgment debt to the Union Bank & Trust Co. of $2,498.77, dated October 10, 1937, but which had been reduced, when the claim was probated, on March 23, 1928, to $2,147. He owed a probated claim to Gidenhagen of $419.54, which has not been paid. He also owed the following: to Peoples Bank, Searcy, $1,800, secured by mortgage, which was foreclosed; to Bank of Searcy, $1,000, secured by mortgage on the homestead, which was foreclosed; to the Commonwealth Building & Loan Association, Little Rock, $1,000, secured by a mortgage which was foreclosed. In addition, there were claims for his last illness, doctor, hospital, funeral and other bills totaling $706.70, all of which were paid by the administrator, reported to the court in his first settlement and approved by it and all of which was done with the knowledge of appellant and with her approval, or at least without objection from her.

One of the contentions made on this appeal is that appellant was entitled to $300 under § 80 and $150 additional under § 86 of Pope's Digest. These sections have reference to the personal estate only. Section 87 provides that: "The widow shall apply for such property before it is distributed or sold, and not after." We think appellant was clearly entitled to the allowance under § 80 if she had made timely application therefor, but not under § 86 as such additional allowance is conditioned by the provision therein, "when the estate is not insolvent," and it rather plainly appears that the estate was insolvent. Appellant never at any time applied for an allowance under § 80, until she filed this suit, more than 12 years after the administrator was appointed and nearly

five months after his death, long after all the personal estate in cash had been used to pay debts and claims and after the saw rig had been sold and used for like purposes. In the very recent case of *Barnes* v. *Cooper, Adm'r, ante,* p. 118, 161 S. W. 2d 8, we held the allowances provided by these sections were personal to the widow, and said "The right thereto is permissive, and, by § 87, 'The widow shall apply for such property before it is distributed or sold, and not after,' and this section applies to the allowance under § 86, as well as to that under § 80." The court, therefore, properly denied her claim for such allowances.

Appellant also contends that she was entitled to dower out of the proceeds of the mortgage loan secured from the People's Bank in the sum of $2,500, dated February 28, 1929. Conceding without deciding that she was so entitled at the time, it does not follow that she is now so entitled. This loan was secured for the specific purpose of paying off the judgment of the Union Bank & Trust Co., above mentioned, the details of which are set out in the former opinion in the case of *Phillips* v. *Phillips*. She made no claim to any part of this fund. She knew the purpose for which it was borrowed—to pay said judgment, which could not have been paid had she secured one-half of it by way of dower. In fact she signed a deed of trust on practically all the real estate to secure such a loan for the same purpose, but which was never consummated because some of the collateral heirs refused to sign. At that time the administrator, his bondsmen and appellant thought they could work out this indebtedness by refinancing it, and Theo Phillips assured her she would be able to save her home, which was also under mortgage, made by her husband and herself, and perhaps they would have done so, but for the great economic depression which followed shortly thereafter, resulting in the insolvency and liquidation of some of the banks at Searcy. So confident were these brothers of deceased, that they could accomplish this end, that they, A. P., J. D. and Theo Phillips, obligated themselves to pay same, and appellant executed the mortgage by acknowledging the same. We agree with the trial court that appellant is

now precluded from asserting any interest in the $2,500 loan both by laches and estoppel.

The complaint charged fraud and collusion on the part of the administrator and his brothers on his bond to dissipate and waste the assets of the estate. We think the allegations in this regard are too indefinite, too general in their nature, to constitute a sufficient averment of fraud, as fraud cannot be charged in general terms, without stating the facts and circumstances constituting it. As said in *Mock* v. *Pleasants,* 34 Ark. 63, found on p. 71, "Fraud is a term the law applies to certain facts, as a conclusion from them, and it is not in itself a fact." In *Fogg* v. *Arnold,* 163 Ark. 461, 260 S. W. 729, the late Judge Hart said: "It is unnecessary to cite authorities upon the rule, so often announced by this court, that a court of equity will not interfere with proceedings in probate courts for the settlement of an estate, except upon allegations of fraud or mistake. It is equally well settled that fraud or mistake cannot be charged without stating the facts and circumstances constituting it. It cannot be pleaded as a conclusion of law." The complaint alleged that the administrator "wrongfully and fraudulently" took credit in his first and second accounts for certain items therein set out without stating in what respect they were wrongful or fraudulent. Another allegation is that A. B., Theo and J. D. Phillips "wrongfully disposed of assets of said estate and wrongfully disbursed the proceeds derived therefrom, without authority from the probate court and in disregard for the rights" of the widow and creditors, but it does not allege what assets were wrongfully disposed of or what proceeds were wrongfully disbursed, or wherein either was wrong. But, assuming the allegations of fraud to be sufficient, the proof wholly fails to sustain them. The first account current was filed and approved in 1934. It is said no vouchers were filed as required by § 182 of Pope's Digest evidencing the items paid out, nor were there any claims against the estate properly presented to the administrator as required by § 100 *et seq.* of Pope's Digest. These failures to comply with the statute literally if there were such failures, are not sufficient to show fraud in allowing

and paying the claims. Nearly all the items challenged were for debts incurred during the last illness and death of decedent and for expenses of administration in the repair, upkeep, insurance and taxes on houses and farms, and when questioned about these items, she could not say that any one of them was fraudulent, or that the administrator or his bondsmen profited by them. The most she could say was that she didn't know. No fees of administration were charged and one of the brothers paid off a note of the decedent, made in his lifetime, with his own personal funds.

By the decree of the court, appellant was awarded judgment against appellees in the sum of $236.99, with interest at six per cent. from April 19, 1937. In all other respects the complaint was dismissed for want of equity. We agree that this action of the court is correct, and the decree is accordingly affirmed.

O'NEAL *v.* B. F. GOODRICH RUBBER COMPANY.

4-6762 162 S. W. 2d 52

Opinion delivered May 25, 1942.

Boyd Tackett and *Tom Kidd,* for appellant.

C. H. Herndon and *Alfred Featherston,* for appellee.

HOLT, J. August 31, 1931, appellee, B. F. Goodrich Rubber Company, sued appellant, W. A. O'Neal, and Tom O'Neal, as partners, doing business under the name of Red Ball Garage, to recover $353.50, balance due on account for merchandise. September 21, 1931, judgment by default was entered against W. A. O'Neal and Tom O'Neal in accordance with the prayer of the complaint.

September 2, 1941, the two O'Neals (defendants below) filed "Motion to Vacate Judgment," alleging as grounds therefor: Fraud in procuring the judgment; unavoidable casualty or misfortune preventing them from appearing or defending (§ 8246, Pope's Digest); that no summons was ever served upon either of the defendants; that they had no knowledge or information of the suit or of the judgment rendered; that they did not purchase any merchandise from the plaintiff (appellee); that the claim was barred by the statute of limitation; that appellee sold to the defendants automobile tires under a guarantee; that the tires did not meet the appellee's guarantee; that it became necessary for them to replace used tires with new ones and that if they had been given proper credit on these exchanges of tires, they would owe appellee nothing, and "Each of the defendants specifically denies that they were indebted to the plaintiff in any sum whatever" and "that they had at that time (when the judgment was rendered against them) and have now a meritorious defense to the alleged action."

November 19, 1941, there was a hearing on this motion to vacate the judgment of September 21, 1931. Quoting from the judgment of the court: ". . . the court finds from the evidence introduced that summons was

not served upon W. A. O'Neal or Tom O'Neal, but further finds that W. A. O'Neal had personal knowledge of the judgment being rendered within a short time after September, 1931, and finds that the said W. A. O'Neal is now estopped by his own laches from vacating said judgment. It is, therefore, by the court . . . decreed that the motion of W. A. O'Neal to vacate judgment is . . . denied, and the . . . judgment is hereby vacated and set aside as to Tom O'Neal."

W. A. O'Neal has appealed from the judgment as to him and appellee has cross-appealed from the action of the court in sustaining Tom O'Neal's motion to vacate the judgment as to him.

It is conceded that on September 21, 1931, when the judgment in question was rendered against W. A. O'Neal and Tom O'Neal, they were partners. The record before us reflects not only by the return of the officer, but by the recitals in the judgment of September 21, 1931, that W. A. O'Neal and Tom O'Neal were duly served with summons to appear in the action and this record *prima facie* must be taken to import absolute verity. *Moore* v. *Price,* 101 Ark. 142, 141 S. W. 501.

Before this judgment may be vacated it devolved upon the O'Neals to prove not only that they had not been properly served with summons, but they must allege and prove a meritorious defense, and that they did not know of the proceedings against them in time to make a defense.

In *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575, this court said: "Conceding . . . that the appellees were not served with process in the original suit, nevertheless appellees have failed to sustain their cause of action because they have utterly failed to show that they did not know of the proceedings in the original action in which judgment was rendered against them in time to make a defense. This was essential. In *State* v. *Hill,* 50 Ark. 458, 8 S. W. 401, Judge Cockrill, speaking for the court, said: 'One who is aggrieved by a judgment rendered in his absence must show not only that he was not summoned, but also that he did not know of

the proceeding in time to make a defense.' This language was also used in the case of *Moore* v. *Price,* 101 Ark. 142, 141 S. W. 501."

And in *H. G. Pugh & Co.* v. *Martin,* 164 Ark. 423, 262 S. W. 308, this court said: "Certainly, the court was justified in not vacating his decree unless facts showing fraud in the procurement of the judgment, or some valid defense to the action, were alleged. Section 6293, C. & M. Digest (now § 8249, Pope's Digest), provides that a judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment was rendered. It is the doctrine of this court that judgments on collateral attack will not be vacated until a meritorious defense is alleged and proved."

Appellant, W. A. O'Neal, approximately ten years after the rendition of the judgment in question, contends that he had no knowledge of it, is not guilty of laches, and that he has alleged a meritorious defense. We think none of these contentions can be sustained. We agree with the finding of the trial court that W. A. O'Neal had personal knowledge that the judgment in question had been rendered against him shortly after its rendition September 21, 1931. There is in evidence copy of the following letter written by attorney, Jerry Witt, to Lemley & Lemley, attorneys in Hope, Arkansas, who procured the judgment in question for appellee:

"November 17, 1941. Messrs. Lemley & Lemley, Attys., Hope, Arkansas. Gentlemen: Mr. W. A. O'Neal of O'Neal Brothers of Glenwood is in the office and shows me the letter just received from you with reference to a judgment of the Goodrich Rubber Company against his firm. I happen to know both of the brothers and their financial condition. They operate the station at Glenwood and I know that the Bank here at Mount Ida has a mortgage on all of the equipment and fixtures in the garage for around $2,000.

"Mr. W. A. O'Neal tells me that the Louisiana Oil Refining Company is not indebted to his firm, or either of them, but that on the contrary they owe the Louisiana

Oil Refining Company. I will say this for these men that they are honest and I believe as quick as they get out from under this mortgage to the bank that they will make you a substantial payment on the judgment, and I trust that you can give them more time. I cannot see how you can collect with a garnishment suit or by an execution at the present time. With best personal regards, I remain Yours Very Truly, Jerry Witt."

While this letter bears the date of November 17, 1941, we think it clear that by its contents, and other evidence in the record, the court was justified in finding that it was written November 17, 1931. W. A. O'Neal testified that at the present time and since 1934 he has been able to pay the judgment if required to do so. We think, therefore, the evidence establishes that W. A. O'Neal knew of this judgment at the time the letter was written and that he is barred by laches.

The textwriter in 34 Corpus Juris 263, § 488, announces the rule in this language: "A party who has knowledge of the judgment against him is required to exercise reasonable diligence in seeking to have it set aside, and his unexcused delay in making the application, amounting to laches, will justify the court in refusing the relief asked . . ." The case of *Awbrey* v. *Hoopes,* 145 Ark. 502, 224 S. W. 959, is cited in support of the text.

We are also of the view that neither W. A. O'Neal nor Tom O'Neal alleged and proved a meritorious defense as required. The trial court made no finding that either of these defendants (below) alleged or proved a meritorious defense. The effect of their allegations in their motion to vacate the judgment was that they did not owe the debt. While they alleged that they were operating under a guarantee with appellee, they did not set forth nor did they attempt to prove any of the terms of the alleged guarantee and their allegations amount to no more than conclusions of the pleader. No facts were alleged sufficient to show a meritorious defense such as would justify the vacating of this judgment as to W. A. O'Neal or Tom O'Neal, which they now attack collaterally approximately ten years after its rendition.

Accordingly the judgment against W. A. O'Neal on direct appeal is affirmed, and on cross-appeal the judgment in favor of Tom O'Neal is reversed and judgment will be entered here against him.

SMITH and MEHAFFY, JJ., dissent.

BAILEY *v.* STATE.

4254 163 S. W. 2d 141

Opinion delivered May 25, 1942.

Bruce Ivy, Reid & Evrard and *W. Leon Smith,* for appellant.

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

MEHAFFY, J. The appellant was charged in the circuit court of the Chickasawba district of Mississippi county, Arkansas, with the crime of murder in the first degree for the killing of P. C. Kitsmiller on September 30, 1941; was tried and convicted of the crime of murder in the second degree, and his punishment fixed at ten years in the state penitentiary. An appeal is prosecuted to this court to reverse said judgment.

The killing for which appellant was tried occurred on September 30, 1941. On that day there was held, in the city of Blytheville, Arkansas, the annual National Cotton Picking Contest. Many people attended this meeting. The killing occurred in what is known as the Midnight Inn, which is approximately one and a half miles north of Blytheville on U. S. highway No. 61. In leaving the scene of the cotton picking contest, it was necessary for appellant to pass the Midnight Inn on his way home in Pemiscot county, Missouri. On his way home appellant stopped at the Midnight Inn and went inside. The owners and operators of this inn were absent at the time of the killing and were operating a stand on the grounds at the Cotton Picking Contest, selling drinks and sandwiches. There were, at the inn, Edith Grizzell and Eloise Parks. The appellant did not know Kitsmiller before this time. At the time appellant entered the Midnight Inn there was no one in the cafe part except the two waitresses. The appellant ordered a bottle of beer, and it was served to him at the counter by the Parks girl. After drinking a portion of the beer appellant got up from the stool at the counter, went around the end of the counter and into the rest room. As he was going around the end of the counter he passed a man whom he did not know. He later learned that this was Kitsmiller. When appellant opened the door to the rest room the Grizzell woman was standing at the lavatory. The appellant owned and operated a place of business in Holland, Missouri.

It is alleged that the appellant has enemies who had several times sought to take his life, and that for that reason he went armed at all times. There is some conflict in the evidence as to what was said between the appellant

and the Grizzell woman when he went into the rest room, but the Grizzell woman slapped the appellant, and about this time Kitsmiller came into the rest room, struck appellant in the back of the head, knocking him across the rest room and into the bathtub.

There is evidence that the appellant apologized both to the Grizzell woman and Kitsmiller and shook hands with the deceased, and shortly thereafter left the building and deceased took his seat at the counter. Appellant shortly thereafter returned and, as he entered the door of the cafe, brandished a pistol and stated, in effect, that he was taking charge, walked over to Kitsmiller and shot him and then leaned over him and fired two more shots.

Information was filed by the deputy prosecuting attorney charging appellant with murder in the first degree. No preliminary hearing was had in the municipal court where the information was filed, but the circuit court convened in Blytheville on October 27, 1941, and appellant was arraigned on a charge of murder in the first degree on information filed by the prosecuting attorney in circuit court.

Thereafter, the appellant filed in the circuit court a motion for a continuance in which he alleged in substance that he had not had reasonable opportunity between the date on which Kitsmiller was killed and the date set for his trial in which to interview material witnesses nor to make any proper investigation in the preparation of his defense, nor to properly prepare for his defense.

The motion for continuance is quite long, and after a hearing, it was overruled by the court.

The court did not err in overruling appellant's motion for a continuance. This court has many times held that the question of a continuance in a criminal case is within the sound discretion of the court, and its action will not be disturbed on appeal, except where there is a clear abuse of discretion, which amounts to a denial of justice. *Smith* v. *State,* 192 Ark. 967, 96 S. W. 2d 1; *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946; *Martin* v. *State,* 194 Ark. 711, 109 S. W. 2d 676.

In the case of *Banks* v. *State,* 185 Ark. 539, 48 S. W. 2d 847, 82 A. L. R. 1051, this court said: "The first assignment of error is that the court erred in refusing to grant the defendant a continuance. The granting or refusing of continuance is within the sound legal discretion of the court, and this court will not interfere where there has been no abuse of that discretion." In support of this rule, the court cited the following cases: *Golden* v. *State,* 19 Ark. 590; *Edmonds* v. *State,* 34 Ark. 720; *Jackson* v. *State,* 54 Ark. 243, 15 S. W. 607; *Goddard* v. *State,* 78 Ark. 226, 95 S. W. 476; *Morris* v. *State,* 102 Ark. 513, 145 S. W. 213; *Bruder* v. *State,* 110 Ark. 402, 161 S. W. 1067; *Sease* v. *State,* 155 Ark. 130, 244 S. W. 250; *Adams* v. *State, supra.*

After the appellant had filed his motion for a continuance, he filed a petition for a change of venue.

Section 10 of art. 2 of the Constitution of the state of Arkansas, after providing for a trial in the county in which the crime shall have been committed, continues as follows: "provided that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of accused, in such manner as now is, or may be prescribed by law; and to be informed of the nature and cause of the accusation against him, and to have a copy thereof; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to be heard by himself and his counsel."

Section 3917 of Pope's Digest provides that any criminal cause may be removed to the circuit court of another county whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein. It is then provided how the application for change of venue shall be made.

Section 3918 reads as follows: "The application of the defendant for such order of removal shall be by petition setting forth the facts on account of which the removal is requested; and the truth of the allegations in

such petition shall be supported by the affidavits of two credible persons who are qualified electors, actual residents of the county and not related to the defendant in any way. Reasonable notice of the application shall be given to the attorney for the state. The court shall hear the application and, after considering the facts set forth in the petition and the affidavits accompanying it and any other affidavits or counter affidavits that may be filed and after hearing any witnesses produced by either party, shall either grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence."

The Constitution expressly provides that the venue may be changed to any other county of the judicial district in which the indictment is found upon the application of accused "in such manner as now is or may be prescribed by law." The court has a right not only to receive counter affidavits and consider them, but he has a right to hear the witnesses produced by either party, and shall either grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence.

The Constitution having provided that the change of venue may be had in the manner provided by law, it was perfectly proper for the court to consider not only the counter affidavits, but to hear the witnesses offered. The court is authorized to determine the truth of the matter, and he is certainly better qualified to pass on the application for a change of venue than is any one else.

This court recently said: "This court has ruled that, in order for an affiant to qualify as a credible person under the statute, he must be cognizant of the prejudice existing throughout the whole county, and not merely in portions thereof." *Hedden* v. *State,* 179 Ark. 1079, 20 S. W. 2d 119. The following cases are cited in support of the above rule: *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346; *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113; *Williams* v. *State,* 162 Ark. 285, 258 S. W. 386; *Mills* v. *State,* 168 Ark. 1005, 272 S. W. 671. See, also, *Avey* v. *State,* 149 Ark. 642, 233 S. W. 765.

"The statute contemplates that the subscribing witnesses shall have fairly accurate information concerning the state of mind of the inhabitants of the entire county toward the dfendant." *Speer* v. *State, supra.* This case also holds that it has been uniformly held that unless the trial court has abused its discretion in overruling a motion for change of venue, the order is conclusive on appeal. To support this rule the following cases are cited: *Bryant* v. *State,* 95 Ark. 239, 129 S. W. 295; *Ford* v. *State,* 98 Ark. 139, 135 S. W. 821; *McElroy* v. *State,* 100 Ark. 301, 140 S. W. 8. See, also, *Dame* v. *State,* 191 Ark. 1107, 89 S. W. 2d 610.

"Where local prejudice rendering impossible an impartial trial is made a cause for change of venue only in case its existence is established to the satisfaction of the judge holding the court, it is the consensus of opinion in criminal cases that the presumption of law is that a defendant can get a fair and impartial trial in the county in which the offense was committed, and that in order to overcome this presumption the defendant must show clearly that this cannot be done. Indeed, a change of venue in a criminal prosecution must be deemed a wrong to the public unless the necessities of justice to the accused require it, and before a court is justified in sustaining an application therefor on account of the prejudice of the inhabitants of the county, it must affirmatively appear that there is such a feeling of prejudice prevailing in the community as will be reasonably certain to prevent a fair and impartial trial." 27 R. C. L. 815.

The appellant has called attention to some cases in other jurisdictions. In some of those states the trial court has no discretion, but this court has repeatedly held that the judge, in passing on this motion, does have discretion and unless there is an abuse of this discretion, the judgment of the trial court will not be disturbed.

We have very carefully examined all the evidence and have reached the conclusion that the tiral court did not err in admitting or rejecting testimony. There is ample evidence to support the verdict and finding of the court.

The judgment is affirmed.

SMITH, J., (concurring). I concur in the affirmance of the judgment in this case, for the reason that, in my opinion, the trial judge was warranted in finding, from the oral examination of the supporting affiants, that they were not sufficiently advised as to the state of public feeling against appellant to constitute them credible persons within the meaning of the law.

In the case of *Hedden* v. *State,* 179 Ark. 1079, 20 S. W. 2d 119, it is said: "In order to obtain a change of venue to another county, by one charged with crime in any circuit court in this state, the statutes require that it must be made to appear by petition of the defendant, supported by the affidavits of two credible persons, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against him that he cannot obtain a fair and impartial trial therein. This court has ruled that, in order for an affiant to qualify as a credible person under the statute, he must be cognizant of the prejudice existing throughout the whole county, and not merely in portions thereof. *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346; *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113; *Williams* v. *State,* 162 Ark. 285, 258 S. W. 386; *Mills* v. *State,* 168 Ark. 1005, 272 S. W. 671."

But I do not concur in the view that the trial judge had the right to find whether appellant could obtain a fair trial in the county where he had been indicted.

The majority quote the excellent rule stated in 27 R. C. L., chapter Venue, § 35, p. 815. The General Assembly might well adopt this rule. Its adoption would prevent an abuse of the constitutional right to a change of venue. By § 10, of art. 2, of the Constitution it is provided that an accused shall be entitled to a change of venue "upon the application of the accused, in such manner as now is, or may be, prescribed by law." The General Assembly might, therefore, adopt what appears to be the general rule in other jurisdictions in regard to change of venue in a criminal case, that is, it has the power to do so.

By § 14342, Pope's Digest, it is provided that "Hereafter the venue of civil actions shall not be changed

unless the court or judge to whom the application for change of venue is made finds that the same is necessary to obtain a fair and impartial trial of the cause."

The General Assembly has the power to adopt the same rule in criminal cases; but the majority opinion renders this legislative action unnecessary if we are to adopt the rule stated in 27 R. C. L., quoted in the majority opinion, and which is apparently approved. But under the law, as it now exists and has been declared to be in many cases, the trial court, in criminal cases, may pass only upon the credibility of the persons who, by affidavit, support the petition for a change of venue.

In the case of *Ward* v. *State,* 68 Ark. 466, 60 S. W. 31, the trial judge resided in the county where the prosecution was pending, and upon denying the petition for a change of venue stated that "he knew the defendant could get a fair and impartial trial in Lee county, and that he would not permit two persons to come into court and recklessly swear to the contrary." This was held to be error, the petition being in proper form. In that case the prosecuting attorney proposed to show that the affiants were not credible persons; but the court denied the petition without hearing this evidence. Had the evidence been heard, and the finding made that the affiants were not credible persons, the motion could and should have been denied upon that finding.

It was said in the case of *Strong* v. *State,* 85 Ark. 536, 109 S. W. 536, 14 Ann. Cas. 229, that while the credibility of the affiants may be investigated, the truth or falsity of their evidence cannot be inquired into; and in the case of *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346, it was said that if the petition was supported by the affidavits of two credible persons an order for a change of venue must be made.

The case last cited defines "credible persons" within the meaning of our statute, and fully discusses and defines the discretion and duty of trial judges in passing upon petitions for change of venue. The case so fully disposes of the question that I quote from it rather extensively. It was there said:

"In a criminal case, when a petition for a change of venue and the supporting affidavits are in the form prescribed by statute, the only inquiry upon which the trial court may enter is as to the qualifications of the supporting witnesses; and if it be found that they come within the definition of the statute, as 'credible persons who are qualified electors, actual residents of the county and not related to the defendant in any way,' the court has no further discretion and the order for a change of venue must be made. The court may, however, in order to pass upon the credibility of the supporting witnesses, have them called before the court and examined. That is not the exclusive method of passing upon the question, but is the familiar one more often pursued in this jurisdiction. The court may inquire into the means of knowledge of the witness and as to the probability of the petitioner being able to obtain a fair and impartial trial, but only for the purpose of reaching a conclusion upon the credibility of the supporting witnesses. . . . It is true that the word 'reputable' is laid down by the lexicographers as synonymous with the word 'credible,' but the two words are not synonymous in the fullest sense and can not be treated as synonymous when considered in interpreting our statute on the subject of change of venue. A person may be of good repute in the community in which he lives, and yet, by reason of a reckless and inaccurate oath, based upon insufficient knowledge, fail to be a credible person within the meaning of the statute. A credible person is one who has the capacity to testify on a given subject and is worthy of belief; and one who lacks knowledge on the subject under investigation is not a credible person to be accepted as worthy of belief in that particular inquiry."

In addition to the Dewein case, *supra,* the majority opinion cites other cases, all of which are to the same effect, and no case to the contrary was cited. In other words, in passing upon a petition for change of venue, in proper form, the limit of the inquiry which the trial court may make is that of the credibility of the supporting affiants. If they are found not to be credible, the petition may and should be denied; but if they are found

to be credible the court is without discretion and must make an order changing the venue.

In addition to the cases cited in the majority opinion, all of which support the rule just stated, the opinion in the case of *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376, cites a number of others. The proper practice in such cases is there again extensively reviewed, and the opinion quotes approvingly from the opinion in the case of *Whitehead* v. *State,* 121 Ark. 390, 181 S. W. 154, as follows: "In the last case cited above (*Whitehead* v. *State, supra*) the court reviews the authorities and states the rule as follows: 'The trial court exercises a judicial discretion in passing upon the credibility of the affiants, but its discretion is limited to that question. When the petition for change of venue is properly made and supported, the court has no discretion about granting the prayer thereof, whatever the opinion of the court may be as to its truthfulness. The statute provides no method by which the court may determine the credibility of the affiants, but leaves the question to the court. A number of cases, however, have approved the practice of calling the affiants and examining them as to the source and extent of their information for the purpose of ascertaining whether or not they have sworn falsely or recklessly without sufficient information as to the state of mind of the inhabitants of the county as to the accused. But the cases also hold that the statute on this subject does not contemplate that the truth or falsity of the affidavits shall be inquired into, and that the only question for the determination of the court is whether or not the affiants are credible persons, and that all inquiry must be confined to that question.' "

Scores of cases, all to the same effect, are cited in West's Digest of the Arkansas Reports, chapter Venue, §§ 115 to 145, and it would be a work of supererogation to cite them.

I, therefore, concur in the holding that no error was committed in overruling the petition for a change of venue, but for the reason only that the trial judge was warranted in finding that the supporting affiants were

not credible persons within the meaning of the law, as the discretion of the trial judge is limited to the determination of this fact.

The Chief Justice concurs in the views here expressed.

KURRY *v.* FROST.

4-6747 162 S. W. 2d 48

Opinion delivered May 25, 1942.

Hardin & Barton, for appellant.

Chas. I. Evans and *Paul X. Williams,* for appellee.

SMITH, J. On September 24, 1932, appellee was run down by a hit-and-run driver of an automobile in the town of Paris, and was severely injured. The car which ran him down was a B model, wine colored, Ford car, exactly like one owned by Steve Kurry who lived over a hill north of the place of injury and in the same direction the car proceeded after striking the victim. The driver evidently lost control of the car, as it ran into a wire fence which it struck with its right fender. Shortly after the collision a witness saw Kurry's car in his garage with its lights on. Within a half an hour after the collision, investigating officers found the Kurry car in its garage with the lights turned off. The right headlight was broken, and the right fender had such scratches on it as a wire would have made and presented the appearance of having been very recently done.

Appellee brought suit against Mr. Kurry to compensate his injury. The case remained on the docket until January, 1941, when it was tried, and the trial resulted in a verdict for the defendant. The testimony in that case, like the testimony in the instant case, disclosed very convincingly that Mr. Kurry was not the driver of the car, but it did disclose, in appellee's opinion, that Mrs. Kurry was the driver, and, after obtaining this information, disclosed at the trial, suit was brought against Mrs.

Kurry, and a judgment for $1,500 was rendered against her, from which is this appeal.

Appellee did not know prior to this first trial that Mrs. Kurry, and not her husband, was the driver who ran him down. Mrs. Kurry was driving alone on some mission not disclosed, and her husband was, therefore, not responsible for the tort committed in striking appellee. *Brotherton* v. *Walden, ante,* p. 92, 161 S. W. 2d 391.

Appellee was struck about 9 p. m. Mrs. Kurry denied having driven the car that night, and the testimony on her behalf, if credited, shows very clearly that she did not drive the car. The jury could not have found for appellee if this testimony had been accepted as true, and it must be presumed that it was not believed. The credibility of the witnesses who gave this testimony was, of course, a question for the jury.

The testimony of Mrs. Kurry and that of two of her children is to the effect that Mrs. Kurry did not leave her home that night, and the testimony of Luther Adams, if true, very conclusively shows that Mrs. Kurry did not do so. Adams called at the Kurry home between 8 and 8:30 p. m., and remained there about an hour. It was during this time that appellee was struck. Adams did not, during that time, leave the room, but Mrs. Kurry did leave the room and did not return while witness was there. According to this witness, Mrs. Kurry went into a bedroom to attend a sick child. The testimony of this witness is much discredited by the stenographic report of his testimony at the first trial, where he testified as follows: "Q. Did any of them leave while you were there? A. Mrs. Kurry left while I was there. Q. Are you sure about that? A. Yes, sir. Q. Did anyone go with her? A. No, sir. Q. Did she come back while you were there? A. No, sir. Q. She didn't come back while you were there? A. No, sir."

This witness was corroborated by one George Kidwell, who testified that he accompanied Adams to the Kurry home, but remained in the car during the entire period of Adams' visit, and that during that time no one left the house, and no car was driven out of or into the

garage. But, as we have said, the jury has passed upon the credibility of these witnesses.

The jury might well have found that Mrs. Kurry did not drive the car; but, we are unable to say that the finding of the jury to the contrary is not supported by substantial testimony.

It is argued that, even though the testimony sufficiently shows that appellee was struck by the Kurry car, it is purely speculative whether Mrs. Kurry was the driver. But it is not entirely so. Certainly, it is more speculative that it was driven by some other person. The car was in the garage immediately after the collision, with its lights burning, and these had been turned off when the officers came about half an hour later. It was not shown that Mrs. Kurry left the home; but it was shown that she left the room where Adams was being entertained by her husband, and that she did not return to the room. In the last analysis, the responsibility of passing upon this question of fact rested upon the jury; and we are unwilling to say that the verdict was without substantial testimony upon which to base it.

The court gave, over the objection and exception of appellant, an instruction on circumstantial evidence, of which appellant says it "might not be an erroneous abstract statement of law, but it is clearly abstract. It does not undertake to apply the evidence in this case."

The instruction was not abstract, as appellee's case depended upon proof of circumstances to support the inference and finding that appellant was the driver of the car, and it was the function of the jury to weigh and apply the testimony.

Other instructions were objected to, chiefly upon the ground that they were abstract and not warranted by the testimony in the case. We think they were not abstract and were correct declarations of the law upon the question of liability, if it were found that appellant was the driver of the car.

It is very earnestly insisted that the cause of action, which occurred about nine years before the suit was filed,

was barred by the statute of limitations, and that defense was interposed. Upon that issue the court gave an instruction, numbered 2, reading as follows: "Section 8952 of Pope's Digest of the statutes of Arkansas reads as follows: 'Absconding Debtor. If any person by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented.' If you find from a preponderance of the evidence that by reason of any improper act of the defendant the commencement of the action was prevented within three years of the time of receipt of his injuries, then plaintiff would have three years after discovering that defendant was responsible for his injuries, if you so find, within which to file his suit. So, if he first learned of this fact, if it is a fact, in January, 1941, he is not barred."

The instruction quotes the statute, and the first question which presents itself is whether the cause of action was an "action in this act specified."

This section is found in all the digests of our statutes, and is correctly stated to have been taken from Chapter 91 of the Revised Statutes, entitled "Limitations." It first appears in "Laws of Arkansas Territory, compiled and arranged by J. Steele and J. M'Campbell, Esqs.," published in 1835. It there appears as § 5 of the chapter on Limitation of Actions, and as having been taken from an act passed July 4, 1807, by Louisiana Territory. The actions to which the act referred are enumerated in § 1 of this Territorial Act, which reads: "In all actions upon the case other than for slander; . . .," following which other causes of action are enumerated. This § 5, with some mutations which do not destroy its identity or change its effect, appears as § 26 of Chapter 91 of the Revised Statutes.

Now, Mrs. Kurry denies striking appellee. If she did strike him—and the verdict of the jury is conclusive of that fact, then she has concealed that fact, and even yet attempts to do so.

By § 17 of act 134 of the Acts of 1911, now appearing as § 6645, Pope's Digest, which was passed soon after automobiles came into general use, it was required that Mrs. Kurry should stop and, upon request of the person injured, give him her name and address. This she did not do, and she offered him no aid, and made no report of the incident. It was highly improper, indeed, inhumane, to omit the performance of these duties, if no law had imposed them.

At § 231 of the chapter on Limitation of Actions, 34 Am. Jur., p. 187, under the sub-title, "Concealment of Cause of Action," it is said, in part: "According to the majority rule, however, fraudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action; under this rule, one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered. Stated in another way, the general trend of the decisions is in support of the rule that where a party against whom a cause of action has accrued in favor of another, by actual fraudulent concealment prevents such other from obtaining knowledge thereof, or the fraud is of such a character as to conceal itself, the statute of limitations will begin to run from the time the right of action is discovered or, by the exercise of ordinary diligence, might have been discovered."

The case of *Conditt* v. *Holden,* 92 Ark. 618, 123 S. W. 765, 135 Am. St. Rep. 206, was an action to recover a mule, of which the defendant had had possession for more than three years when the suit was brought, and the three-year statute of limitations against suits in replevin was pleaded in bar of the action. The defendant had taken up

the mule as an estray animal, but had not posted it as such, as the law required him to do. The plea of the statute of limitations was sustained by the trial judge, and in reversing that action it was said, after quoting § 5088, Kirby's Digest (now appearing as § 8952, Pope's Digest), that "The defendants did not attempt to comply with the statute, but on the contrary they wrongfully and unlawfully claimed the mule as their own, and kept it on and about their farm for over four years, until the true owner claimed it. This conduct not only rendered them guilty of a criminal offense, but it was a fraud on the plaintiff's rights which amounted to a fraudulent concealment from plaintiff of his right of action against them for the recovery of his property. Under these circumstances they cannot invoke the benefit of the statute of limitation, which began to run against plaintiff only from the time of his discovery of the fraud."

The case of *Free* v. *Jordan,* 178 Ark. 168, 10 S. W. 2d 19, was another replevin suit for an animal, which reaffirmed the holding in the Conditt case.

Here, Mrs. Kurry did not stop, as the law and the dictates of humanity required, but drove on, leaving appellee to his fate. Had she stopped it would have been known who had struck appellee, but in driving away, in violation of the law, she concealed her identity, and appellee remained unaware of his cause of action against her until the trial of the suit against her husband.

Apart from this statute (§ 8952, Pope's Digest) many cases hold, as does the case of *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. 2d 826, that, where there has been a fraudulent concealment of a cause of action, the statute of limitations does not begin to run until the fraud is discovered. The most recent of these cases is that of *Quattlebaum* v. *Busbea, ante,* p. 96. 162 S. W. 2d 44, where it was held that "While fraudulent execution of illegal warrants remained undisclosed, with concealment of transactions by which money was withdrawn from treasury, statute of limitation did not begin to run."

Mrs. Kurry did not conceal herself. She concealed her act. She continued to reside in Paris, where the in-

jury was inflicted, but she has never yet, and does not now, admit striking appellee, and we think a question was made for and properly submitted to the jury whether she had, by "any other improper act of her own," concealed from appellee his cause of action against her.

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

Mr. Justice MEHAFFY is of opinion that the cause of action is barred by the statute of limitations.

LINKE *v.* KIRK.

4-6761 162 S. W. 2d 39

Opinion delivered May 25, 1942.

Arthur Sneed, for appellant.

E. G. Ward, for appellee.

GREENHAW, J. On October 24, 1929, J. J. McCord and Helen McCord, his wife, executed and delivered to W. F. Linke their promissory note for $300, payable in six annual installments of $50 each, the first installment becoming due October 24, 1930, and the remaining installments becoming due on October 24 of each year thereafter, the last installment being due October 24, 1935. The note bore interest at the rate of ten per cent. per annum, payable annually after maturity until paid. It provided that if any annual installment was not paid when due all installments might become due and payable immediately, at the option of the holder. This option was never exercised.

To secure the payment of the note, Mr. and Mrs. McCord duly executed and delivered to W. F. Linke their real estate mortgage on a 40-acre tract in Clay county, Arkansas. Thereafter the mortgagors conveyed the mortgaged property to Pearl Spradling. She later conveyed to James M. Holden. Holden conveyed to Noel and Lillian Large, who in turn conveyed the property, on October 29, 1937, to J. F. Kirk, appellee herein.

The mortgage was duly filed for record in November, 1929. No payments were made on this note, and on October 22, 1940, suit to foreclose the mortgage was filed in the Clay chancery court, eastern district. The mortgagors and all subsequent owners of the mortgaged property except appellee were made parties defendant. Summonses were issued for part of the defendants, and a warning order for the nonresident defendants. For some reason appellee, who at that time owned the property and was in possession thereof, was not made a party defendant.

In April, 1941, judgment was entered for the entire amount of principal and interest due on said note, and a decree of foreclosure and order of sale entered. The sale was advertised to take place on July 11, 1941, and on July 7 appellee filed his intervention in this proceeding, in which he contended that the entire indebtedness was barred by the statute of limitation, asked that the decree theretofore entered be set aside and that title to the

property involved be quieted and confirmed in him. Thereafter the court set aside the former decree, and held that the cause of action was barred, dismissed the complaint for want of equity and quieted and confirmed title in appellee, from which is this appeal.

In an action upon a note and to foreclose a mortgage, the five-year statute of limitation is applicable. In the instant case the first five annual installments were clearly barred by the statute of limitation, they having become due on the 24th day of October in 1930, 1931, 1932, 1933 and 1934.

In 34 American Jurisprudence, p. 114, § 142, we find the following statement which supports our holding in this case: "The rule is firmly established that when recovery is sought on an obligation payable by installments, the statute of limitation runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." See, also, *Bush* v. *Stowell, et al.,* 71 Pa. 208, 10 Am. Rep. 694; 17 R. C. L., p. 769, par. 135.

In Wood on Limitations, 4th Ed., vol. 1, p. 731, it is stated: "Where a note or bill is made payable by installments, the statute attaches to and begins to run upon each installment as it becomes due."

The suit to foreclose was filed two days before the last installment would have been barred by the statute of limitation. The fact that appellee, the present owner, was not included as a defendant in the foreclosure suit at the time it was filed, and thereafter intervened in the case a few months more than five years from the due date of the last installment, did not enable him to invoke the statute of limitation as to the last installment.

In *Rowland* v. *Griffin,* 179 Ark. 421, 16 S. W. 2d 457, it was held that a decree foreclosing a mortgage is not void for failure to make a subsequent purchaser from the mortgagor a party, since his only right in the property is an equity of redemption, which is not cut off. To the same effect is *Livingston* v. *New England Mortgage Security Co.,* 77 Ark. 379, 91 S. W. 752.

Having concluded that the lower court erred in failing to render judgment for the sixth installment, includ-

ing interest, and in failing to enter a decree of foreclosure and order of sale, the decree is reversed and the cause remanded with directions to enter a decree in conformity with this opinion.

[redacted]

GAZETTE PUBLISHING COMPANY *v.* BRADY.

4-6767 162 S. W. 2d 494

Opinion delivered June 1, 1942.

[redacted]

Thos. T. Dickinson, for appellant.

Talley, Owen & Talley, for appellee.

HUMPHREYS, J. On June 13, 1941, appellant, a corporation, brought suit in the third division of the circuit court of Pulaski county, Arkansas, against appellees, doing business as partners under the firm name of United Grocers Association, Inc., to recover a balance due it on open account of $476.96, for publishing advertising matter pertaining to the business.

Appellees filed an answer admitting the correctness of the account, and interposing the defense that they were not doing business as partners, but were doing business as a corporation duly incorporated as the United Grocers Association, Inc., under Act 255 of the Acts of 1931 of the General Assembly of Arkansas, which act constituted them a body politic and exempted them from personal liability for the debts of said corporation.

Appellants filed a reply to the answer of appellees denying that they complied with Act 255 of the Acts of 1931 so as to exempt them from personal liability for the debts of the purported corporation.

The facts disclosed by the record are undisputed, and reveal that on the 13th day of March, 1939, appellees, D. A. Brady, Paul E. Talley, and Elizabeth Brady filed articles of incorporation with the secretary of state of the State of Arkansas, C. G. Hall, at which time the said secretary of state issued them a certificate of incorporation under the name of United Grocers Association, Inc. A copy of the articles of incorporation were never filed in the office of the county clerk of Pulaski county or any other county in the state of Arkansas. The names of the three incorporators and the names of sixteen other stockholders and the amount of stock subscribed for and owned by each were incorporated in the articles of incorporation. It does not appear whether the stockholders ever met and selected a board of directors, but the record reflects that D. A. Brady acted as president and C. P. Stuart as manager of the association. They opened a warehouse and office at 205 North Arch street in the city of Little Rock in Pulaski county, Arkansas, in the name of United Grocers Association, Inc., and conducted the grocery business. C. P. Stuart acted as manager until March 31, 1940, at which time he was discharged and his responsibilities were assumed by Elizabeth Brady who managed the business until the United Grocers Association, Inc., ceased to do business. The advertisements were contracted for and run in appellant's paper, were paid for by checks drawn on the bank account of United Grocers Association, Inc., by C. P. Stuart while manager and Elizabeth Brady while manager and were countersigned

by D. A. Brady, president, but at the time United Grocers Association, Inc., ceased to do business there was a balance due appellant of $476.96. Appellant extended credit for advertising to the United Grocers Association, Inc., under written contract proposed by United Grocers Association, Inc., "Advertiser, by D. A. Brady." Appellant being under the impression that United Grocers Association, Inc., was a duly incorporated corporation contracted with it as such through its president and manager and did not deal with or contact individually the organizers or stockholders and did not know who they were.

Appellant sued the organizers and stockholders individually as partners doing business under the firm name of United Grocers Association, Inc., after it found out that the United Grocers Association, Inc., had not filed the articles of incorporation with the county clerk in Pulaski county or any other county in the state. After the testimony was concluded appellees requested the court to instruct a verdict for it. Appellant requested six separate instructions based upon facts revealed by the evidence, which facts were undisputed.

The court thereupon instructed the jury to return a verdict for appellees and refused to submit the case to the jury upon the six instructions requested by appellant, all over the objections and exceptions of appellant.

Pursuant to the verdict, the court rendered a judgment in favor of appellees and dismissed appellant's complaint and adjudged the costs against appellant, from which appellant has duly appealed to this court.

The questions arising on this appeal are: (1) "Was the United Grocers Association, Inc., incorporated under the laws of the State of Arkansas? And, (2) if not, are the stockholders liable individually for the debts of the business?"

The facts being undisputed, of course, the court correctly took the determination of the facts from the jury. There were no issues of fact for the jury to determine. The sole question became a question of law as to whether, under the undisputed facts, appellees were liable for the debts incurred by the United Grocers Association, Inc.,

during the time it continued in business. Appellant contends that under § 3 of Act 255 of the Acts of 1931, now § 2131, Pope's Digest, it was and is necessary for the organizers and the stockholders of a corporation to file their articles of incorporation with the Secretary of State and thereafter with the county clerk in order to constitute its corporation an entity or a *de jure* corporation and thereby relieve the incorporators and stockholders from personal liability for the debts of the corporation.

Appellees, on the other hand, contend that under said act it is only necessary to file their articles of incorporation with the Secretary of State to constitute themselves a corporate entity and thereby exempt themselves from personal liability for the debts of the concern.

Section 3 of said act is in part as follows: "Upon the filing with the Secretary of State of articles of incorporation, the corporate existence shall begin. Provided, however, a set of the articles of incorporation (bearing the filing marks of the Secretary of State) shall be filed for record with the county clerk of the county in which the corporation's principal office or place of business in this state is located."

We think the proper interpretation of said section is that in order to become a corporation *de jure* the articles of incorporation shall be filed with both the Secretary of State and the county clerk of the county in which the corporation's principal office or place of business is located. Said section is not materially different from § 9 of Act XCII of the Acts of 1869, relative to the creation and regulation of corporations, which latter act was repealed by Act 255 of the Acts of 1931. That act, however, was in full force and effect until repealed by Act 255 of the Acts of 1931, and during the time it was in effect this court in a long line of decisions, beginning with the case of *Garnett* v. *Richardson,* 35 Ark. 144, held that in order to exempt the organizers of a corporation from personal liability for the debts of the concern, the articles of incorporation must be filed in both the office of the Secretary of State and the office of the county clerk.

We think the construction placed upon § 9 of Act XCII of the Acts of 1869 is applicable to § 3 of Act 255

of the Acts of the General Assembly of 1931 as both sections require the filing of the articles of incorporation in both the office of the Secretary of State and the county clerk of the county in which the corporation's principal office or place of business is located in order to constitute the corporation a *de jure* corporation. In other words, we are of the opinion that the failure to file the articles of incorporation in either the office of the Secretary of State or in the office of the county clerk has the effect of constituting the proposed corporation a *de facto* corporation. In order to exempt any association of persons from personal liability for the debts of a proposed corporation they must comply fully with the act under which the corporation is created. A partial compliance with the act is not sufficient. Unless they comply fully with the act, they are, as to business transacted, a partnership.

We think the rule announced in *Garnett* v. *Richardson, supra,* and the subsequent cases reannouncing the rule is controlling in the instant case.

Under this view of the law the trial court should have instructed a verdict for appellant instead of for appellees.

The judgment is, therefore, reversed and judgment is entered here for $476.96 in favor of appellant, with interest thereon at the rate of 6 per cent. per annum from the date of the filing of its suit together with all of its costs expended in both courts.

EDWARDS *v.* JEFFERS.

4-6757 162 S. W. 2d 472

Opinion delivered June 1, 1942.

Miles & Young and *Mark Woolsey,* for appellant.

Carter & Taylor, J. E. Yates and *Partain & Agee,* for appellee.

HOLT, J. Appellee, Esther Jeffers, and Gordon Jeffers, her husband, joined in a suit under our guest statute against appellants, Irene Edwards and Chester Edwards, in the Franklin circuit court, Ozark district. Esther Jeffers sought to recover $15,000 to compensate personal injuries alleged to have been received by her while riding

in an automobile owned by appellants and which was overturned. Gordon Jeffers sought to recover $2,500 for loss of services, etc. When the case was reached for trial Gordon Jeffers took a nonsuit without prejudice.

Esther Jeffers alleged in her complaint that she was riding in appellants' Buick automobile "at the specific request and insistence of appellants and for their benefit"; that Mrs. Edwards drove the car at a reckless, dangerous and unlawful rate of speed and that while attempting to negotiate a curve on the gravel highway, the car left the road, turned over in a ditch, and as a result she was seriously injured.

She further alleged that her injuries were caused by the willful and gross carelessness of appellants in that Irene Edwards operated the car at a careless and unlawful rate of speed and that her "action and conduct amounted to willful and gross negligence."

Appellants denied every material allegation in the complaint and affirmatively pleaded that appellee, Esther Jeffers, was a guest of appellants at the time of the alleged injuries to her and is barred from recovery of damages under our "guest statute," §§ 1302-1304 of Pope's Digest.

A jury awarded Mrs. Jeffers damages in the amount of $3,500 and from the judgment on this verdict comes this appeal.

This cause was tried by the court below on the theory that Esther Jeffers was a guest in appellants' car at the time of the alleged injury. This is clearly shown by the instructions given. Under § 1302 of Pope's Digest a guest is denied the right to recover "unless such automotive vehicle was willfully and wantonly operated in disregard of the rights of the others." Section 1303 provides "The term guest as used in this act shall mean self-invited guest or guest at suffrance." Section 1304 is similar in effect to § 1302 except under this provision certain persons there named are denied the right of recovery under any circumstances.

Appellee requested seven instructions, all of which the court gave. Appellants also requested seven instruc-

tions, four of which the court gave. In the instructions requested and given on behalf of the appellee, and those requested and given on behalf of the appellants, the trial court submitted but one issue and that was if appellee, Esther Jeffers, was being transported as a guest in an automobile operated by appellants and that appellant, Mrs. Edwards, drove and operated the car in a willful and wanton manner in disregard of the rights of Esther Jeffers, and such operation amounted to willful and wanton misconduct or negligence on the part of the driver of the car, and as a result Esther Jeffers was injured, then Esther Jeffers should recover. No instruction was requested by either party, and none was given by the court, on the theory that appellee was not a guest at the time of the injury, in which event it would have only been necessary for appellee, Esther Jeffers, to show that appellant, Irene Edwards, failed to use ordinary care in the operation of the car at the time it turned over and injured appellee.

While appellee argues here that she was not a guest within the terms of the statute, *supra*, it is too late to raise that issue here for the first time. In *Brown* v. *LeMay,* 101 Ark. 95, 141 S. W. 759, this court said: "The rule is well settled that when a cause is tried in the lower court upon a definite theory, it cannot for the first time be contended in this court that it should have been tried upon a different one."

And in *Southern Insurance Company* v. *Hastings,* 64 Ark. 253, 41 S. W. 1093, this court said: "There was evidence to justify the instructions given. The appellant did not ask the court below to present to the jury the theory of the case it contends for here. Therefore, it cannot complain."

The primary question presented, and the one decisive of this case, therefore, is: Were the injuries complained of by appellee, Esther Jeffers, occasioned by the willful and wanton negligence of Irene Edwards in the operation of the automobile?

The evidence is to the effect that appellee and appellants were good friends. The Edwards were visitors in the home of appellee in the morning before the accident

in the afternoon. On Sunday afternoon, October 13, 1940, while appellee, Esther Jeffers, was a guest in appellants' Buick sedan automobile at a point on state highway No. 96 near Cecil, Franklin county, Arkansas, where the highway makes a sharp or "square" turn, Mrs. Edwards, the driver, lost control of the car, it skidded on the gravel, left the highway and turned over on its side in a ditch and Esther Jeffers was injured. At the time of the accident, Mrs. Jeffers was riding on the front seat with Mrs. Edwards and Mrs. Edwards' husband and their three-year-old daughter were on the back seat. Appellee estimated the speed of the car at between sixty and seventy miles per hour, "maybe faster." Mrs. Edwards estimated the speed at between forty and fifty.

Mrs. Jeffers also testified: "A. I called Mrs. Edwards down two or three times and told her she was driving too fast and told her she couldn't drive that fast over a gravel road with curves in it and I called her down two or three times. Q. What did you say to her in substance? A. I would say, 'Irene, you are driving too fast over this road,' and we would come to a sign and I would say, 'There is a curve or a turn,' and I told her that this gravel was loose. Q. What would she say in response to you? A. She said she knew how to drive, I believe that's what she said, and went on. Q. Did she slow down on these occasions? A. No, sir."

Grady Bearden testified that he heard Mr. Edwards say to his wife: "You wasn't driving less than seventy or eighty." And as to the extent of the damages to the car, Mr. Bearden further testified: "Q. Did you look at the automobile? A. Yes, I came back by that evening and looked at it. Q. Had they taken the car out of there? A. No, sir. Q. What did it do to the automobile? A. I couldn't tell it did anything, only probably mashed the fender next to the ground."

From the evidence, which includes a plat, it appears that Mrs. Edwards had negotiated a sharp turn in the road a quarter of a mile before the point of the accident. It is our view that this testimony falls far short of that degree of willful and wanton misconduct on the part of appellant, driver of the car, that would warrant recovery

under the statute, *supra,* on the part of Mrs. Jeffers, appellants' guest.

In a recent case, *Splawn, Admx.,* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248, wherein recovery was sought under the provisions of our guest statute, we said: "To show ordinary or simple negligence is not enough, in fact it would not be sufficient if gross negligence were shown.

"This court has laid down the rule that in order to sustain a recovery under our guest statute, *supra,* the negligence must be of a greater degree than even gross negligence, that it must be willful or wanton. In the recent case of *Froman* v. *J. R. Kelley Stave & Heading Co.,* 196 Ark. 808, 120 S. W. 2d 164, the difference between gross and willful and wanton negligence is very clearly defined. We quote from the opinion as follows: 'The Supreme Court of Vermont points out the distinction in the case of *Sorrell* v. *White,* 103 Vt. 277, 153 Atl. 359, in an opinion which comports with our own decisions on the question. Malcolm, in his work on Automobile Guest Law, quotes from that case as follows: ". . . Our inquiry must be directed to the difference between gross negligence and willful negligence. There is a distinction between them. Willful negligence is a greater degree of negligence than gross. . . . Willful negligence means a failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. . . . Gross negligence falls short of being such reckless disregard of probable consequence as is equivalent to a willful and intentional wrong. . . . Willful negligence involves the element of conduct equivalent to a so-called constructive intent. . . ."'

"(Quoting with approval from a Louisiana case) Cases will rarely arise in which it can be shown to a court's satisfaction that collisions or upsets of automobiles, with resultant injury to guests, occur because of 'willful misconduct' of the operator. Those who operate automobiles should have (and when mentally normal, do have) a conscious desire to avert injury to themselves in such operation, at least co-extensive with that not to

injure their guests; and since to operate a car in a willfully negligent manner offers a threat to security from injury as great to the operator as it does to the guest, evidence to prove that grade of negligence should be unusually strong and convincing before the operator can and will be convicted of such."

In the instant case, as has been indicated, the Edwards and the Jeffers were good friends. At the time of the accident, Mrs. Edwards' husband and their three-year-old daughter were riding on the back seat. While unquestionably Mrs. Edwards was driving too fast and lost control of the car at the time she attempted to negotiate the curve where the car overturned, the physical facts surrounding the overturning of the car demonstrate that she had not attained the speed of seventy or eighty miles an hour, in the distance of a quarter of a mile from the sharp curve that she had just negotiated, and certainly the undisputed fact that the car had skidded on the gravel and turned over on its side in the ditch and sustained very little damage shows that it could not have been going at the high rate of speed estimated by appellee's witnesses.

Grady Bearden, the only witness who testified as to the extent of the damage to the car, said "I couldn't tell it did anything, only probably mashed the fender next to the ground."

It is not claimed that any of the other people in the car received any injury. If it could be said that Mrs. Edwards' conduct in driving the car amounted to gross negligence (and we do not think it did) still this is not sufficient to warrant recovery under the statute, *supra.*

We conclude, therefore, that the judgment must be reversed, and as the cause appears to have been fully developed, it will be dismissed.

HUMPHREYS, J., (dissenting). The question involved upon this appeal is: Were the injuries complained of by appellee, Esther Jeffers, occasioned by the willful and wanton negligence of Irene Edwards in the operation of the automobile? This question was submitted to the jury,

and the jury found that at the time of the injury Irene Edwards was operating the automobile in a willful and wanton manner, and appellant is bound by the verdict of the jury. The verdict of the jury is supported by practically the undisputed evidence in the case. The positive evidence shows that she was driving the automobile over a gravel road with very sharp curves in it at about seventy miles an hour, or so rapidly that she could not negotiate the curves without running the automobile into the ditch. Appellee protested at the speed she was driving and requested her to slow down two or three times. Irene Edwards responded by saying that she knew how to drive her car and how fast to go. I think this clearly shows and warranted the jury in finding that she willfully and wantonly drove the car at such a speed as to endanger the lives of everyone in the car. There is nothing in the record to show that the jury rendered its verdict through passion and prejudice, and without such a showing the court is without authority to strike down the verdict and dismiss the cause of action.

I, therefore, most respectfully dissent from the majority opinion.

MACK COAL COMPANY *v.* HILL.
(9 cases consolidated)

4-6783 162 S. W. 2d 906

Opinion delivered June 1, 1942.

Jack Smallwood, Harper & Harper and *Warner & Warner,* for appellants.

G. L. Grant and *Coleman, Mann, McCulloch & Goodwin,* for appellees.

GRIFFIN SMITH, C. J. Nine claims allowed by Workmen's Compensation Commission were appealed to Sebastian circuit court for the Greenwood district, or to Logan circuit court for the Northern district. All were affirmed. This court was then appealed to. By agreement the causes were consolidated.

Correct determination of the amount due each claimant is the issue.[1]

[1] No. 8783.—This is an appeal by Mack Coal Company from a judgment of Logan circuit court affirming the commission's award of $19.03 per week in favor of Inez Hill, wife of Frank Hill, the latter having been killed December 5, 1940. There was an additional allowance of $175 covering burial expenses.

Section 12 of Act 319, approved March 15, 1939, referred to the people and approved November 5, 1940, is shown in the margin, the section appearing as a single paragraph.[2]

No. 6806.—Ralph Walker, while employed by Mack Coal Company, was killed January 3, 1941. He lived with his father, Tom Walker, and with his stepmother, Mrs. Ethel Walker, who claimed they were dependents. The commission's order was that payments of $6.61 per week be made to each of the claimed dependents during continuance of such status, not to exceed 450 weeks.

No. 6807.—Because of injuries to his back, received December 18, 1940, while working for Boyd Excelsior Operating Company, Vess Gosnell was awarded weekly compensation of $17.90, this being 65 per cent. of a determined average weekly wage of $27.55.

No. 6808.—Joseph R. Hill was killed December 15, 1940, while employed by Peerless Coal Company. The commission's award was $15.15, this being 55 per cent. of a determined average weekly wage of $26.45. There was an additional award of $200 in favor of the decedent's estate, covering burial expenses. [But see error referred to in body of opinion].

No. 6809.—Dewey Dacus was killed January 3, 1941, while employed by Mack Coal Company. The commission awarded $17.19 per week to Jewel Mabel Dacus and the decedent's three children. The further sum of $250 was allowed for funeral expenses.

No. 6810.—In this case the commission awarded $10.01 per week in favor of George William Koch against K. & S. Coal Company. Claimant's right leg was fractured June 9, 1941. The amount allowed represented 65 per cent. of an average weekly wage of $15.40, payments to be made during continuance of disability, subject to limitations fixed in the Act.

No. 6811.—The commission awarded $17.90 per week in favor of John Sherman Hicks and against Carbon Coal Co. Payments were ordered to be made for fifteen weeks and three days for temporary total disability, and twenty weeks for permanent partial disability. Hicks' left hand was injured.

No. 6812.—Coy Highfield's right leg was fractured and his knee bruised August 11, 1941, while he was employed by New Shockley Coal Company. The commission determined that his average weekly wage was $31.45 and allowed $20 per week during disability, subject to restrictions of the Act. There was the further order that all medical and hospital bills in connection with the injury be paid.

No. 6813.—Ira Elzo Bailey was fatally injured March 13, 1941, while employed by Great Western Coal Company. An award of $20 per week was made, together with $250 for burial expenses. It was determined that Bailey's average weekly wage was $48.45. Of this sum 35 per cent. was for benefit of the widow, and 10 per cent. on account of each of two minor dependents. Maximum payable under the Act is $20 per week.

[2] Section 12. *Determination of Wages:* Except as otherwise specifically provided, the basis for compensation under this Act shall be the average weekly wages earned by the employee at the time of the injury, such wages to be determined from the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by fifty-two; but if the injured employee lost more than seven days during such period, although not in the same week, then the earnings for the remainder of such 52 weeks

As stated by appellants, the principal controversy involves methods employed by the commission and approved by the circuit courts in determining "average weekly wages."

Frank Hall, Ralph Walker, Joseph R. Hill, Dewey Dacus, and Ira Elmo Bailey were killed. Vess Gosnell, George William Koch, John Sherman Hicks, and Coy Highfield, were injured. All were members of United Mine Workers. Their union had contracts with the various coal companies which provided for a maximum five-day week. In most instances contracts called for a fixed daily wage, but in some instances pay was on a tonnage or yardage basis.

What is the meaning of *average weekly wages?*

By what process of reasoning, or by what construction, must we gather from § 12 the legislative intent?

A correct assize is of great importance to all of the litigants.

Subsection (h) of § 2, Act 319, defines wages as the rate at which service is recompensed under the contract in force at the time the accident occurs, including the reasonable cash value of board, rent, housing, lodging, or similar advantage received from the employer; also gratuities received in the course of employment from others than the employer, if bestowed with the employer's knowledge.

Calling attention to introductory words used in § 12—"except as otherwise specifically provided, the basis for

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shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, however, that results just and fair to both parties will thereby be obtained. Where by reason of the shortness of time during which the employee has been in the employment of his employer it is impracticable to compute the average weekly wages by the above method of computation, regard shall be had to the average weekly amount which, during the first fifty-two weeks prior to the injury or death, was being earned by a person in the same grade, employed at the same or similar work in the community. Wherever allowances of any character are made to an employee in lieu of wages or specified as part of the wage contract, they shall be deemed a part of his earnings.

compensation under this Act shall be the average weekly wages earned by the employee at the time of the injury" —the commission's opinion is that where an injured employe worked under a definite contract of hire at a definite daily rate for a definite number of hours a day and a definite number of days a week, "there is nothing left to determine." The commission then continued: "All is known that needs to be known to establish the average weekly wage being earned by the injured employee at the time of the injury."

And again: "Where there is no such definite contract of hire or no definite rate or definite number of hours a day or definite number of days a week, then resort must be had to the formulas set out under § 12 to determine the average weekly wage. This would also be true when the injured employee was a piece-worker, working by the ton, yard, cord, article, etc., or where there was a variance in daily wages or similar uncertainties requiring determination".

Appellants call attention to certain known facts which necessarily attach to the character of work involved. The industry in Arkansas ". . . is of a peculiar nature. These mines produce coal mainly for domestic consumption in various localities throughout the northern and midwestern states. It naturally follows that extent of the demand . . . governs almost entirely. . . . There is demand for the product only in the colder months. This naturally means that in the spring and summer months there is little or no demand for the product of these mines, and as a result they do not produce for the market during these periods".

Production ordinarily begins about August 1 and continues until March of the following year. Each mine operates an average of 118 days annually. Union contracts with the operators provide that, because of seasonal slack, a joint board of miners and owners may extend, from five to six, the days composing a week in order, as appellants say, ". . . that the industry may be able to work at capacity during the season of heavy orders without being penalized through the payment of overtime."

Another custom peculiar to the industry is the frequency with which workers change from one mine to another, "year in and year out."

Replying to the commission's holding that certain fixed standards must be recognized, appellants argue there was no definite contract of hire, and no definite daily rate for fixed hours. It is conceded the contracts called for a maximum of daily hours, a maximum number of days a week, "and even a maximum number of hours a week, and provide that all time worked in excess of such maximum shall be compensated as overtime".[3]

Certain exceptions appear in Act 319, notably in §§ 13 and 23. That there *are* exceptions, say appellants, is justification for their contention that the phrase, "except as otherwise specifically provided", found in § 12, has reference to departures from § 12; hence, it is stressed, in supplying the exceptions, it was not intended that subsection (h) of § 2 should form the basis of compensation. But, say appellants, even if subsection (h) had been intended as a method of determination, it is not applicable to the instant cases because there is no definite contract of hire, etc.

Beginning with the second word in the first line of the printed Act at page 791, the direction is: ". . . but if the injured employee lost more than seven days during [the fifty-two weeks immediately preceding injury], although not in the same week, then the earnings for the remainder of such fifty-two weeks *shall be divided by the number of weeks remaining after the time so lost has been deducted.*"

It is appellees' belief that this class embraces all injured employes who worked within the period of fifty-two weeks preceding injury, but who lost more than seven days. Argument is that it is immaterial whether work was, or was not, continuous; nor was it important that the injured person worked in consecutive weeks. The total number of days actually devoted to the mas-

[3] It is presumed the statement as to overtime is to be read in connection with the contractual provision heretofore mentioned by appellants: that work in excess of five days without overtime shall be determined by a joint board composed of operators and operatives.

ter's service is ascertained in weeks, ". . . and the total earnings for the entire period are to be divided by the number of weeks actually worked." From this, it is submitted, the average weekly wage constituting the basis for compensation is ascertained.

The next class falls within the Act's provision that "When the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed."

As to this group, it is appellees' thought that total earnings during the period of employment is divided by the time applied, computed in weeks; and this, it is claimed, ". . . gives the average weekly wages, which is the basis for compensation."

We agree with the commission, the circuit courts, and appellees, that under the contracts between operators and United Mine Workers, definite bases of pay were provided; and if work were discontinued because there was no demand for coal during several months in each year, this fact is not to be embraced as authority for applying the largest possible divisor and thus reducing the average wage to a figure far below wages actually received by the miners when they worked.

The Act expressly provides that, as to certain classes, the divisor shall be the number of weeks remaining after time "so lost" has been deducted. The difficulty, therefore, lies in determining what is meant by *lost time,* or time "so lost."

If we accept appellants' reasoning, a worker does not lose time when the mine he is serving, and all other mines in the district, cease operating because of seasonal non-demand for coal.

While § 12, as written, may not be the rubric its authors would desire, the underlying purpose seems to have been to determine basic pay—the amount a worker earned. In case of doubt, recourse is had to the average an employe has earned during a fixed period. But where,

as in the cases here, uniformity prevails, and the worker's capacity to earn is equal to what he did earn when employment was available, it is harsh to apply a strict rule of exclusion, the effect of which is to diminish a known basic rate of pay.

It is argued by appellants that when the number of days an employe has worked (assuming his services were intermittent) are divided by five to correspond with a work week, and the number of weeks has been ascertained, the result is not an "average" because the amount such employe receives per day translated into weeks is the determining unit. It is not always possible to deduce from a writing the clear purpose an author, or a group of composers, had in mind. Whatever the legislative objective may have been, one expression appearing in § 12 rings clear:—"provided, however, that results just and fair to both parties will thereby be obtained." If this sentence be construed as investing the commission with "roving authority," answer is that it applies only to those cases where reasonable men would agree that the method of computing wages defeated the law's obvious purpose.

In Case No. 6783, Hill, as mechanic, received a monthly wage of $150. Inez Hill (wife) was allowed 35 per cent. of the decedent's salary on her own account and ten per cent. for each of two dependent minor children.[4] The result was $19.03 per week, based on 55 per cent. of $34.61 per week.

Ralph Walker, in Case No. 6806, was employed as a coal-breaker at $5.29 per day. His average weekly wage was found to be $26.45. Payments of $6.61 to the decedent's father and an equal amount to his stepmother were directed.

Vess Gosnell, in Case No. 6807, was a machine-runner who received $5.51 per day. The weekly wage was found to be $27.55. The order was that he receive weekly 65 per cent. of such sums, amounting to $17.90.

In Case No. 6808, Joseph R. Hill, a "brusher," received compensation of $5.29 per day. His average

[4] See *Gunnells et al.* v. *Gunnells*, 203 Ark. 632, 158 S. W. 2d 54.

weekly wage was $26.45. The award was 35 per cent. to his wife and ten per cent. to each of two dependent minor children, amounting to $15.15. [Fifty-five per cent. of $26.45 is $14.547. It will be presumed that this slight error of 60 cents will be corrected].

In Case No. 6809, Dewey Dacus, as an ordinary miner, was paid $5.29 per day. The average weekly wage was found to be $26.45. Compensation of $17.19 per week was allowed—35 per cent. to the widow and ten per cent. to each of three children.

John Sherman Hicks (Case No. 6811) received a daily wage of $5.29 as an ordinary miner. His weekly wage was ascertained to be $26.45, of which 65 per cent., or $17.19, was payable.

Ira Elzo Bailey (Case No. 6813) worked part of the time on a tonnage basis, and sometimes on a yardage basis. The commission found that during the period of his employment by New Shockley Coal Company, he earned $756.31 in 78 days, the average daily wage being $9.69.

In Case No. 6810—*Koch* v. *K & S Coal Company*—the injured employe had worked 137 days at 80 cents per ton. A new contract was made, calling for 91 cents per ton. Koch had worked seventeen days under the more favorable terms, earning $52.36, or $15.40 per week. It is contended the award of $10.01—65 per cent. of $15.40—bears no relationship to the average required by § 12 to be determined.

In Case No. 6812—*New Shockley Coal Co.* v. *Highfield*—claimant had worked for $5.29 per day. This contract was superseded by an agreement that daily pay would be $6.29. Highfield had worked five weeks under the new arrangement. The commission determined that his average weekly wage was $31.45, disregarding earnings under the old contract.

Appellants, in presenting their cases, have conveniently abstracted compensation statutes in other states.[5] Exclusive of the term, "except as otherwise specifically

[5] Mississippi, alone of all the states, has no workmen's compensation law.

provided", the Tennessee statute is comparable to our own. In *White* v. *Pinkerton,* 155 Tenn. 229, 291 S. W. 448, White, a Vanderbilt University student worked six days during the Christmas season. During other periods he worked Saturday afternoon and at night. The lowest weekly wage paid by White's employer was $15, the award being on that basis. In modifying final judgment, the court held it was the law's object to compensate a disabled employe to the extent of fifty per cent. of the amount received for a given number of weeks. It was then said: "Where the court can see that the application of this rule would be unfair, and evidence has been introduced that would justify us in applying some other rule, we would not hesitate to do so. The court must ascertain the average weekly wages of the petitioner by past earnings, and not what he may earn in the future."

We do not regard this case as controlling. White was employed incidentally. He was an "odd time" worker, helping himself through college, and necessarily an average had to be ascertained as a basis of compensation. See Bragg's *Quarry* v. *Smith,* 161 Tenn. 682, 33 S. W. 2d 87, 34 S. W. 2d 714. In that case the petitioner had no record of earnings. He was employed loading rock at so much per car. Duty kept him out of doors. During rainy, or very cold weather, he did not work. Although Bragg had been employed by the respondent for several years, testimony was that he worked when it suited him. He had no regular hours for beginning or quitting. In the opinion the expression appears, "If the work is discontinuous, that is an element that cannot be overlooked." The decree was modified by reducing the average weekly wage from $22.50 to $12.50. *Carter* v. *Victor Chemical Works,* 171 Tenn. 147, 101 S. W. 2d 462, and *Wilmoth* v. *Phoenix Utility Co.,* 168 Tenn. 95, 75 S. W. 2d 48, were cited. The Tennessee court said:

"The distinction, given determinative recognition in the Wilmoth case, was that [difference which exists] between loss of time occasioned by chance or accident, such as temporary disability of the employee; and, for example, a temporary breakdown in machinery, or temporary and occasioned interruption or suspension of

operations because of bad weather, inadequate shipping facilities, or limitation on the demand for the products. Workers regularly employed in manufacturing, mining, or outdoor construction, habitually lose time occasionally in the due course of their employment because of such incidental happenings as suggested. These are conditions of such employment, to be expected to arise, and the average earnings of the workers are commonly and naturally affected thereby. His average earnings are necessarily subject thereto."

An Indiana statute very similar to ours has been construed in its application to miners. *Holton* v. *Jackson Hill Coal & Coke Company,* 101 Ind. App. 231, 198 N. E. 805. Holton had been employed by the company since 1926. He was injured July 7, 1933. The mine was idle from April 1 to September 16, 1932. In the opinion it is said:

"Appellant had no other employment or occupation. The fact that the mine was idle, whatever the cause, did not change the nature or character of appellant's employment as a miner, and that was his employment for 52 weeks immediately prior to his injury."

As a matter of fact, Holton had been employed only 61 days immediately preceding his injury, or 10.166 weeks. The court held that his average weekly wages was the quotient obtained by dividing $398.74 by $10.166. The coal company's contention was that the amount should be divided by fifty-two. See *Miller* v. *Binkley Mining Company,* 99 Ind. App. 257, 190 N. E. 886.

Under a statute similar to Act 319, the Supreme Court of Alabama held that while Odom worked only 166 days, the applicable divisor was the number of weeks represented by 166 days, and not fifty-two, as the coal company contended. *Odom* v. *Galloway Coal Co.,* 223 Ala. 118, 134 So. 855.

The Compensation Act affords a remedy substituted for a common law right in certain instances, as to which the constitution of 1874 prohibited the legislature from limiting the amount of recovery. Art. 5, § 32.

By Amendment No. 26 the general assembly was given power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employes, irrespective of defenses formerly available to the defendant. Act 319 is remedial and must be construed liberally to effectuate its purpose.

We do not think the commission's construction, as affirmed by Sebastian and Logan circuit courts, is contrary to the statute in its application to the industry affected, in the light of facts showing how the mines were operated. While subdivision (h) of § 2 is merely a definition and does not enlarge the claimant's rights, and § 12 is the so-called yardstick by which compensation is to be measured, we cannot agree that periods of non-operation are not to be counted as lost time, thereby reducing the divisor to the number of weeks remaining, as contrasted with fifty-two.

The most perplexing problem is that presented by claims of injured employes whose rate of pay per day, per week, per ton, or per yard, has been changed, and the increased basis was in force at the time the liability accrued, as in the Koch and Highfield cases.

It is wholly practicable to ascertain the average wages these men received. If the new contract had reduced compensation, Koch and Highfield would have been entitled to include the amount received under the more favorable agreement in arriving at an average. It follows that as to these cases the method of ascertaining average wages was erroneous, and the judgments should be modified as indicated.

We do not think that the commission improperly determined that the father and stepmother were dependents of Ralph Walker; nor were burial allowances incorrectly computed or awarded in any of the cases.

Causes Nos. 6793, 6806, 6807, 6808, 6809, 6811, and 6813, are affirmed.

Causes Nos. 6810 and 6812 must be modified. They are therefore remanded to Logan circuit court where proper judgments will be entered if the commission files

with the circuit court its finding based upon the law as herein declared, and such finding is approved by counsel for appellants and appellees. Otherwise, at the expiration of fifteen days from this date, the mandate will be that the judgments be reversed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* CARRUTHERS, ADMR.

4-6648 162 S. W. 2d 912

Opinion delivered June 1, 1942.

Henry Donham and *Pat Mehaffy,* for appellant.

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

McHaney, J. Appellee is the administrator of the estate of James K. Carruthers, deceased, who was instantly killed in a collision with the first section of train No. 2, the Sunshine Special, at the Elm street crossing, in Prescott, Arkansas, on the night of November 11, 1940, at about 9:45 p. m. He brought this action against appellants, the railroad company, its trustee in bankruptcy and the engineer on said train, John T. Griffin, to recover damages therefor. The negligence alleged in the complaint and relied on at the trial was failure to sound the whistle or ring the bell, and "that the headlight on the engine—was defective, in that same was very dim, if in fact the headlight was burning at all, and alleges that it could not be seen at a safe distance by travelers upon said Elm street as was the deceased"; damages were prayed in a large sum both for the benefit of the widow and children of deceased, and for the benefit of his estate; for conscious pain and suffering. The answer was a general denial and a plea that the death of deceased was caused by his own negligence and carelessness in driving upon the track in front of said train without exercising any care for his own safety and protection; that said Elm street crossing is equipped with an electric gong and wig-wag signal in the center of Elm street, which gong was sounding and the wigwag working warning him of the approach of said train; that notwithstanding said warning, and without looking or listening and without stopping, or without exercising any degree of care, he drove his car onto the track immediately in front of said train, causing it to strike him, at a point and under such conditions that it was impossible for the operatives to avoid striking him, and that his own negligence and carelessness was the direct and proximate cause of his injuries and death. Trial resulted in a verdict and judgment against appellants in the sum of $20,000.

The facts most favorable to appellee and the undisputed facts disclose that appellee's intestate was driving his car north on highway No. 67, which parallels the main

line railroad track through Prescott and is 110 feet west of said track; that at the intersection of said highway and Elm street there is a traffic light with red and green signals to control traffic; that, on reaching said intersections, intestate turned to his right without stopping and proceeded east to cross the railroad track, driving at a rate of speed of 15 to 20 miles per hour; that, immediately west of the main line of railroad, there are two switch tracks that come to a dead end at or near Elm street, both having box cars spotted on them in such close proximity to Elm street as to obstruct the view of one approaching the main line from the west until such obstruction was passed; that there is also located west of said switch tracks and south of Elm street a loading platform and freight depot which obstruct the travelers' view to the south; that there is located, in the middle of Elm street and just west of the main line an electric gong and wigwag signal to warn persons using the crossing of the approach of trains; that at the time intestate was struck and killed the gong was sounding and the wig-wag signal was working and that he had to pass same, within a few feet of it, to get on the main line track; that it is 18 feet between the end of the ties on the main line and the end of the ties on the first or No. 1 switch track to the west; that there was a freight train on a passing track south of the crossing, which is east of the main line, waiting for No. 2 to pass before pulling out, and escaping steam from its engine was making some noise; and that this passing track is 136 feet south of the Elm street crossing. Appellant's witness, Fielding, testified it was 38.8 feet from the center of the main line track to the center of side track No. 1. Mr. Boyette, signalman for appellant, testified, and was not disputed, that when a train hits the electric circuit 2,000 feet south of the crossing on the main line, it starts the gong ringing and the wig-wag working, and that, for the freight train on the passing track to cause the gong to ring and the wig-wag to work, the switch to the main line has to be open and we understand that to mean it has to be lined up with the main track so as to divert a train from the main line to the side track or from the side track to the main line. In other words, the circuit that works the gong and wig-

wag is wired to the main line, and that a train on the side or passing track would not work the signals unless there was actual contact between the rails of the side track and the rails of the main line. That there was no such contact is conclusively demonstrated from the fact that train No. 2 proceeded along the main line past the switch stand. Had the switch been open it would have wrecked No. 2, which was running about 50 miles per hour. It necessarily follows that the local freight on the passing track did not cause the gong to ring and the wig-wag to work at the time intestate was killed, but that it was caused by No. 2 on the main line.

Five witnesses testified for appellee to the effect that train No. 2 did not whistle for the Elm street crossing, but that it did whistle down about the depot, south of this crossing, and one of them that the bell was ringing. Three of them said the headlight was not burning when the accident occurred. Witness Silas said he didn't think it was burning and Gee said it was out when it hit the car, but when he first saw the train, the headlight was on, and he thought it went out about the depot. Stockton said he never saw a train run without a headlight before. All five witnesses say No. 2 was making a lot of noise that could be heard a long distance away and that the gong was ringing and the wig-wag working.

Opposed to this evidence of appellee, appellants offered the testimony of 12 witnesses, in no way connected with it, who testified positively either that the bell on No. 2 was ringing or that the whistle was blowing and that the headlight was burning, although it had been dimmed so that the operatives on the local freight could see its signals. In addition to appellant Griffith, the engineer on No. 2, nine other employees of the railroad company testified in corroboration of the 12 non-employees. It thus appears that there was some conflict in the evidence as to whether the signals were given for this particular crossing, but there seems to be little, if any, conflict in the evidence that the whistle blew down about the passenger depot which was some two blocks south of Elm street. One of appellee's witnesses, Silas, made a statement to the claim agent on November 14,

1940, three days after the accident, which was taken by the official court reporter, in which he said the train whistled before he saw it, at least as far south as the passenger depot, and that it continued to whistle almost constantly up to where the accident happened. As to the headlight, the complaint did not allege it was not burning, but that it was defective in that it was very dim, and could not be seen at a safe distance. The overwhelming proof shows, not only that the signals were given, but that the headlight was burning, although it had been dimmed to enable the waiting crew on the local freight to see its signal lights which indicated that another section of No. 2 was following this train, and the engineer said he blew a classification signal at the local engine to attract their attention to his signal he was carrying for the second section. He said that, to dim the headlight, there is a switch in the cab and it is thrown off the headlight with several hundred candle power and put on the hundred candle power, so the local crew could see his classification, and then switched back on the high candle power, and that was what he did. No doubt this dimming of the high light caused some three of the witnesses to think the headlight had gone out.

But regardless of whether the signals were given or the headlight was temporarily off, all the witnesses agree that this train was traveling at about 50 miles per hour and was making a very loud noise, that could be heard for a mile or more down the track. We think this case is ruled adversely to appellee by the very recent case of *Mo. Pac. Rd. Co.* v. *Howard, ante,* p. 253, 161 S. W. 2d 759.

Appellee's intestate was grossly negligent in driving upon the tracks, under the circumstances here presented, in total disregard of the ringing gong and the working wig-wag, which cried out to him, in no uncertain terms, that danger was approaching. Even though his view was obstructed to the south, the direction from which No. 2 was approaching, the duty was imposed upon him to approach said crossing with greater caution, especially in view of the warning signals staring him in the face and beating upon his sense of hearing. In the Howard case, *supra,* we said: "The very fact that box cars were spotted

so near the crossing, as to cut off the view to the south, made it her duty, in the exercise of due care, to approach the main line track in such a way as to permit her to get a clear view to the south after the box cars ceased to obstruct her view and to stop, if necessary, to avoid the danger. In other words, as the danger increases, the degree of care required to free one of contributory negligence in a crossing accident increases." See cases there cited to support that statement. We there held that the contributory negligence of Howard equalled or exceeded that of the railroad company, conceding it to have been negligent for failure to give the signals, and that there could be no recovery under the provisions of § 1213 of Pope's Digest. The statute, § 11135 of Pope's Digest requires railroad companies to ring the bell or blow the whistle at crossings, that is, to do one or the other, beginning 80 rods away, and to continue until the crossing is passed. We have held in many cases that these statutory signals cease to be factors and that no recovery can be had for failure to give them when the presence of the train is plainly discoverable by other means, the latest being the Howard case. Here, not only did the warning signals in the middle of Elm street give intestate this information, but the loud noise of the train could have been heard by him, had he used the slightest care. Either he saw and heard these signals and the noise of the approaching train and thought he could beat it across, or he was preoccupied with something else and failed to see and hear what was plainly to be seen and heard and what every one else saw and heard, including his own witnesses. In either case, there can be no recovery, because his own negligence was the proximate cause of his death.

We conclude, therefore, that intestate's negligence, under the circumstances here presented, equalled or exceeded that of appellants, assuming them to be negligent as stated, and that the judgment should be reversed and the cause dismissed.

MEHAFFY, J., not participating.

SMITH, J., (dissenting). The majority correctly say that there can be no recovery if the negligence of the deceased was equal to or greater than that of the em-

ployees of the railroad company. Both were negligent, but, in my opinion, the respective degrees of negligence was a question for the jury, and I, therefore, dissent from the judgment dismissing the cause of action. The jury might well have found that the negligence of the deceased was greater than that of the operatives of the train; but that finding was not made.

However, I think it certain and undisputed that deceased was negligent, but, in my opinion, the jury did not take that fact into account. The wigwag was working, but the warning which it gave was disregarded. Certainly this was negligence, and the statute (§ 1213, Pope's Digest) provides that "where such contributory negligence is shown on the part of the person injured or killed, the amount of recovery shall be diminished in proportion to such contributory negligence."

If this statute is applied and given effect, the judgment for $20,000 cannot be sustained, and should be materially reduced. In my opinion, under the undisputed evidence, the judgment should be materially reduced, although the cause should not be dismissed.

HUMPHREYS, J., (dissenting). The majority correctly say that there can be no recovery if the negligence of the deceased was equal to or greater than that of the employees of the railroad company. The majority in the last analysis of the testimony conclude that intestate's negligence equaled or exceeded that of appellants, and that the judgment should be reversed and the cause dismissed. This was not the conclusion of the jury. The jury analyzed the evidence and concluded by their verdict that appellants' negligence was greater than that of deceased. There is substantial evidence in the record tending to support the finding of the jury, and the verdict should not be stricken down by the court unless there is evidence showing that the verdict was the result of passion or prejudice. There is nothing in this record showing that the verdict was based upon passion or prejudice. The jury are better judges of the weight and effect of the testimony of witnesses than the court can possibly be. In fact, the Constitution of this state makes the jury

the exclusive trier of the facts. No authority is conferred upon the Supreme Court to try the facts *de novo* in a suit at law. In chancery suits, the court may do so, but not in suits at law. In my opinion, the majority of the court in striking down the verdict and dismissing the suit invaded the exclusive province of the jury.

In his dissenting opinion Mr. Justice Smith says that the majority erred in striking down the verdict and dismissing the suit, and that instead of doing so the court should have diminished the verdict in proportion to the deceased's contributory negligence under § 1213 of Pope's Digest. In his dissent he states that the jury did not take the fact of deceased's contributory negligence into account. I am at a loss to understand why he concludes that the jury did not take deceased's contributory negligence into account in arriving at their verdict. Whatever contributory negligence deceased was guilty of was before the jury, and the presumption necessarily is that they took it into consideration in arriving at their verdict. It was the duty of the jury to take any contributory negligence on the part of the deceased into consideration, and I cannot agree with my learned associate that they did not take it into consideration. I not only dissent from the majority opinion, but dissent from that portion of my associate's dissenting opinion which says that the court should have materially reduced the verdict instead of striking it entirely down. There is nothing in this record showing that a verdict for $20,000 is excessive, even though the deceased was partially to blame for the collision.

For the reason given, I most respectfully dissent from the majority opinion in this case.

BLANKENSHIP *v.* W. E. COX & SONS.

4-6765 162 S. W. 2d 918

Opinion delivered June 1, 1942.

John R. Thompson, J. H. Lookadoo and *Steve Carrigan,* for appellants.

W. S. Atkins and *Ned Stewart,* for appellees.

GRIFFIN SMITH, C. J. Two causes were consolidated. The appeals are from judgments rendered on jury verdicts for the defendants, partners who operated farms and gins. On behalf of John Blankenship, a minor, it is contended he was employed in violation of Initiative Act No. 1. Pope's Digest, §§ 9068, 9069, 9071.

The second contention relates to the suit of D. W. Futrell, administrator of the estate of Alfred H. Futrell. It is conceded there was substantial testimony upon which the triers of facts could have found for or against the defendants as to either plaintiff. Unless instructions were erroneous, the judgments must be affirmed.[1]

Alfred Futrell, a cripple, had been employed by W. E. Cox & Sons since 1928. For a number of years he had been general foreman, supervising operations of gins and other machinery. Because of physical impairments it was Futrell's custom to sit near when men were working and to explain to them how the work should be done. The Cox gin at Fulton was being overhauled. When in service it was driven by a gasoline engine. July 20 and

[1] A gasoline explosion in a gin owned and operated by defendants caused Alfred Futrell's death and severe injuries to young Blankenship. It occurred July 21, 1938, slightly less than a month before John would have been fifteen years of age.

21 men had been working in the engine room. Alfred Yarbrough testified that late in the afternoon (July 21) he was sent by Ernest Cox to procure five gallons of gasoline for use in cleaning machinery. There is testimony that a tub and bucket were partially filled with the fluid, into which rags were dipped and applied to the machinery. As a consequence, gasoline dripped to the concrete floor and formed small pools in recesses until the restricted area in which operations were being conducted became permeated.

Yarbrough asserted that Ernest Cox directed the work. Cox testified he had spent part of the day in the engine room, but contended he did not exercise authority because Futrell was foreman and had charge of the work. An extension cord approximately twenty feet long was utilized in examining the engine. Yarbrough's explanation of the fire was that insulation had been worn from a four,- five,- or six-inch section of the cord, permitting wires to contact and form a short circuit. The cord, he said, had been frequently dragged over the floor. Yarbrough was looking at the cord—presumably the end to which the light socket was connected—when the flash occurred and the gasoline was set on fire.

John Blankenship had been assisting a painter with outside work, but finished the assignment about thirty minutes before quitting time. Yarbrough and Blankenship asked Futrell what to do. He directed that they help clean the engine. Futrell was sitting near a door and had been working on a lock from a door on Kenneth Cox' automobile. Blankenship, at the time of trial, weighed 163 pounds, and was six feet and one inch tall. He was paid $1.25 per day.

In testifying regarding the extension cord, Yarbrough asserted that Ernest Cox was present when it was being used, and that the exposed wires were easily seen. This witness also testified: ". . . . the extension cord was on the floor when we began cleaning the engine, under Mr. Cox's direction. . . . When Mr. Cox was there he was the boss around the engine."

The inference is clear that the cord belonged to Futrell, or that it was kept by him and carried from place

to place for use as occasion might require. Futrell had a chest containing various tools, in which the cord had been frequently seen. Some of the tools were sent to Mrs. Futrell after her husband died, but the cord was not in evidence, although witnesses testified to having seen it after the fire. Some were of opinion that the insulation referred to by Yarbrough as having been worn away was destroyed by fire.

Blankenship's burns confined him to a hospital for three weeks. Medical treatment was required thereafter. Futrell died twenty-six hours after receiving burns.

Instruction No. 6, given on request of the defendants, reflects the trial court's construction of the law applicable to Futrell:—"If you find from the evidence that the light extension cord in question was the property of Futrell, then you will find for the defendants in the Futrell case."

Objection was that even though the cord belonged to Futrell, it was being negligently used at the time the fire started, and such use was supervised by Ernest Cox. The court was asked to amend the instruction by adding: "Unless you further find that at the time the extension cord was put in use by the deceased, it was defective, or in an unsafe condition."

There is testimony that it was customary for Futrell to engage employes for Cox & Sons. Also, it is in evidence that Cox & Sons did the hiring and that Futrell's duties were to superintend. While Yarbrough may be inaccurate in saying Ernest Cox was directing work in the engine room at the time the fire occurred, nevertheless Yarbrough did give testimony to that effect, and he coupled with such testimony the assertion that Futrell was otherwise engaged for perhaps twenty minutes preceding the blaze, and that Cox directed the cleaning process.

It would be formulary to say, as a matter of law, that because of the prevailing custom permitting Futrell to superintend mechanical operations, responsibility for specific conduct engaged in by employes in the immediate presence of Ernest Cox was deflected in such a

way as to clear the partnership and attach to Futrell—and this upon the theory that if Futrell *owned* the extension cord there could be no recovery by the administrator. Instruction No. 6 is what is termed "binding". It closes with the expression, ". . . then you will find for the defendants". Although evidence strongly indicates the cord was owned by Futrell or was so commonly utilized by him as to justify the presumption that if it were purchased by the Cox partnership, members of the firm were not concerned regarding it, there was no special finding of ownership. We do not, however, regard this as controlling.

Appellees' contention is that ". . . if the jury found that the . . . cord in question was defective and caused the fire and was the property of Alfred Futrell, and that Futrell was foreman and had charge and was superintending and directing the work, then, in this event, it is a well-settled rule of law that 'no liability [is] incurred when the employe's knowledge equals or exceeds that of the employer' ".

A flaw in this statement is assumption that the cord was defective when put to use by Futrell the previous day. Also, there is conflict in the testimony regarding relative activities of Ernest Cox and Futrell. Result is that a "binding" instruction which omitted essential elements should not have been given; nor could the vice be cured by giving an appropriate instruction.

Was the court in error when it refused to give plaintiff's requested Instruction No. 1 in the Blankenship case?

Sections 2, 3, and 4 of the law which it is contended controls are copied in the margin.[2] The instruction asked

[2] Section 2: "No child under sixteen years shall be employed or permitted to work in any occupation dangerous to the life and limb, or injurious to the health and morals of such child. . . ." (Pope's Digest, § 9068).

Section 3: "No child under sixteen shall be employed or permitted to work at any of the following occupations: (1) adjusting any belt to any machinery; (2) sewing or lacing machine belts in any workshop or factory; (3) oiling, wiping or cleaning machinery or assisting therein; (4) operating or assisting in operating any of the following machines: (a) circular or band saws; (b) wood shapers; (c) wood jointers; (d) planers; (e) sandpaper of wood polishing ma-

would have told the jury no child under sixteen years of age may be lawfully employed to oil, wipe, or clean machinery or assist "therein or about" in connection with any process in which dangerous or poisonous acids or gases or other chemicals are used. . . . "Therefore you are told that (as the undisputed evidence shows that John Blankenship, who was under sixteen years of age, was employed by W. E. Cox & Sons, in oiling, wiping or cleaning machinery or assisting therein in, about, and in connection with processes in which dangerous and poisonous acids or gases and other chemicals were used, and [was employed to] wipe and clean machinery with rags dipped in gasoline from open containers and being used at the time to clean machinery) . . . [this] was an occupation dangerous to life and limb, and injurious to the health and morals of John Blankenship, and [if] as a result of such employment John Blankenship suffered certain personal injuries, . . . the defendants are liable to John Blankenship. . . ."

There was no testimony that poisonous acids or other chamicals were used. We have judicial knowledge of the fact that in certain circumstances inflammable gases are created in consequence of evaporation of gasoline and its mixture with air. The lower court was justified in refusing to give the instruction on account of the extraneous matter it contained, including the reference

chinery; (f) wood turning or boring machinery; (g) picker machines or machines used in picking wool; (h) carding machines; (i) job or cylinder printing presses operated by power other than feet power; (j) boring or drill presses; (k) stamping machines used in metal or in paper or leather manufacturing; (l) metal or paper cutting machines; (m) corner staying machines in paper box factories; (n) steam boilers; (o) dough brakes or cracker machinery of any description; (p) wire or iron straightening or drawing machinery; (q) rolling mill machinery; (r) washing, grinding or mixing machinery; (s) laundering machinery; (5) or in proximity to any hazardous or unguarded belt, machinery or gearing; (6) or upon any railroad, whether steam, electric or hydraulic." (Pope's Digest, § 9069).

Section 4: "No child under the age of sixteen shall be employed, permitted or suffered to work in any capacity; (1) in, about or in connection with any processes in which dangerous or poisonous acids or gases or other chemicals are used; (2) nor in soldering; (3) nor in occupations causing dust in injurious quantities; (4) nor in scaffolding; (5) nor in heavy work in the building trades; (6) nor in any tunnel or excavation; (7) nor in any mine, coal breaker, coke oven, or quarry; (6) nor in a bowling alley or pool or billiard room; nor in any other occupation dangerous to the life and limb, or injurious to the health and morals of such child." (Pope's Digest, § 9071).

to occupations injurious to the health and morals of the plaintiff.

Similar objections are open to requested Instruction No. 2.

An instruction was that if the jury should find from a preponderance of the evidence that the explosion and resulting fire were caused by acts of the defendants in having employes wipe machinery with rags dipped in gasoline supplied in open containers in the engine room in proximity to charged electric wires, and that the defendants, as ordinarily careful and prudent persons, knew, or should have known, that this method of work was dangerous and could easily result in a fire or explosion, and that as a result of such negligence the explosion occurred and Blankenship was injured, "then you should find for the plaintiff Blankenship."

There was objection, general and specific, to the court's action in giving defendant's Instruction No. 7:— "The mere use of gasoline is not in itself negligence, unless it should be further shown that it was used under such circumstances as would cause a reasonably prudent person to anticipate that it would be ignited."

Does § 9069 of Pope's Digest, which directs employers not to permit a child under sixteen years of age to oil, wipe, or clean machinery, or assist therein, prohibit such minors from engaging in the character of work John Blankenship is shown to have been doing? It is conceded he was wiping or cleaning machinery. What, then, was the intent of the statute?

Recovery was allowed in *Terry Dairy Co.* v. *Nalley,* 146 Ark. 448, 225 S. W. 887, 12 A. L. R. 1208, on the theory that violation of the statute was the proximate cause of injury, there having been no intervening agency. So, in *Fort Smith Rim & Bow Company* v. *Qualls,* 146 Ark. 475, 225 S. W. 892. In the Dairy Company case it was said: ". . . the undisputed evidence shows that the child was injured while in the course of his employment, and the court properly took the question of proximate cause from the jury." Further comment was that employment of a minor in violation of the statute is negligence *per se.*

If the injury is caused by reason of such employment, the act of employment is negligence, and is the cause from which the result came.

Indicative of the legislative intent regarding Initiative Act No. 1 is the second paragraph of § 3, authorizing the state board of health to conduct hearings, and ". . . determine what other occupations are sufficiently dangerous to the life or limb or injurious to the health or morals of children under sixteen years to justify their exclusion therefrom. . . ."

If preservation of life or limb, and guardianship of health and morals of children, prompted initiation of the Act, can it be said there was an intent by those who framed the measure, or by the people who adopted it, to prohibit a child under sixteen from cleaning a non-operating gasoline engine? Was the word "machinery" intended to be all-inclusive, and to embrace mechanical contrivances of every kind and to prohibit persons who had not reached the designated age from using an oiled or gasolined rag in cleaning at a time when the contrivance or machine is not in use, cannot be operated, and is no more dangerous than a parked automobile from which the battery has been taken and the brakes set?

Webster's International Dictionary defines a machine as any device consisting of two or more resistant, relatively constrained parts, which, by a certain predetermined intermotion, may serve to transmit and modify force and motion so as to produce some given effect or to do some desired kind of work. . . . "According to the strict definition, a crowbar abutting against a fulcrum, a pair of pliers in use, or a simple pulley block with its fall, would be a machine, but ordinary use would hardly include such as these; while an implement or tool whose parts have no relative movement, as a hammer, saw, chisel, plane, or the like, would not, of itself, in any case be a machine.

"Popularly and in the wider mechanical sense, a machine is a more or less complex combination of mechanical parts, as levers, gears, sprocket wheels, pulleys, shafts and spindles, ropes, chains, and bands, cams and

other turning and sliding pieces, springs, confined fluids, etc., together with the framework and fastenings supporting and connecting them, as when it is designed to operate upon material to change it in some preconceived and definite manner, to lift or transport loads, etc."

Taking into consideration the evil sought to be remedied, "machinery," as used in the Act, must mean a more or less complex combination of mechanical parts operating in such manner as to fascinate or confound a person of tender years; and as to such contrivances it was the intent to prevent children from having access to them at a time and in circumstances when harm might conceivably result. To say it was the purpose to prohibit persons under sixteen years of age from cleaning the base of an engine made harmless by disuse, as to which there are no moving parts, would be carrying construction beyond reason.

An Alabama statute prohibited employment of boys under fourteen years of age in any mine. In *Sloss-Sheffield Steel & Iron Co.* v. *Bearden,* 199 Ala. 132, 74 So. 230, it was held that while § 1033 of the Code of 1907 applied to ore as well as coal mines, "we think that, regardless of the technical definition of the word 'mine', it was the legislative purpose to protect employes in underground mines, whether coal or ore, and not in open or surface mines, such as the one here involved."

In *Daniels* v. *Thacker Fuel Co.,* 79 W. Va. 255, 90 S. E. 840, the holding was that a statute prohibiting employment of boys under fourteen years of age "in any coal mine" did not mean "in or about a coal mine."

It will be observed that § 9069 relates to enumerated "occupations." Certainly, in 1915, oiling and wiping idle machinery was not an occupation in Arkansas. Conversely, oiling and wiping machinery in operation was so generally engaged in that framers of the law might well have had in mind saw mills, cotton gins, and factories.

We must assume, therefore, that in using the word "machinery" Act writers and the people visualized what a reasonable person would see in words arranged as

those appearing in the sections urged by appellant Blankenship as authority for the proposition that his injuries were traceable to appellees' disobedience of law.

It follows that the court did not err in refusing to hold, as a matter of law, that the defendants were liable for Blankenship's injuries merely because he was employed to clean an idle engine, no part of which featured in the result complained of. Nor is gasoline dangerous, *per se*. The court was correct in instructing that before the fact of its use could be relied upon as a basis of liability, it was essential to find that circumstances were such as to cause a reasonably prudent person to anticipate that its fumes might be ignited.

The judgment in the Blankenship case is affirmed. As to Futrell, the judgment is reversed and the cause is remanded for a new trial if the plaintiff so desires.

Mr. Justice HUMPHREYS dissents in the Blankenship case. Mr. Justice MEHAFFY concurs in the Futrell case and dissents in the Blankenship case.

TILMON, COUNTY ADMINISTRATIVE ASSISTANT, *v.* ADKISSON, AGENT.

4-6775 162 S. W. 2d 903

Opinion delivered June 1, 1942.

Sam Rorex and *J. E. Lightle, Jr.*, for appellant.

R. W. Robins, for appellee.

MEHAFFY, J. The appellee, Mrs. G. W. Adkisson, agent, brought suit in the chancery court of Faulkner county against Joe McCuin and Wayne Tilmon, county administrative assistant. She alleged that Joe McCuin was indebted to her and, for a valuable consideration, agreed to indorse and deliver to her a certain rental check drawn by the United States Government in favor of the defendant; that said rental check had been duly issued by the United States Government and was now in the hands of the defendant, Wayne Tilmon, county administrative assistant, who is threatening to deliver said check to the defendant, Joe McCuin; that McCuin was threatening to cash the same and not deliver same to plaintiff. She alleged that McCuin was indebted to her in the sum of $258.91 upon a certain promissory note. A copy of the note was attached and made part of the complaint; that McCuin is insolvent and has no property out of which she can collect said indebtedness and if the check is turned over to the defendant, he will cash same and fail and refuse to pay the plaintiff, and the plaintiff will thereby suffer irreparable injury and damage, and she has no adequate remedy at law. The amount of said check payable to McCuin is in the hands of Wayne Tilmon and is in the amount of $72.80.

A temporary restraining order was issued and served, and the appellee then filed an amendment to her complaint and alleged that the check was issued by Secretary of Agriculture or some other agent of the Federal Government and is a negotiable bill drawn on the United States Treasury payable to the order of Joe McCuin and was in payment of the amount due to said defendant from the federal government in compliance with the conservation program of the federal government by said defendant while a tenant on plaintiff's farm in Faulkner county during 1940. All the work to be done by defendant McCuin for which said check represents payment has been performed in full and accepted by the government officials who have determined that said amount is due to Joe McCuin. The defendant, Wayne Tilmon, as administrative agent, has no interest or control over the proceeds of said check and does not have any discretion or power

with reference to said check or the proceeds thereof. Said check has been sent to the defendant, Tilmon, and is in his hands solely for the purpose of delivering same to Joe McCuin.

Joe McCuin did not appear or answer and there is no dispute about the indebtedness and no dispute about the fact that the work was done and accepted by the government, for which the check was issued.

Defendant, Wayne Tilmon, county administrative agent, filed a motion to dismiss, alleging first that the Secretary of Agriculture of the United States is a necessary and indispensable party and has not been made a party thereto; second, that this action contravenes the statutes of the United States, to-wit: 16 U.S.C.A. 590h; third, the complaint does not state facts sufficient to constitute a cause of action against this defendant; fourth, the court is without jurisdiction over the subject-matter of this action; and fifth, that the court does not have jurisdiction over this defendant in his official capacity as county administrative assistant.

The court entered the following decree: "Now on this day comes the plaintiff, Mrs. G. W. Adkisson, agent, by her solicitor, R. W. Robins, and comes the defendant, Wayne Tilmon, county administrative assistant, by J. E. Lightle, Jr., assistant United States attorney for the Eastern District of Arkansas, and the defendant, Joe McCuin, comes not, though duly served with process herein for the time and in the manner prescribed by law, and this cause coming on to be heard upon the motion to dismiss filed herein by the defendant, Wayne Tilmon, county administrative assistant, and being well and sufficiently advised, it is by the court considered, ordered, adjudged and decreed that the said motion to dismiss be and the same is hereby overruled, and the said defendant, Wayne Tilmon, county administrative assistant, electing to stand upon said motion and declining to plead further herein, it is by the court considered, ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant, Joe McCuin, the sum of $258.91 and all costs of this suit, and that the defendant, Wayne Tilmon, county administrative assistant, be

and he is hereby ordered, enjoined and required to deliver to the clerk of this court, for the plaintiff, the check for $72.80 heretofore issued by the Secretary of Agriculture of the United States, or his agents, payable to the defendant, Joe McCuin, and the defendant, Joe McCuin, is hereby ordered, enjoined, and required to indorse said check, and the clerk of the court will thereupon deliver same to the plaintiff, and the proceeds of said check, when collected by the plaintiff, shall be credited upon the judgment against the defendant, Joe McCuin, herein; and the plaintiff may have execution or other process upon this judgment as upon a judgment at law.

"The defendant, Wayne Tilmon, county administrative assistant, excepted and objected to the above ruling of the court, and to the foregoing decree, and prayed an appeal therefrom to the Supreme Court of Arkansas, which was granted. Entered this 6th day of September, 1941."

The case is here on appeal.

The defendant, McCuin, did not answer and did not claim that he did not owe the indebtedness mentioned in plaintiff's complaint. In fact, it is conceded that he owes the debt and that he was given the check in payment of work which he had completed and which had been accepted by the government. There is no claim by the government or any of its agents that it or any of its agents have any interest in the check or in this controversy. The appellant, Tilmon, does not claim any interest and does not claim that he has any duty to perform with reference to the check, except to deliver it to McCuin.

It is first contended by the appellant that the remedy sought expressly contravenes the federal statutes. We do not think it contravenes any federal statute or any decision of the United States court.

Appellant not only claims this contravention of the statutes, but he calls attention to the case of *Graves Bros., Inc.,* v. *Lasley,* 190 Ark. 251, 78 S. W. 2d 810, contending that that case prevents the maintenance of this suit. The facts in that case are so unlike those in the case at bar that it really is no authority for this case. However, the

court there said: "The courts commonly concur in holding that public policy forbids any interference between the court and its contractor under such circumstances if the work is still in progress, for the interferences would tend to retard the occupancy of the building. But here the complaint alleges that the work has been completed. There is no longer any public interest to be subserved by withholding payment from the contractor, and no reason for withholding the debt from the reach of the remedy in this sort of proceeding."

Appellant also calls attention to the case of *Federal Land Bank of St. Paul* v. *Bismarck Lbr. Co.,* 314 U. S. 94, 62 S. Ct. 1, 86 L. Ed. *. That case involved the validity of a sales tax on the Federal Bank by the State of North Dakota, and the court said: "Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lend-functions, the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are 'instrumentalities of the federal government, engaged in the performance of an important governmental function.' *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 55 S. Ct. 705, 79 L. Ed. 1408; *Federal Land Bank* v. *Gaines,* 290 U. S. 247, 54 S. Ct. 168, 78 L. Ed., 298. The national farm loan associations, the local co-operative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities."

It is unnecessary to review all the authorities cited. We know, however, of no statute or decision of the court that prohibits a suit of this character. Numbers of the authorities are reviewed in the cases above cited. In the case of *Federal Land Bank* v. *Priddy, supra,* this court said: "The second contention of petitioner in support of its request for writ of prohibition is that the Federal Land Bank of St. Louis, Missouri, is an instrumentality of the government of the United States, and that on that account its property is not subject to attachment. In the act authorizing the creation of said banking corporation, there is no limitation or restriction against reaching its property by attachment. We know of no law prevent-

* Page not available at time of going to press.

ing levy by attachment against the property of corporations created by act of Congress except preventing attachment against the property of national banks before judgment is obtained against them.''

It is next contended that the Secretary of Agriculture of the United States was a necessary and indispensable party. There seems to be no reason why the Secretary of Agriculture should be made a party. He does not claim any interest, has not asked to be made a party, and it is conceded that neither the United States nor any of its agencies had or claimed to have any interest.

We find no error, and the decree is affirmed.

MISSOURI AND ARKANSAS RAILWAY COMPANY *v.* JOHNSON.

4-6766 162 S. W. 2d 475

Opinion delivered June 1, 1942.

W. S. Walker and *W. W. Sharp,* for appellant.

H. M. McCastlain and *J. H. Thompson,* for appellee.

SMITH, J. It appears from the testimony in this case that the Federal Government purchased, the State Highway Department installed and the appellant railway company maintains, electric traffic barriers at the point where highway No. 70 crosses appellant's railroad track

near the town of Wheatley. This point is only a short distance from appellant's depot in Wheatley. The testimony does not explain, but it is generally known, what the purpose of the barriers is, and how they operate. The railroad tracks run north and south and the highway east and west, and the crossing is at a right angle. There are barriers on both sides of the railroad track, which are raised to obstruct the highway as trains approach the highway traveling either north or south. The barriers are about 150 feet apart. The movement of the trains throws an electric switch, which raises the barriers, and they remain up until the train has proceeded and run on to another switch, which breaks the electric connection and the barriers are automatically lowered.

According to the testimony of appellee, and that of a companion who was driving with him in a truck, they approached this crossing at about 4:30 p. m., driving east. When they reached the railroad track the red light suspended in the center of the road over the tracks was burning and the barriers were up. A freight train was switching near this crossing, and this movement turned the lights off and on and raised and lowered the barriers as its operation connected or disconnected the electric current. When the barriers were down the traffic lights were green; when they were up the lights were red.

When appellee reached the first barrier on the west side of the track, he brought his truck to a full stop, as the barrier was up and the red light was showing. He waited until the light changed to green which is the "Go ahead" signal, and the barriers were lowered. He drove safely across the railroad track, but just as he reached the barrier on the east side it rose and the truck struck it and was deflected off the highway, and appellee sustained the injury to compensate which this suit was brought. The crossing was plainly in the view of the operatives of the train, but they gave no warning or signal by blowing the whistle or ringing the bell, or otherwise, that the engine of the train was about to make a movement which would result in the electrical connection which would raise the barriers and obstruct the traffic.

The railway company filed an answer, in which it "denied every material allegation contained in the complaint of plaintiff," and, further answering, alleged "that if the plaintiff suffered any injuries or damage, the same was due to his own negligence."

For some reason not explained in the record the defendant railway company did not appear at the trial, and the case was submitted to the jury under instructions of which no complaint is made.

The errors assigned in the motion for a new trial are that the verdict is contrary to the law; is contrary to the evidence; and is contrary to the law and the evidence, and that the court should have instructed a verdict for the defendant.

No complaint is made of the erection and maintenance of the barriers, and it is not questioned that they were operating properly and as it was intended that they should operate. Obviously, they were erected and maintained for the protection of the traveling public, and they would have afforded that protection had the operatives of the train not been unmindful of the fact that traffic would move on the highway and across the railroad track when the green light extended an invitation so to do.

There was a verdict and judgment for the plaintiff, from which is this appeal.

Whatever the truth may be, the undisputed testimony is to the effect that appellee was injured without fault or carelessness on his part as a result of the negligent failure of the operatives of the train to give notice and warning that it was about to move, thereby making the electric connection which would raise the barriers. Appellee stopped on the red lights, as it was his duty to do, and did not proceed across the tracks until the green light came on and gave assurance that he might cross in safety, but, without warning, according to the testimony offered by appellee, the movement of the train restored the electric connection and the barriers were raised just before appellee could drive the 150 feet intervening between the barriers and in time to strike the truck or to cause the truck to strike the barriers. In other words, the

appellee was trapped without warning between the barriers.

Citation of authority is unnecessary to support the finding of the jury that appellant was negligent in the operation of the barriers. However, numerous cases are cited in the brief of appellee like that of *Sgier* v. *Philadelphia & R. Ry. Co.,* 260 Pa. 343, 103 Atl. 730, where it was said by the Supreme Court of Pennsylvania that a railroad must exercise reasonable care in operating safety gates so as to protect travelers on the highway from the cars and from the gates, and like also the case of *Director General of Railroads* v. *State, for Use of Hurst,* 135 Md. 496, 109 Atl. 321, where it was said by the Court of Appeals of Maryland that whether a railroad was negligent in suddenly dropping safety gates on an automobile driver, after he had entered upon a crossing, so as to cause him to lose control of the automobile and collide with a train, was a question of fact for the jury. See, also, *Evans* v. *Lake Shore & Michigan Southern R. Co.,* 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223, and numerous other cases cited in Vol. 3, Elliott on Railroads (3d Ed.), § 1650, under the title "Signboards and gates at crossing."

Here, the questions of fact presented by the testimony were submitted to and passed upon by the jury, and the testimony supports the finding that appellee's injury was due to the negligence of the railway company in moving its train without warning.

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

WILSON *v.* FRAPS.

4-6768 162 S. W. 2d 561

Opinion delivered June 8, 1942.

R. C. Waldron, W. A. Jackson and *W. E. Beloate,* for appellant.

Lamb & Barrett, E. H. Tharp and *A. U. Tadlock,* for appellee.

SMITH, J. A suit was filed on behalf of the state, under the authority of act 119 of the acts of 1935, to confirm the forfeiture and sale of the east half of the northeast quarter of section 16, township 15 north, range 2 east, with other lands, for the nonpayment of the general taxes due thereon for the year 1936.

Under the authority of § 6 of this act 119 an intervention was filed, which alleged the invalidity of the tax sale for numerous reasons, and prayed the right to redeem. It was also prayed that Sylvester Wilson be made a party defendant, and that intervener's title be quieted as against Wilson. Accompanying the intervention was an affidavit of tender made to Wilson, which the intervention renewed and continued, covering the cost to Wilson of a deed from the State Land Commissioner, and also a deed from the Cache River Drainage District to Wilson, and taxes subsequently paid by Wilson.

The deed from the State Land Commissioner recites that it is based upon a sale to the state for the 1936 taxes. It does not appear to be questioned that this sale was invalid for any one of several reasons alleged, and no at-

tempt is made to uphold its validity, but, in any event, its invalidity is clearly shown.

The court found that neither of the deeds to Wilson operated to convey the title; and we concur in that holding. As has been said, the deed from the State Land Commissioner was invalid because the tax sale on which it was based was not in conformity with the law; and the deed from the drainage district is ineffective to convey title for the reason that the district did not own the land when the deed was made.

The land was sold to the drainage district under a foreclosure decree rendered May 25, 1933, which was later confirmed, and the district, in 1936, conveyed the land to the Pierce-Williams Company, and by *mesne* conveyances this title was acquired by intervener Fraps. The drainage taxes were not thereafter paid; but there was no foreclosure of the lien for these delinquent taxes. Five days after Wilson had purchased the land from the state, he obtained a deed from the drainage district which recites, as a consideration therefor, the payment of the delinquent taxes. This deed did not convey title; it only effected a redemption. *Webb* v. *Williamson,* 202 Ark. 763, 152 S. W. 2d 312; *Mivelaz* v. *Bonner,* 200 Ark. 1189, 141 S. W. 2d 22; *Person* v. *Miller Levee District No. 2,* 202 Ark. 173, 150 S. W. 2d 950.

It is insisted that Fraps is in no position to raise these questions, for the reason that he was not the owner of the land. But the record shows that he had not merely color of title, but is the owner of the record title. The Lesser-Goldman Company had been the owner of the original title. After the drainage district acquired the title under the foreclosure decree of 1933, the district conveyed the land, October 1, 1936, to the Pierce-Williams Company. Recitals in subsequent deeds show that this deed should have been made to J. Paul Smith, the manager of the Pierce-Williams Company. On October 19, 1936, the Lesser-Goldman Company conveyed to J. Paul Smith, who, on February 8, 1937, conveyed to Fraps, and a deed was executed on the same date by the Pierce-Williams Company to Fraps. Since the date last-men-

tioned Fraps has been in possession through a tenant, who has a lease from Fraps with an option to purchase. This tenant also intervened, as did certain other persons, whose rights were adjudged, and that adjudication is not questioned and need not be recited.

Three of the deeds just mentioned were lost before they had been placed of record. But there was executed and recorded a deed from the drainage district to the Pierce-Williams Company, dated April 21, 1941, which recites that it was executed in lieu of a similar deed to the same grantee on October 1, 1936, which was lost and not recorded.

On April 5, 1941, the Pierce-Williams Company executed a deed to Fraps, which recites that it was executed in lieu of a similar deed to the same grantee dated February 8, 1937, which was lost without having been recorded.

On March 10, 1941, the Lesser-Goldman Company executed a deed to J. Paul Smith, which recites that the grantor had, under date of October 19, 1936, conveyed the same land to J. Paul Smith, which deed had been lost without having been recorded.

These substituted deeds did not convey title, but evidenced the execution of deeds which had previously conveyed it. It was said in the case of *Thornton* v. *Smith,* 88 Ark. 543, 115 S. W. 677, that "A duplicate or new deed could convey nothing, but would be only evidence that a former deed conveying title had been made; and this is the only purpose it can or was intended to subserve."

These conveyances show sufficient title in Fraps to entitle him to redeem the land from the sale to the state, it having been many times held by this court that almost any right, either in law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or encumbrance upon the land, amounts to such an ownership as will enable the party holding it to redeem from a tax sale.

In the case of *Billert* v. *Phillips,* 198 Ark. 698, 130 S. W. 2d 715, we construed § 6 of act 119 of the acts of

1935, under the authority of which the confirmation proceeding was instituted, in which the intervention was filed. It was there held that a showing that the tax sale sought to be confirmed was invalid for any reason was a meritorious defense to the confirmation suit, and that upon establishing this meritorious defense the land owner should be permitted to redeem upon the conditions there provided. Fraps met these conditions by tendering, as the court found, a larger sum than the law required to effect a redemption, and upon this finding, together with the finding that the tax sale of 1936 sought to be confirmed was invalid, and that the deed from the drainage district to Wilson was a mere redemption, canceled those deeds as clouds upon Fraps' title.

For the reasons stated this decree is correct and will be affirmed.

Certain collateral matters were adjudicated, which are not questioned, and will not, therefore, be recited or discussed.

Decree affirmed.

HOME ICE COMPANY *v.* BONE, JUDGE.

4-6829 162 S. W. 2d 563

Opinion delivered June 8, 1942.

House, Moses & Holmes, for petitioner.

Dean R. Lindsey, for respondent.

MEHAFFY, J. On October 22, 1941, Dr. L. T. Evans was driving on East Ninth Street, Little Rock, Arkansas, and L. A. Galloway was driving a Home Ice Company truck, when the two collided. Galloway, driver of the ice truck, brought suit in the Pulaski circuit court against Dr. L. T. Evans for injury and damages, which he alleged he received in the collision above mentioned, for the sum of $1,700. Two hundred dollars was alleged to be the damage to the truck and $1,500 for personal injury.

Thereafter Dr. L. T. Evans, a citizen of Independence county, brought suit in the Independence circuit court against the Home Ice Company for $5,250. The Home Ice Company, without entering its appearance for any other purpose, moved the court to dismiss the plaintiff's complaint for want of jurisdiction. It was alleged in said motion: "This suit arises out of an accident involving plaintiff's automobile which occurred on or about October 22, 1941, at the intersection of Ninth and Cumberland Streets in the city of Little Rock, Pulaski county, Arkansas. The automobile of the plaintiff was being driven by the plaintiff, and a truck, which was also involved in the accident, was driven by a man by the name of L. A. Galloway, who is a resident of Pulaski county, Arkansas."

The circuit court of Independence county overruled the motion to dismiss, to which ruling and judgment of the court the Home Ice Company excepted and asked that its exceptions be noted of record, which was done.

Thereafter the petitioner, Home Ice Company, a corporation, filed its petition in this court for a writ of prohibition against the Independence circuit court, Honorable S. M. Bone, Judge.

The suit brought by Galloway against Evans in the Pulaski circuit court is simply a suit between Galloway and Evans. The Home Ice Company was not a party and was not even mentioned in the suit. Galloway claims that he owns the truck and sues, not only for personal injury,

but damage to the truck. The suit by Evans in Independence county is a suit against the Home Ice Company, alleging that its truck was involved in the accident and that Galloway was its employe.

The petitioner, in his brief and argument, first calls attention to 39 C. J. 1313, § 1514, which is a statement of the law involving the question of the liability between the master and servant. It is stated that a servant is liable to his master for damages which the master has been compelled to pay to third persons because of the negligence or other wrongful act of the servant. No such question arises in this case, and no authorities mentioned or discussed by the petitioner, except the case of *Kornegay* v. *Auten, Judge,* and *Melton, Admr.,* v. *Auten, Judge,* 203 Ark. 687, 158 S. W. 2d 473.

After a very careful study of the questions involved in this case and the questions in the Kornegay case, we are of opinion that the Kornegay case is controlling in this case. Every question raised here was raised and decided in that case. It was, however, contended in that case by Kornegay, in his petition for prohibition that act 314 of the Acts of the General Assembly of 1939 gives him the right to determine the venue in the case because he attached some affidavits to his motion showing that he was not to blame for the collision. In other words, being an innocent injured person as a result of the collision, he had the superior right over Joe Melton, Administrator, and Albert Glover, Executor, to bring the suit in the county where he lived or where the collision occurred. The court then copies § 1 of the act, which is as follows:

"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."

After copying the above section of the act the court said: "We find nothing in the act showing that the intention of the legislature was to give either one of two or more persons any priority over the other or others as to where the suit shall be brought. In the instant case, prior to the institution of the suit by *John W. Kornegay* v. *Joe P. Melton, administrator, and Albert Glover, executor,* the administrator brought suit in Lonoke county against John W. Kornegay alleging that Sam Booker Glover was killed through the negligence of John W. Kornegay. He had just as much right, under the act, to bring the suit in the county where the collision occurred and where the deceased at the time resided as did John W. Kornegay to bring the action in his home county. Having equal rights to bring the suit in their respective home counties or in the county where the collision occurred, Joe P. Melton, administrator, brought the suit against John W. Kornegay in Lonoke county before John W. Kornegay brought suit against them in Monroe county. Of course, the county in which the first suit was brought acquired jurisdiction over the subject matter of the suit and the parties thereto."

The same questions were involved in that case as are in this case, and they were there decided adversely to the contention of the petitioner. Of course, the court in the Galloway case had jurisdiction of the parties and the subject matter of that particular suit. The parties, however, as we have already said, were Galloway and Evans and the Ice Company was not even mentioned.

If the theory of the petitioner were correct, then every time there was an accident and injury caused by the negligence of a servant of one of the parties, that servant could immediately bring suit against the injured party in the county where the master or corporation resided, and absolutely prevent the other party from suing, where the act expressly says he may sue. In other words, the master could, if he desired, have his servant bring suit in the county where the master was located and prevent the injured party from suing in his own county, but compel him to bring suit in the county of the master's

residence. The legislature certainly did not intend that the law should be annulled in this way. We think the intention of the legislature was that suit might be brought either in the county where the injury occurred or where the injured party resided at the time of the accident.

Since we have concluded that this case is ruled by the Kornegay case, *supra,* there is no reason why a suit by one party should compel the defendant in that suit to bring his suit against another party in the same jurisdiction; in other words, permit the master always to determine where the suit might be brought. However, we think that as this case is controlled by the Kornegay case, the writ should be denied. It is so ordered.

SMITH, MCHANEY, and HOLT, JJ., dissent.

KILPATRICK *v.* KILPATRICK.

4-6764 162 S. W. 2d 897

Opinion delivered June 8, 1942.

Ross Mathis, for appellant.

John D. Eldridge, Jr., for appellee.

McHaney, J. The parties to this litigation are Negroes, appellant being the widow of Bishop Kilpatrick who was the brother of appellee. The action was brought September 3, 1940, by appellee against appellant and he alleged that, on June 10, 1929, he acquired a certificate of purchase for the delinquent taxes for the year 1928 on the SE SW 26-6 N, 2 W, in Woodruff county, and had regularly paid the taxes thereon from 1929 to date; that he procured a clerk's tax deed to said land which was filed for record July 20, 1940; that he put his brother, Bishop, who died in 1940, in charge of said land, and that Bishop left surviving him his widow only; that he has been in possession of said land for more than eleven years; that appellant claims some interest in the property, the nature of which he is unaware; that Bishop farmed same as his tenant; that he is entitled to an accounting of the rents and profits for 1940 and to an injunction to prevent appellant from disposing of the crops for said year; that appellant has no valid claim to the property; and that she is insolvent. He prayed that she be so enjoined, for an accounting on the 1940 crops, that his title be quieted and confirmed and that he have a writ of possession. The answer was a general denial and averments regarding the title to said land, which will be hereafter referred to.

Trial resulted in a finding and decree for appellee. The court found that, on June 10, 1929, L. L. Cole, a white merchant, with whom Bishop Kilpatrick did business, purchased for appellee the land involved for the delinquent taxes of 1928 and received a certificate of purchase; that in 1940, appellee procured a clerk's tax deed to the land, which is of record; that appellee, from 1929 to May, 1940, has been in adverse possession of said land through his brother, Bishop, as his tenant; that Bishop died in May, 1940, and appellant refused to turn over

possession of the property to appellee; that appellee is the owner and entitled to the possession and that the receiver, theretofore appointed, should turn over to appellee the rents collected by him. This appeal followed.

There is a suggestion that the court was without jurisdiction as this is a suit in ejectment. The point was not raised below and is not seriously raised now, and it was not wholly a possessory action. Other equitable relief was prayed and granted, including an accounting.

The facts are that the land in controversy had belonged to Ike Smith, a brother-in-law of appellee and Bishop, who acquired same by donation from the State about 1900. At that time he, Ike, was married to Celia Kilpatrick Smith, sister of appellee, and they lived together as husband and wife until about 1910, when he deserted her and went away with another woman, but there was no divorce and Ike died about 1913 or 1914. Celia remained in possession of said land from 1910 to 1924, when she died. Both Bishop and appellee lived with her at times and Bishop and appellant were living with Celia at the time of her death. Bishop paid the taxes from 1924 to 1928, but refused to pay the 1928 taxes due in 1929, and he never claimed to own the land. Both he and appellee erroneously thought Celia owned the land. The undisputed testimony is that Celia wanted appellee to have it and Bishop so told Mr. Cole who bought the land at the tax sale in the name of appellee, and Bishop paid Mr. Cole the purchase price by selling a cow belonging to appellee. Thereafter Bishop paid the taxes each and every year in the name of appellee, Bishop being left in possession as appellee's tenant, the rent being the taxes and upkeep of the property. In 1940, appellee got his deed. Thus, appellee was in possession for eleven years through his tenant, under his tax purchase. The collector's certificate of purchase was evidence of title. In *Worthen* v. *Fletcher,* 71 Ark. 386, 42 S. W. 900, it was said: "This court held (in the original oral opinion in same case) and still holds that the certificate of purchase at tax sale is a sufficient evidence of title as that upon which the administrator and heirs of Edwards could base

their defense, and adduce their evidence of adverse possession, since the statute makes the tax sale, and not the tax deed, the investiture of title in the purchaser, in so far as concerns controversies like this." And in *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 299, it was held "that actual possession of part of a tract purchased at tax sale held under the certificate of purchase was sufficient to sustain a suit for trespass committed on a part of the tract not in actual occupancy." The quoted language is that of Judge McCulloch in *Haggart* v. *Ranney,* 73 Ark. 344, 84 S. W. 703, where the holding in *Worthen* v. *Fletcher* was also distinguished and not overruled. In *Townsend* v. *Penrose,* 84 Ark. 316, 105 S. W. 588, it was held that a tax sale certificate of purchase was not color of title within the meaning of § 5057 of Kirby's Digest, now § 8920 of Pope's Digest. We, therefore, hold that the tax sale certificate of purchase in this case, accompanied by actual possession of all or a part of the land in controversy, is sufficient evidence of title upon which appellee could base a claim of adverse possession under the seven year statute of limitation, § 8918 of Pope's Digest, and the payment of all the taxes thereafter in appellee's name is a strong corroborative circumstance of his possession and ownership.

We do not think the fact that Mr. Cole advised Bishop that the best way to get the title out of Ike Smith was to let the land forfeit and buy it in in the name of appellee was a fraud upon appellant. Neither she nor her husband Bishop ever had any title to the land. Appellant could not claim any dower interest in the land, for the reason her husband had no title, was never "seized of an estate of inheritance" in said land. Section 4396, Pope's Digest. Being a stranger to the title and in possession with her husband as tenant of appellee, she is in no position to question the title of appellee. We think the evidence conclusive that Bishop was in possession as a tenant of appellee, else why did he pay the taxes in appellee's name from 1929 to his death. At least we cannot say the finding of the court is against the preponderance of the evidence.

Whether Ike Smith's heirs, if he had any, are barred, is not here determined. As between appellant and appellee, we agree with the trial court that appellee is the owner, entitled to the rents and profits and to a writ of possession, if he so elects.

Affirmed.

ELVINS *v.* MORROW.

4-6771 162 S. W. 2d 892

Opinion delivered June 8, 1942.

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

Rex W. Perkins, for appellee.

GRIFFIN SMITH, C. J. Two decrees were rendered: one June 20, 1941; the other August 29, 1941. The first was set aside August 15, 1941, when the cause was reopened and continued for hearing at the regular August term.

A recital in the decree of June 20 is that the cause was heard upon the plaintiff's petition, the answer of defendants, and the evidence offered in support of the conflicting contentions.

The decree of August 29, after enumerating the pleading, recites a hearing upon testimony of Sam Morrow, W. M. Elvins, Mrs. O. H. Weddle, and Bernal Seamster.

The motion before us is to strike the matter presented as a bill of exceptions. The cause is captioned: "In the Washington Chancery Court. Sam Morrow v. W. M. Elvins, Faye Tom Elvins, and City Water Plant, defendants; Mrs. O. H. Weddle, Intervener." There follows the clerk's attestation: ". . . the above entitled cause came on to be heard upon the pleadings heretofore filed."

Under "Evidence Introduced on Behalf of Plaintiff," there appears the following: "Sam Morrow, having been called as a witness in his own behalf, after being duly sworn testified. . ."

Similar language precedes the testimony of Harry E. Hamilton, Mrs. O. H. Weddle, and W. M. Elvins, witnesses for plaintiff, and Bernal Seamster, called by the defendants. Certain exhibits are attached.

Finally, there is the clerk's certificate that ". . . the foregoing 59 pages of typewriting contain a true and complete transcript of the pleadings, docket entries, and decree . . ." Immediately preceding the clerk's certificate is the following by Gertrude Williams: "I do hereby certify that the foregoing testimony of witnesses and exceptions thereto, the rulings of the court, and the exceptions thereto, were duly taken down by me in shorthand and duly and correctly transcribed and the foregoing is a full, true, and correct copy thereof, and all the acts and things done in this cause as reflected by the pleadings filed herein and the hearing held on August 29, 1941. Witness my hand this nineteenth day of February, 1942."

If, from the nature of the writing, we may assume that Gertrude Williams was court reporter, (either regularly appointed or selected especially for this case) there is the further complication that in the same certificate pleadings and other matters forming part of the record are referred to. Since it is the clerk's duty to prepare

and avouch the record, including depositions and transcribed oral testimony properly brought in, that part of the certificate is at least superfluous.

It will be observed that no witnesses are identified in the so-called stenographer's certificate; and while the testimony of six persons appears in that part of the transcript intended as a bill of exceptions, only four witnesses are mentioned in the decree of August 29. Harry E. Hamilton and Clyde Counts are quoted at transcript pages 39 to 42, inclusive.

In *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 618 (chancery case), oral testimony was taken at trial without an order designating a stenographer. A paragraph in the opinion is: "Under our practice, oral evidence introduced in chancery cases may be made a part of the record by having it taken down in writing in open court and filed with the papers in the case, by bill of exceptions, or by reducing the testimony to writing and embodying it as a recital in the record of the decree."

There was this additional holding: ". . . in order for the transcribed stenographic notes to become a part of the record, under order of the court and without consent of the parties, they must be transcribed and filed in court during the term at which the case is tried, and not at a time beyond the adjournment of the court."

In *Sercer* v. *Hamilton,* 155 Ark. 639, 245 S. W. 35, the decision is summarized in a headnote to the Arkansas Report as follows: "Testimony of witnesses heard orally before the chancery court and taken down in shorthand and ordered transcribed and filed as depositions in the case was improperly incorporated, where it was not filed with the clerk during term time nor brought into the record by bill of exceptions or by being incorporated in the decree."

Per curiam orders were made June 5, 1939, in Causes Nos. 5536 *(Jesse Pearl Lautner* v. *Marvin E. Lautner)* and 5554 *(Arabella White* v. *J. N. White).* In each appeal —the first having been from Washington chancery, and the second from Logan chancery—appellee's motion to strike the bill of exceptions was sustained on the ground

that no time had been asked or allowed within which to file a bill of exceptions, and that which purported to be a bill of exceptions was not signed by the chancellor.

In *Smith* v. *House,* 163 Ark. 423, 260 S. W. 441 (chancery case), it was said: "Depositions filed after the term at which the case was decided, where no time was given for so filing them, will not be considered on appeal, though the parties stipulate that they constitute all the evidence introduced at the trial."

In the instant case there is no order by the chancellor granting time for filing the transcribed testimony. Neither is there an order fixing time for filing a bill of exceptions. Between August 29, 1941—when the decree was rendered—and February 19, 1942—when the clerk certified the record—the November term of court intervened.

In *Floyd* v. *Booker,* 161 Ark. 87, 255 S. W. 288, (chancery case) it was said: "No time having been requested or obtained within which to file the bill of exceptions beyond the term at which the decree was rendered, the judge trying the case could not have approved, signed, and ordered the bill of exceptions to be filed as a part of the record after the adjournment of the court. Under our statute, in order for a bill of exceptions, prepared and filed after adjournment of court, to become a part of the record, it was necessary for a day certain to have been fixed for the filing of same and for the bill to have been approved and signed by the trial judge or agreed upon by the parties, and filed with the clerk within the time allowed by the court. *Watson* v. *Watson,* 53 Ark. 415, 14 S. W. 622; *Stinson* v. *Shafer,* 58 Ark. 110, 23 S. W. 651; *Springfield* v. *Fulk,* 96 Ark. 316, 131 S. W. 694."

There is nothing in Act 12, approved February 2, 1937, negativing the requirement that a bill of exceptions be approved by the judge unless the parties are in agreement. Section three of the Act, after providing that the stenographer shall make copies[1] of the testimony, directs that the original be delivered to the clerk to be inserted in the transcript, ". . . while the third copy shall be

[1] An original and two copies.

kept on file in the clerk's office with the other papers in the case, which copy so filed shall be treated and have the same effect as depositions in the case in the regular manner."

In *Chaffin* v. *Lee County National Bank,* 151 Ark. 106, 235 S. W. 283, (law case) Act 163 of 1921, providing for an official court stenographer to serve the first judicial district, was construed.

Contention was that the provision for a ribbon copy for the clerk's use ". . . as a part of the transcript in the supreme court on appeal without the necessity of another copy thereof" did away with the requirement that bills of exceptions be approved by the judge. In the opinion it is said:

"We think the section quoted has no such purpose as appellants ascribe to it. The purpose of the Act was to permit and require the official stenographer, in transcribing his notes, to make a 'ribbon copy thereof' so that it would not be necessary for the clerk of the court . . . to make a copy of the bill of exceptions as prepared by the stenographer, but to permit the use of the copy made by the stenographer in the transcript. In other words, the necessity of copying the bill of exceptions by the clerk was to be dispensed with. The act was intended only to save labor, and not to deprive the presiding judge of the right and duty to approve the bill of exceptions."

So, with Act 12 of 1937. Direction that the copy filed with the clerk ". . . shall be treated as and have the same effect as depositions in the case in the regular manner" was also intended to prevent duplication of effort.

Neither does § 1493 of Pope's Digest afford relief, as the language is almost identical with the special act.

However, in construing this section in *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096, the court held that oral evidence in a chancery case may be made a part of the record (1) by having it taken down in writing in open court "and by leave filed with the papers in the case," (2) by bill of exceptions, or (3) by reducing the testimony to writing and embodying it as a recital in the decree. See *Woodruff* v. *Dickinson,* 199 Ark. 663, 135 S. W. 2d 667.

Verity is the essential sought in testimony. The trial court (except as to a by-standers' bill of exceptions) is the final authority, and approval by the judge of what purports to be transcribed testimony is imperative unless brought into the decree or judgment, or unless the parties are in agreement. This goes only to the testimony covered by the agreement. It does not authorize bills of exceptions to be filed after the term has expired and a new term has intervened, unless time was given when the decree or judgment was rendered, or when the appeal was granted, or there was an agreement to that effect.

The next inquiry is, What is meant by the expression found in § 1493 of Pope's Digest that a stenographer's transcription of oral testimony shall be filed with the clerk "and treated as depositions taken in the regular manner?" Was it intended thereby to substitute a stenographer's certificate for the judge's approval of a bill of exceptions? We do not think so. The parties may agree that a particular person shall "take" the testimony, copy it, and then file with the clerk. Obviously the same procedure was intended to apply to oral testimony taken in open court. If the parties agree that a designated person may take such testimony, transcribe it, and file as depositions, such consent eliminates necessity for subsequent court approval of the stenographer's work if the transcription is filed before a new term of court intervenes in those cases where time is not given, or if filed within the designated period when time is allowed.

The statute does not expressly prescribe the time within which transcribed stenographic notes of testimony must be filed, but by necessary implication the period cannot run beyond the beginning of an intervening term, except by consent. The decree becomes final when the term ends unless jurisdiction has been retained.

In the Harmon case this statement appears: "It cannot be left to the stenographer to make up the record after the term has ended, without the supervision or direction of the chancellor. To allow this might be to substitute an entirely different record on appeal. Nor does the section give the stenographer and chancellor in

vacation the power to make up the record without a bill of exceptions.''

That authentication of the transcript by a court stenographer is unavailing is too well settled to require extended citations. See *Murphy* v. *Citizens' Bank,* 84 Ark. 100, 104 S. W. 187, rehearing denied *Citizens' Bank* v. *Murphy,* 104 S. W. 934; *Blackford* v. *Gibson,* 144 Ark. 240, 222 S. W. 367.

It follows that in the case at bar there is no bill of exceptions. That which purports to be must be disregarded because it has been challenged by appellee on grounds falling within the court's rules. Since no errors appear upon the face of the record, the decree must be affirmed.

LUCKYADO *v.* STATE.

4264 163 S. W. 2d 146

Opinion delivered June 8, 1942.

J. H. Carmichael, Jr., for appellant.

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

GRIFFIN SMITH, C. J. J. L. Taylor, restaurateur of England, was killed by appellant in circumstances which resulted in a jury finding that the accused was guilty of murder in the first degree. Judgment was that he be electrocuted.

Two errors are argued: (1) The act was justified as a measure of self-defense because appellant was being

assaulted by Taylor and his grown son, Robert, each of whom was wielding a wine bottle. (2) If a crime was committed, it was not first degree murder, and the court should have instructed to that effect.

The restaurant, or cafe, operated by Taylor was partitioned in such a way that whites and Negroes could be served and segregation maintained. Taylor had a wife and six children. They utilized the back of the building as living quarters.

Sanford, sixteen years of age, and Robert, twenty, assisted their father in serving customers with food and drink. Sanford testified that appellant entered the cafe after nine o'clock at night and ordered coffee and a sandwich. He paid for the sandwich, but did not pay for the coffee. Another Negro loaned appellant half a dollar and witness put forty-five cents on the counter near appellant's plate. Appellant kept insisting he wanted forty-five cents; whereupon Sanford pointed to the money and said, "shut up and be quiet."

Appellant began cursing, punctuating his profanity with the statement that "No white man is going to tell me what to do." Appellant then tried to cash a check to procure money with which to pay for his coffee. Sanford took the check to Robert, who said there wasn't money to spare. After fifteen minutes appellant left, still cursing. A short time later he returned, accompanied by another Negro. Again appellant sat down and began cursing. Sanford's father then went to appellant and told him that if he didn't quit swearing he would have to leave. Appellant left, but returned in fifteen minutes with another Negro, who had nothing to do with the disorder.

Appellant ordered a bowl of stew and began eating. He remained quiet for some time, then resumed his boisterousness. Sanford says his father told appellant he didn't want any more cursing because there were customers present. Additional testimony is quoted in the footnote.[1]

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[1] "He didn't say anything, but laughed at Daddy, and his eyes 'blurred' around. . . . I saw Robert take a bottle of wine in his hand, and Daddy took a bottle of wine off the counter and held it in his hand. The Negro asked him if he had any other kind [of wine]

Robert Taylor's testimony was that his father had a pint bottle of wine in his hands (presumably in response to appellant's request to be served), but told Luckyado to get out if he couldn't behave. Appellant then used an extremely offensive expression. The witness also testified: "Daddy started to hit Luckyado with the bottle, and he started shooting. . . . I couldn't tell what he was going to do with his right hand until he pulled it up and pulled the gun. My father missed the Negro when he struck at him with the wine bottle. He shot three times before I got to him."

On cross-examination Robert admitted he testified at the preliminary hearing that appellant was sitting on a stool, and:—"I started toward him when he made a remark and hit at him and missed. My father came out with a beer bottle and he shot and broke it and killed my father."

Is the evidence sufficient to sustain the verdict of first degree murder?

Appellant seems to have been seeking trouble. His conduct in returning to the cafe twice after having demeaned himself in an offensive manner indicates a wilfullness of purpose. He did not testify; hence we are dependent upon other witnesses for essential facts. Testimony of Sanford and Robert Taylor is susceptible of the inference that appellant, while sitting before the counter, held a drawn pistol in his lap, concealed in such manner that the Taylors could not know that Luckyado was waiting reaction to his own provocative conduct for an excuse to carry into effect the murderous design he entertained.

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and Daddy told him that was what he had. Robert told him if he wanted anything he would sell it to him, but if he didn't want anything, and couldn't behave, he would have to leave. Luckyado then said to Robert, 'No . . . is going to tell me what to do.' He was talking right across the counter from Robert. He had one hand in his lap and the other on the table. His hand down in his lap was hidden behind the counter. Robert drew back with the bottle of wine and struck down, and Luckyado jumped back and the wine bottle went on the floor. My father went around the counter. Robert jumped over it. Luckyado shot three times. One shot hit Daddy in the leg and he kept on going backwards. Robert tried to get in between my father and the Negro, but didn't until Daddy dropped his head and staggered toward the back door and fell. My father did not get his hands on Luckyado. Robert got hold of the gun after three shots had been fired. He jerked the weapon out of Luckyado's hands, and the Negro ran."

The verdict finding that appellant acted wilfully, feloniously, with malice aforethought, and with premeditation and deliberation, can be sustained only on the theory that Luckyado's purpose was to create the situation he took advantage of. We are unable to say there was not sufficient evidence to sustain this construction of appellant's acts, and the judgment must therefore be affirmed. It is so ordered.

HOLT, J., (dissenting). The undisputed evidence in this case discloses that at the time the fatal shots were fired by appellant, he was being attacked by the deceased and the son of the deceased. The deceased was wielding a bottle of beer and the son a bottle of wine. In these circumstances I think the elements of premeditation and deliberation, which were necessary to support a conviction of murder in the first degree, were lacking. This court in *Dowell* v. *State,* 191 Ark. 311, 86 S. W. 2d 23, held: "In a prosecution for murder, the manner in which the killing was effected is a potent circumstance tending to prove or disprove premeditation and deliberation."

It is my view that the evidence, when considered in its most favorable light to the appellee, would not support a conviction for a higher degree of homicide than that of murder in the second degree, the punishment for which may not be more than 21 years in the state penitentiary.

It is within the power of this court to reduce the crime to the lower grade. *Phillips* v. *State,* 190 Ark. 1004, 82 S. W. 2d 836. It is my view, therefore, that the judgment should be modified, by assessing appellant's punishment at 21 years in the state penitentiary, and as so modified, affirmed.

Mr. Justice FRANK SMITH concurs in this dissent.

LYLE *v.* STERNBERG.

4-6773 163 S. W. 2d 147

Opinion delivered June 8, 1942.

[redacted]

Claude B. Brinton, for appellant.

Wils Davis and *Roy Penix,* for appellee.

HUMPHREYS, J. Appellant brought suit on October 27, 1941, in the chancery court of Craighead county, Western District, against appellee alleging ownership of: northwest quarter, southwest quarter of section four, township fourteen north, range two east, in Craighead county, Arkansas, and prayed for cancellation of a deed as a cloud upon her title which was executed by the commissioners of the Cache River Drainage District on the 5th day of January, 1939, to appellee.

She alleged ownership of said land under and by virtue of a tax title deed executed to her by the commissioner of state lands of the state of Arkansas on the 23rd day of January, 1939.

Appellant offered, on cancellation of the drainage district deed to appellee, to do equity by paying all the sums the court might decree as due and payable to appellee.

Appellee filed an answer denying the validity of the tax title deed relied upon by appellant as the basis for ownership of said land and asserting ownership thereof under and by virtue of a valid deed thereto from said drainage district and, by way of cross-complaint, prayed for cancellation of appellant's tax title deed as a cloud upon his title to said land.

On February 18, 1942, the cause was submitted to the trial court upon the pleadings and lengthy written stipulations of the parties as to the facts from which the court found that said land originally belonged to and was the property of O. F. Wayland, and that said land was and is within the boundaries and was assessed for the benefit received from the construction of Cache River Drainage District and was subject to assessment benefits therefor; that the installment of assessment benefits due said drainage district for the year 1927 against said lands became delinquent and the said lands were sold to said drainage district on December 31, 1927, pursuant to chancery court proceedings which were duly approved and confirmed by the court, and that a deed was issued by the commissioner of the court to the Cache River Drainage District on January 2, 1928, pursuant to the decree of foreclosure and order of sale of said property; that thereafter, until January 5, 1939, the date the lands were sold and conveyed to appellee, H. J. Sternberg, said lands were owned by the said drainage district in its governmental capacity as a governmental agency and were exempt from assessment and payment of state and county taxes; that the assessment of said lands for state and county taxes for the year 1928, and the purported forfeiture and sale of the lands to the state of Arkansas for the taxes for the year 1928 and the tax deed dated January 23, 1939, executed by the Commissioner of State Lands to appellant were void and should be canceled; that, appellee, H. J. Sternberg, tendered into court the amount of the state and county taxes paid by appellant on said lands for the year 1939.

The court by its decree based upon such findings canceled the tax title deed and confirmed in appellee the

title to the lands acquired under his deed from said drainage district and canceled all the proceedings concerning the assessment, sale and forfeiture of said lands to the state of Arkansas for the year 1928, and the deed made pursuant thereto to appellant, dated January 23, 1939, together with all his costs.

From this decree appellant has duly prosecuted an appeal to this court. The trial court correctly found from the undisputed facts that the lands involved were sold under foreclosure proceedings on December 31, 1927, and deeded to Cache River Drainage District on January 2, 1928, for the drainage tax due said district thereon for the year 1927. We do not find anything in the record showing that the lands in question were ever redeemed from this foreclosure decree, and, therefore, the lands remained the property of the Cache River Drainage District until it sold them to H. J. Sternberg on January 5, 1939. This court has ruled that when a drainage or improvement district acquires title to lands before the lien for state and county taxes becomes fixed, they are exempt from taxation or assessment for state and county taxes as long as the lands remain the property of said district as during that time they are held by the drainage or improvement district as a governmental agency and for governmental purposes. This rule is sustained by the cases of *Miller* v. *Henry,* 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754; *Robinson* v. *Ind.-Ark. Lbr. Co.,* 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426; *Crowe* v. *Wells River Savings Bank,* 182 Ark. 672, 32 S. W. 2d 617; and *Little Red River Dr. Dist. No. 2* v. *Moore,* 197 Ark. 945, 126 S. W. 2d 605. Under the rule thus announced the lands were not subject to be assessed for state and county taxes for the year 1928 and were erroneously forfeited and sold to the state and appellant acquired nothing from the state under her deed of date January 23, 1939.

Appellant contends, however, that the lands in question were redeemed from the foreclosure decree in favor of the Cache River Drainage District and argues that there was a redemption of said lands shown by a notation on the chancery decree record of said decree of fore-

closure, which notation is as follows: "W½ E½ NW¼, 7-26-29, redeemed by O. F. Wayland; N½ W½ NW¼, 7-26-29, redeemed by O. F. Wayland."

The record reflects that O. F. Wayland owned a number of tracts of land in the drainage district, but the notation above relied upon does not include the lands in question, but does show redemptions of some other lands that were owned in said district by O. F. Wayland.

The delinquent improvement district of the Western District of Craighead county, Arkansas, for the delinquent tax due Cache River Drainage District in the year 1927 appearing in this record shows that the lands redeemed by O. F. Wayland were lands in the northwest quarter of section four, township fourteen north, range two east and not the lands involved in the suit before the court, which are described as the northwest quarter of the southwest quarter of section four, township fourteen north, range two east.

We think the trial court was correct, under these circumstances, in the short opinion he wrote in this case on page 17a of the transcript in the case, which opinion is as follows: "After an examination of the record, briefs and arguments in the cause I deem it unnecessary to enter into a lengthy discussion of the cause. It is well settled by the decisions of our court that there can be no delinquency for state and county taxes while the title to the land is in an improvement district. In this case it is undisputed that prior to the forfeiture to the state the lands were held by the drainage district under a sale by it for delinquent taxes.

"Contention is made that after the decree in favor of the district the owner of the land at the time redeemed the same. A notation of the clerk is presented. The notation is in form and fact an interlineation upon the record purported to have been made by the clerk of the court. However, this interlineation does not describe any land and will not therefore be considered. There is no positive showing that the land involved in this suit was redeemed."

The decree of the trial court is, therefore, affirmed.

Opinion delivered June 8, 1942.

Ralph Morrow, for appellant.

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

HOLT, J. On an information charging grand larceny, appellant, William Tate, was tried and convicted,

and his punishment assessed at one year in the state penitentiary. For reversal two errors are assigned: (1) that the trial court erred in permitting the prosecuting attorney, over the objections and exceptions of appellant, to amend the information; (2) that the evidence is not sufficient to support the verdict.

1.

The information, among other things, charges that "The said William Tate in the county and state aforesaid, on the 5th day of January, A. D., 1942, unlawfully and feloniously did take, steal and carry away one hundred and twenty-five feet of belting, of the value of fifty dollars, and one blow torch, of the value of five dollars, the property of Bob Stephens (S. E. Thompson & Son) against the peace and dignity of the State of Arkansas."

The record reflects that when the first state witness, Bob Stephens, was introduced, the prosecuting attorney made the following statement to the court: "If the court please, the information charges that this was the property of Bob Stephens. I find that Mr. Bob Stephens was in possession of the property, but the title was not in him, it was in S. E. Thompson & Son, and I ask to amend the information to that extent."

Over appellant's objection, to which proper exceptions were preserved, the state was permitted to amend the information by inserting after the name "Bob Stephens," S. E. Thompson & Son in parentheses. It is our view that no error results from this action of the court for the following reasons:

Section 3840 of Pope's Digest (formerly § 3018 of Crawford & Moses' Digest) provides: "Where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material."

In construing this section of the statute in *Tucker and Peacock* v. *State,* 194 Ark. 528, 108 S. W. 2d 890, this

court had under consideration an information in effect the same as that in the instant case. In the Tucker case, it was alleged in the information, among other things, that the "said Vance Tucker . . . in the county of Drew, and state of Arkansas on or about the 15th day of December, A. D., 1936, did then and there take, steal and carry away twelve hogs, the property of Bailey Jones in Lincoln county and transported same to the home of Vance Tucker in Drew county, contrary, etc., . . ." There this court said:

"There can be no doubt but that the information describes the offense with sufficient certainty to identify the act. . . . The purpose of requiring the owner of the property to be named is for the protection of the defendant. But as our statute provides, where the offense is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the ownership of the property is not material. . . . The offense appears to be described in such a way that there can be no doubt about it. . . . The information is sufficient if it can be understood therefrom that the act charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case. Section 3013, Crawford & Moses' Digest.

"Section 3014 of Crawford & Moses' Digest (now § 3836 of Pope's Digest) is as follows: 'No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits.'

"Even if it were necessary to name the owner of the property, under § 3018 above quoted, still no substantial rights of the appellant are affected. The owner, however, even when it is necessary to prove ownership, need not have the legal title; but if he had exclusive possession and control of the property, it may be alleged that he is the owner."

Here we think the information describes the offense of grand larceny with sufficient certainty to identify

the act and an erroneous allegation as to the true owner of the property is not material and does not constitute error.

It is also undisputed in the instant case that Bob Stephens as the superintendent of the sawmill in question was in possession and control of the property at the time it was stolen, and, as pointed out in the Tucker case, *supra,* it was not error to allege in the information that he was the owner.

Still another reason why no error was committed is that § 24 of Initiated Act 3, adopted at the General Election November 3, 1936 (now § 3853 of Pope's Digest) permits the amendment of indictments or informations. The only limitation on such amendment is that it relate to "matters of form," and not "change the nature or the degree of the crime charged."

We think it clear that the amendment allowed by the court here did not have the effect of changing the nature of the crime or the degree thereof and that no error was committed in permitting the amendment.

In *Brewer* v. *State,* 195 Ark. 477, 112 S. W. 2d 976, this court in construing the effect of § 3853 of Pope's Digest, said: ". . . So, it will be seen that an indictment may be amended under this section with leave of the court provided it does not change the nature of the crime or the degree thereof. The amendment did not have the effect of changing the nature of the crime or the degree thereof. So the court properly permitted the amendment." See, also, *Johnson* v. *State,* 197 Ark. 1016, 126 S. W. 2d 289.

2.

In testing the legal sufficiency of the evidence to support the verdict, it must be viewed in the light most favorable to the state. *Turnage* v. *State,* 182 Ark. 74, 30 S. W. 2d 865; *Clayton* v. *State,* 191 Ark. 1070, 89 S. W. 2d 732; *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50; *Combs* v. *State,* 194 Ark. 1155, 107 S. W. 2d 526; *Smith* v. *State,* 194 Ark. 264, 106 S. W. 2d 1010.

The record reflects that the state relied largely for conviction upon the testimony of Clyde Hale, an accomplice. Before the conviction of appellant, therefore, may be allowed to stand, there must be under our statute, § 4017, Pope's Digest, corroboration of the testimony of Clyde Hale.

In considering the effect of this section of the statute this court in the recent case of *McDougal* v. *State,* 202 Ark. 936, 154 S. W. 2d 810, said: ". . . the rule is . . . 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." See, also, *Smith* v. *State,* 199 Ark. 900, 136 S. W. 2d 673; *Shaw* v. *State,* 194 Ark. 272, 108 S. W. 2d 497; *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Mullen* v. *State,* 193 Ark. 648, 102 S. W. 2d 82.

Guided by this rule, it is our view that there is sufficient testimony corroborating the accomplice Hale to sustain the verdict.

Clyde Hale testified that he had known William Tate, appellant, for about ten months; that on the night of January 5, 1942, he and appellant went to a sawmill south of Garner, operated by Bob Stephens, and stole the property in question; that they transported the property in a Ford V-8 truck, which belonged to John White, and drove to White's home after the theft and put the stolen property in White's attic; that on the way back from Garner, he and appellant stopped in Beebe and got a cup of coffee and cigarettes at a restaurant; that while in the restaurant, he secured some paper from the restaurant owner with which he defrosted the windshield of the truck by holding the burning paper against the windshield.

R. M. Pennoch testified that on the night of the theft in question two men stopped at his restaurant in Beebe between nine and ten o'clock; they bought some coffee and cigarettes and that one of them got a piece of

paper to defrost his windshield. On being asked to identify appellant at the trial, the witness testified that the man with the accomplice, Clyde Hale, had on an officer's cap and a leather jacket. When appellant was asked to stand up for identification, Pennoch testified: "I didn't pay much attention to the man that was sitting down, I wouldn't like to swear that was the man, but he was dressed similar to that man. . . . He looked a whole lot like him." He further testified that the accomplice lighted the paper with a match and held it up to the windshield.

S. Y. Turnage, deputy sheriff of White county, testified that he examined the footprints at the mill; that there were two sets of tracks, one fitted shoes like those worn by the accomplice and the other tracks were sharp pointed and smaller. He also testified that he procured shoes similar to those worn by the accomplice from the store where the accomplice had recently bought shoes, and that they fitted one set of the tracks, and that the smaller tracks resembled those made by the shoes that appellant was wearing.

Tom Pickard testified that appellant told him that he wanted to talk to the accomplice Hale and that in his presence "he (appellant) told Hale he would be back in the morning and see the prosecuting attorney and clear it up and I asked him if he knew all about it and he said he did, he said he was going to clear it all up." That appellant further said "We were down there, but what we want to get is the fellow that sent us down there." They said "He will be looking out these bars before sundown tomorrow night"; that appellant called the name "White."

Sheriff James A. Neavilles, Jr., testified that he went down to the mill and checked the tracks and that the smaller track had a leather heel and a sharp pointed toe; that when appellant was arrested in Little Rock he had on sharp pointed shoes with leather heels and that he would say the shoes compared identically with the tracks at the mill. There is other evidence that the ground was covered with an inch of snow at the time.

It is our view that this testimony sufficiently corroborates the testimony of the accomplice Hale to connect appellant with the crime charged. Accordingly the judgment is affirmed.

GRIFFIN SMITH, C. J., (concurring). No prejudice resulted from the court's ruling that the information might be amended. If, however, it is the majority's intention to say that substitution of one name for another in *any case* would not be error, I think that holding would be wrong. If it should be alleged that A, of Pulaski county, stole a cow belonging to B, of Sebastian county, when in fact the animal had been purloined from C, of Union county, and the defendant in good faith had prepared to defend the original charge, it would not require the marshalling of logic to convince one that rights had been impaired by permitting a different owner to be named and denying time to meet the new issue.

In quoting from *McDougal* v. *State,* 202 Ark. 936, 154 S. W. 2d 810, the statement is repeated that ". . . sufficiency of the corroborating evidence is also a question for the jury." Credibility of witnesses whose testimony corroborates an accomplice is for the jury, but such evidence must be substantial, and substantiality is a matter of law. *Murphy* v. *Murphy,* 144 Ark. 429, 222 S. W. 721; *Missouri Pacific Transportation Company* v. *Bell,* 197 Ark. 250, 122 S. W. 2d 958.

JOHNSON *v.* STATE.

4262 163 S. W. 2d 153

Opinion delivered June 8, 1942.

Mills & Mills and *Shouse & Shouse,* for appellant.

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

HOLT, J. On information charging that appellant, Joe Johnson, "did unlawfully, willfully and publicly exhibit contempt for the flag of the United States," he was tried, convicted and his punishment assessed at "a fine of $50 and imprisonment in the county jail for a period of 24 hours." For reversal here, appellant alleges that the evidence was not sufficient to warrant his conviction and that the trial court erred in refusing to so instruct the jury in accordance with instruction No. 1 requested by appellant.

Section 2941 of Pope's Digest, upon which the information was based, provides in part "Whoever . . . shall in any manner . . . or by word or act publicly exhibit contempt for the flag . . . of the United States . . . shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine not exceeding $100, or imprisonment for not more than thirty days, or both."

The evidence, upon which the jury found appellant guilty, is to the following effect:

Mrs. Nell Cooper was in charge of the Welfare Commissary at Marshall, Arkansas, when appellant came to procure commodities for himself, his wife and eight children. We quote the following from her testimony: "He came in the commissary on the first day of the period, and we had quite a crowd in there, and I had been told that he was drawing for more people than he really had in family, and also that he wouldn't salute the American flag, and I first asked him about a rumor that he was drawing for more than he had members in his family, and he says, 'That is just talk, I do have that many.' I thought it was hardly possible he would say he had more than he had, and I didn't give much faith to the rumor.

And I says, 'It is also rumored that you don't believe in saluting the flag. Is there anything in that?' And I didn't demand. I asked him—merely requested him. I says, 'Just to quiet the rumor, salute that flag.' And he said he would die before he would, and turned to the people there and says, 'You can't get anything here unless you salute the flag. It don't have eyes and can't see, and has no ears and can't hear, and no mouth and can't talk,' and says, 'It doesn't mean anything to me. It is only a rag.' And I says, 'You can't talk that way here.' And he kept on talking, and I first told him I would call one of the boys and ask him to be put out, but he left. . . . He was addressing the other people who were waiting for commodities. . . . When I asked him—I didn't demand, but I asked him—he turned and walked directly under the flag, and was facing the people outside. . . . I don't know whether he touched it or not, but his hand was in touching distance of the flag, and he reached toward the flag. . . . It wasn't any higher than his head. . . . I know who was in the commissary. I was angry, and I couldn't say who was there at the time."

Ogle Horton testified (quoting from appellant's reply brief): "I didn't understand all the conversation. He got under the flag and reached up and got hold of it and says, 'It don't mean anything to me. It's got no eyes and can't see, no ears and can't hear, no mouth and can't speak."

Appellant testified: "The Bible says not to bow to anything up in the Heaven or on the earth or in the earth, or anywhere. We are supposed to bow to God and God only. . . . It says in the Bible not to even salute your friend, but to call him by name, says, 'Claim thy friend by name.'" It was his conviction that to salute the flag or any other like emblem would be contrary to the Bible. He did not show disrespect for the flag. "I believe in everything it stands for." He denied that he had spoken disrespectfully of the flag or had exhibited contempt for it in any manner.

The trial court very clearly and properly instructed the jury that appellant could not be convicted for refusing to salute the flag of the United States; that he was within his constitutional rights to refuse to salute the flag if he did not desire to do so. Appellant's instruction No. 2 given by the court is in this language:

"You are instructed that before you can find the defendant guilty under this charge, you must find from the evidence and beyond a reasonable doubt that he did or said something or some things in an affirmative sense, manifesting a contempt for the flag; it is not sufficient that he merely refused or failed to salute the flag when directed to do so by the prosecuting witness, Mrs. Cooper, or failed or refused to do any other thing directed by her. To constitute the crime with which he is charged required some voluntary action or statement on his part in contempt of the flag."

The question, therefore, presented here is not whether appellant was within his constitutional rights in refusing to salute the flag, but did the evidence warrant the jury in finding the appellant guilty of "publicly exhibiting contempt for the United States flag" in violation of the provisions of the statute, *supra.*

It seems to us that it would be difficult to imagine a state of facts under which contempt for the flag could be more convincingly demonstrated in public than in the circumstances here. The strange and unnatural conduct of this man at the very time he was receiving, from the hands of a most generous government, supplies to aid him in sustaining a large family, may not be explained away on the grounds of ignorance or religious beliefs. It is one thing to be given the privilege of refusing to salute the flag, but quite another when one by word or act publicly exhibits contempt for the flag. Here appellant after refusing to salute the flag, as was his privilege, proceeded to address a large number of people and tell them that the flag meant nothing to him and was only a "rag." Webster's dictionary defines "rag" as "A waste piece of cloth torn or cut off, a shred or tatter,

something resembling or suggesting a rag or rags and considered of little worth or service;—used *contemptuously*, jocularly, or ironically as of a *flag*, newspaper, etc." We think appellant's statement clearly evinces contempt for the flag within the terms of the statute in question.

The Supreme Court of the United States in *Minersville School District* v. *Gobitis*, 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375, 27 A. L. R. 1419, recently said: "The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This court has had occasion to say that '. . . the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. . . ; it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.' *Halter* v. *Nebraska*, 205 U. S. 34, 51 L. Ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525.

. . .

"The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . ."

It is our view on the testimony presented that appellant has violated the plain terms of the statute in question and the jury was warranted in finding him guilty as charged. Accordingly the judgment is affirmed.

GRIFFIN SMITH, C. J., (dissenting). The conduct engaged in by Johnson, and adjudged violative of § 2941, occurred in June, 1941—six months before the attack on Pearl Harbor. Act 64, from which § 2941 is taken, was approved February 10, 1919. Its title discloses a praiseworthy design to prevent desecration, mutilation, or improper use of the flag.

The legislature of 1919 was the first to convene after World War No. 1 had been concluded. Memories of multitudinous tragedies between April 6, 1917, and November 11, 1918, were living images. It was natural that realism of war would amalgamate with the fervor of peace when members of the Forty-second general assembly convened in Little Rock to plan the economy of a world they thought had been made safe for democracy. Nor was it inappropriate that a commonwealth whose sons had distinguished themselves should promulgate the law with which we are now concerned. Chateau Thierry, Vaux, Belleau Woods, Argonne plateaus, and other battlefields in France were not to be forgotten.

. . . .

When congress responded to President Wilson's demand for action against the aggressor, appellant was seventeen years of age. He endeavored to enlist in the armed forces, but was prevented by his mother from doing so. From Louisiana he moved to El Dorado, then to Texas, and finally settled near St. Joe, in Searcy county, where he has been for three years. Johnson owns a 39-acre tract of land. In addition to his wife there are eight children—a family of ten. The oldest is fourteen; the youngest, two. Appellant had not been arrested prior to the present difficulty. In June, 1941, he was not a Jehovah's Witness, although shortly thereafter affiliation was made.

Nell Cooper, upon whose complaint Johnson was convicted, was the principal witness. To some extent she was corroborated by Horton. Mrs. Cooper had been "hearing rumors." Some related to appellant's patriotism, or "loyalty," as she expressed it; others had to do with a suspicion that Johnson was dividing donated groceries

with Jehovah's Witnesses. When asked whether she had instructions from any superior officer ". . . not to let Jehovah's Witnesses have commodities unless they saluted the flag," Mrs. Cooper replied: "No cult was named. They were sworn by affidavits that you wouldn't receive any unless they were a loyal American citizen." There was the further question:—"Did you receive instructions that you would have the right to require anybody to salute the flag before you would give the commodities out?" Answer:—"It might be that I overstepped in asking him to salute. We were sworn not to give to anyone who wasn't a loyal American citizen. I think saluting the flag comes under being a loyal American citizen."

The situation seems to have been this: Mrs. Cooper had certain beliefs regarding loyalty. Saluting the flag was evidence of patriotism. The jury, without objection, was permitted to be told what this witness thought Act 64 applied to, as distinguished from the court's instructions regarding the law; and she assumed the burden of dissipating or confirming the disquieting stories gossip had conveyed. According to Mrs. Cooper, she said to appellant:—"To quiet the rumor, there is the flag: let's see you salute it." Appellant is alleged to have asserted he would die before complying. To other welfare clients, appellant is charged with having said: "You can't get anything here unless you salute the flag. It doesn't have eyes, and can't see; it doesn't have ears, and can't hear; it has no mouth, and can't talk: it doesn't mean anything to me, it is only a rag."[1]

A question asked on direct examination was:—"Tell the jury, if you can, what his demeanor and tone of voice were." Answer:—"Just as though he were delivering an oration."[2]

[1] In making the so-called speech, appellant stood in the doorway, or near it, ". . . over which the flag hung."

[2] Ogle Horton, WPA commissary clerk, testified appellant's words were:—"Gentlemen, you can't get your commodities unless you salute this flag. It is nothing but a piece of rag. I don't believe in anything: I don't believe in any kind of church." On cross-examination the witness added that appellant said:—"I don't believe in any church, and I thank God for that. . . . He made those assertions in very harsh words."

Mrs. Cooper and Horton testified that the language they quoted was all appellant said.

Johnson testified that at the time the trouble occurred he had been studying literature published by Jehovah's Witnesses and comparing it with the Bible. He had concluded it was not right "in the sight of God" to salute the flag.

Psalm 115 was appellant's authority:—"Not unto us, O Lord, not unto us, but unto thy name give glory, for Thy mercy, *and* for thy truth's sake. Wherefore should the heathen say, where *is* now their God. But our God *is* in the heavens: he hath done whatsoever he hath pleased. Their idols *are* silver and gold, the work of man's hands. They have mouths, but they speak not: eyes they have, but they see not. They have ears, but they hear not, noses have they, but they smell not. They have hands, but they handle not: feet have they, but they walk not. . . ."

Interpreting the psalm and other biblical authority, appellant thought he was commanded to bow to God and to God only:—"That was my sincere belief. The Bible says not to even salute your friend, but to call him only by name. It says, 'Claim thy friend by name.'

"It was my conviction that to salute the flag or any other like emblem would be contrary to the Bible. I did not show disrespect for the flag. I believe in everything it stands for. I was born in this country and have always lived here, and I am in sympathy with our form of government and its laws. I love the laws of this country and love to obey them, and I appreciate our land.

"The morning this trouble came up I went to the commissary early. Several people were sitting around. Mrs. Cooper was not there. She soon came and went in. I went to her desk and asked if my commodity slip had run out. She asked, 'Are you taking these groceries to these Jehovah's Witnesses?' I told her I was not: that I was only drawing for the actual members of my family. I didn't have time to fully answer her. I about halfway shook my head. Before I had time to finish she said, 'Prove yourself and salute the flag.' It stunned me so that I just stood there. She again said, 'Prove whether

you are a Jehovah's Witness or not.' I told her I wouldn't salute the flag. I walked to the door and pulled off my hat and made a little speech. I didn't want to talk to the lady: some of them make things bigger than they are. I said, 'This flag means as much to me as to you. My forefathers died for it the same as yours.' . . . I do not recall saying the flag didn't mean anything to me, because it does. It means all to me, [but] it hasn't any life or being, [such] as a God. . . . I was not angry at Mrs. Cooper. Her statement surprised me and shocked me—like going out a door and having somebody throw a bucket of water on you."[3]

. . . .

It is clear that the controversy into which appellant was drawn had its inception in Mrs. Cooper's assumption that she had a right to require those whom she conceived to be on the shady side of patriotism to make profert of some loyal act, the nature of which should satisfy the tension of her emotion. The colloquy bore but slight resemblance to "the feast of reason and the flow of soul." She must have thought that somewhere in the decalogue of things prohibited and things commanded it was requisite that those receiving bread in consequence of government bounty should stand at attention when so directed.

Of course Mrs. Cooper was entirely sincere; yet, however meritorious her meaning may have been, it is easy to understand that a person who at the time was sympathetic with a minority group, (and who later became affiliated) would react somewhat unnaturally. I do not agree with appellant's point of view. To me it is mawkish. My disagreement with the court's majority is in ascertaining appellant's purpose. *The statute is intended to prevent a person, by word or act, from publicly exhibiting contempt for the flag.* Johnson's aversion was not to the flag. His conduct was based upon his religious belief; and while to me it appears vapid, to him it was real. The Bible, he said, contains pronouncements against

[3] W. E. Tharp, witness for appellant, testified that Johnson said: —"This flag means as much to me as anybody else. My forefathers fought for the flag. It doesn't smell, taste, talk, nor walk." Concluding, Tharp said:—"That is all I heard Johnson say. Mrs. Cooper told him to leave the premises, and he did so."

bowing to graven images. Appellant's idea was that any act of obeisance, any deference, any homage to that which was without eyes to see with, without ears to hear with, without a mouth to taste with, and without a nose to smell with, was forbidden by holy writ.

. . . .

Conscientious objectors are excused from combat military service. A great hero of 1918, even after being drafted, for a time held doggedly to the conception that the Bible banned war: yet when Sergeant York became convinced that national safety was threatened he used rifle and pistol with deadly effect.

. . . .

Contempt, as defined by Webster's New International Dictionary, is the feeling with which one regards that which is esteemed mean, vile, or worthless; an act of contemning, or despising.

An impulsive declaration by one suddenly confused or confounded that the flag means nothing to him (assuming, for the purpose of this discussion, that appellant made such comment) is at most a method of emphasizing ignorance. If to the remark is coupled the further assertion that appellant characterized Old Glory as a rag, still consideration must be given the undisputed evidence that in thus designating the object of controversy appellant modified his meaning with the explanation that because the flag was something inanimate he could not bow down and worship it.

It is a strange philosophy—if appellant's belief may be dignified by that term—which blunts a citizen's patriotic sensibilities when in the presence of his country's emblem, or dulls his comprehension of its status.[4]

In spite of my own lack of sympathy with appellant's attitude, irrespective of an entrenched belief that a country would not endure if peopled by men entertaining the

[4] General Sir E. Hamley, referring to the colors of the Forty-third Monmouth Light Infantry, wrote:

"A moth-eaten rag on a worm-eaten pole,
It does not look likely to stir a man's soul.
'Tis the deeds that were done 'neath the moth-eaten rag,
When the pole was a staff, and the rag was a flag."

ideas appellant expounded as interpreted by the state, the fact remains that we are engaged not only in a war of men, machines, and materials, but in a contest wherein liberty may be lost if we succumb to the ideologies of those who enforce obedience through fear, and who would write loyalty with a bayonet.

Amendment No. 1 to the federal constitution prohibits congress from making any 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.

By § 6, art. 2, those who framed the state constitution of 1874 wrote that liberty of the press should forever remain inviolate, and "The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right." I think that under the "responsibility" provision of § 6 the general assembly was authorized to prohibit a citizen from engaging in conduct which shows public contempt for the flag, but I do not believe that in the circumstances of this case it was appellant's intention to do so.

December 10, 1941, Attorney General Francis Biddle said: "The United States is now at war. Every American will share in the task of defending our country. It is essential at such a time that we keep our heads, keep our tempers—above all, that we keep clearly in mind what we are defending. The enemy has attacked more than the soil of America. He has attacked our institutions, our freedoms, the principles on which this nation was founded and has grown to greatness. Every American must remember that the war we wage today is in defense of these principles. It therefore behooves us to guard most zealously these principles at home."

In his address December 15, 1941, President Roosevelt declared "We will not under any threat or in the face of danger surrender the guarantees of liberty our

forefathers framed for us in the Bill of Rights. We hold with all the passion of our hearts and minds to those commitments of the human spirit."

In June, 1920, Charles Evans Hughes, in an address at Harvard Law School, referring to hysteria that followed the last war, asserted: "We may well wonder, in view of the precedents now established, whether constitutional government as heretofore maintained in this republic, could survive another great war even victoriously waged."

The noble utterances of President Wilson at the beginning of our war with Germany are clearly recalled:—"An unwillingness even to discuss these matters produces only dissatisfaction and gives comfort to the extreme elements in our country which endeavor to stir up disturbances in order to provoke governments to embark upon a course of retaliation and repression. *The seed of revolution is repression.*"

Referring to prosecutions under the Espionage Act of 1917, Judge Amidon said: "Only those who have administered the Espionage Act can understand the danger of such legislation. When crimes are defined by such generic terms, instead of by specific acts, the jury becomes the sole judge, whether men shall or shall not be punished. Most of the jurymen have sons in the war. They are all under the power of the passions which war engenders. For the first six months after June 15, 1917, I tried war cases before jurymen who were candid, sober, intelligent business men, whom I had known for thirty years, and who under ordinary circumstances would have had the highest respect for my declarations of law, but during that period they looked back into my eyes with the savagery of wild animals, saying by their manner, 'Away with this twaddling, let us get at him.' Men believed during that period that the only verdict in a war case, which could show loyalty, was a verdict of guilty."

Madison once remarked, in discussing tendencies of governmental encroachment:—"It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens and

one of the noblest characteristics of the late revolution. The freemen of America did not wait until usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all the consequences in the principle and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it."

An excerpt from "Democracy in Government," by John J. Parker, senior United States circuit judge, Fourth district, is well worth repeated consideration. "From the standpoint of the happiness of the individual, as well as from that of the development of the life of society," says Judge Parker, "no rights of the individual are more important than those relating to the free expression of personality, by which I mean freedom of religion, freedom of speech, freedom of the press and freedom of assembly, all guaranteed by the first amendment to the constitution of the United States. The essential dignity of man's nature depends upon his relation to the infinite, and this depends upon his right to worship God according to the dictates of his own conscience. The free expression of his thought and the right to share that thought with others are necessary to his intellectual growth and happiness. Free expression of views . . . is necessary for the dissemination of intelligence and the correction of error. . .

"While all of these rights are of the first order of importance, I would speak particularly of freedom of speech, because it is always in danger. Truth is apprehended in the mind of the individual. Its progress is slow and fraught with difficulties; and only by free expression can it hope to gain acceptance by the majority in the community. The history of human thought is one continuous process of the triumph of ideas which upon their first expression were condemned as error by the learned and the powerful. Progress is dependent upon the advance of truth; and this in turn is dependent upon the right of men to give free expression to any view they may entertain. To the objection that free speech may lead to the propagation of error, the answer is that truth is able to take care of itself in a contest,

and that, in an atmosphere of freedom, error will be detected and exposed and the truth will eventually prevail. No wiser opinion was ever delivered than that of Gamaliel, who, when the teachers of Christianity were brought before him, said, 'Refrain from these men and let them alone; for if this counsel or this work be of men, it will come to naught. But if it be of God, ye cannot overthrow it.' And as John Stuart Mill has pointed out in his Essay on Liberty, even where truth is accepted, it is benefited by free expression of opposing views."

In a dissenting opinion to *Abrams et al.* v. *United States,* 250 U. S. 616, beginning at page 624, 40 S. Ct. 17, 63 L. Ed. 1173, Mr. Justice Holmes wrote: ". . . when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempt to check the expression of opinions we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is desired to save the country." The expressions were concurred in by Mr. Justice Brandeis.

Little more need be said regarding appellant, his conduct, and his conviction. If ignorance were a legal crime the judgment would be just. But witch-hunting is no longer sanctioned. The suspicions and hatreds of Salem have ceased. Neighbor no longer inveighs against neighbor through fear of the evil eye.

Mr. Justice MEHAFFY concurs in this dissent.

Opinion delivered June 8, 1942.

Jno. R. Thompson, for appellant.

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

McHANEY, J. Appellant was convicted of the crime of assault with intent to rape and sentenced to three years imprisonment in the state penitentiary. The only question argued on this appeal is the sufficiency of the evidence to support the verdict and judgment against him.

The statute, § 3403 of Pope's Digest, defines rape as "the carnal knowledge of a female forcibly and against her will." Section 3407 provides: "Whoever shall feloniously wilfully, and with malice aforethought assault any person with intent to commit a rape, and his counsellors, aiders, and abettors, shall, on conviction thereof, be imprisoned in the penitentiary not less than three nor more than twenty-one years."

In *Begley* v. *State,* 180 Ark. 267, 21 S. W. 2d 172, it was said: "In order to warrant a conviction of assault with intent to rape, it must appear not only that defendant intended to have carnal knowledge of the girl alleged to have been assaulted, forcibly and against her will, but

that he did some overt act towards the accomplishment of his purpose, which amounted in law to an assault upon her. An assault usually implies force by the assailant and resistance by the assailed. It is not necessary that the attempt by the assailant be persisted in to the utmost, but it is sufficient that it was actually begun without reference to the reason which causes the assailant to desist." Citing cases. In *Paxton* v. *State,* 108 Ark. 316, 157 S. W. 396, the court said that subsequent yielding and consent do not mitigate or justify an assault with intent to commit rape. See, also, *Boyette* v. *State,* 186 Ark. 815, 56 S. W. 2d 182.

Applying the rule so aptly stated by the late Chief Justice HART, in the Begley case, *supra,* and by the late Judge BUTLER in the Boyette case, we think the evidence for the State in this case is sufficient. The prosecuting witness was a saleslady in Little Rock, but her parents lived at Opal, about 12 miles out of Beebe. On the night of October 25, 1941, after work hours, she took a train to Beebe, intending to spend the week-end with her parents. She arrived in Beebe about 11 p. m., where she had arranged to meet a girl friend and both were to go out to Opal on the bus. The girl friend did not show up, but she met appellant, with whom she was slightly acquainted, who asked her to let him take her home. She reluctantly accepted, and they started out highway 67 and turned on highway 64. After driving a short distance, appellant turned his car off on a dim road to a secluded spot, killed his motor, and attempted to have intercourse with her forcibly and against her will, forcibly in that he put his right arm around her and with his left he tried to put his hand under her dress while she was resisting his efforts both by word and act. As she wrestled with him, her arm came in contact with the door handle, the door was opened and she stepped out. He got out of the car on his side, went around to her and continued his efforts to accomplish his purpose. He caught hold of her, attempted to unbutton his trousers, attempted to kiss her, but she continued to frustrate his purpose. She cried out for help twice, and was heard by a witness in his

home not far away, but who thought nothing of it at the time. She had a box of clothing and a handbag in the rear seat of the car and she asked him to give them to her and she would catch the bus on home. He refused, pushed her back in the car, shut the door and drove away cursing because she refused him. A short time later he either knocked her in the head with some kind of instrument, or she attempted to jump from the running car and seriously injured herself. He picked her up, put her in the front seat, and took her to Dr. Abbington's hospital in Beebe. She had three bad gashes in her head, had bled profusely and was unconscious. She did not know how she got the blows on the head, but was very positive she did not jump out of the car.

We think the evidence amply sufficient to support the verdict and judgment, and that her sad experience should serve as a warning to other 19 year old virtuous girls, as she was, not to take a chance at late hours of the night by riding alone with a young man who is a mere acquaintance.

The facts in this case are quite similar to those in *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9, where the evidence was held sufficient.

The judgment is accordingly affirmed.

HARDIN, COMMISSIONER OF REVENUES, *v.* VESTAL.

4-6798 162 S. W. 2d 923

Opinion delivered June 15, 1942.

Leffel Gentry and *Elsijane Trimble,* for appellant.

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

McHaney, J. Appellee brought this action against appellant, as a class suit, to enjoin appellant from collecting or attempting to collect a sales or gross receipts tax from him, or others similarly situated, based on the gross receipts or gross proceeds derived from the sale of raw products produced by them, either from the farm, orchard or garden, where such sale is made by them directly to the consumer or user from an established business located on their farms where said products are produced. The act under which the tax is proposed to be levied is No. 386 of 1941. His complaint, in addition to alleging that he is a citizen and resident of Pulaski county and is a florist and nurseryman, operating a floral farm and nursery in said county, also alleged that he is engaged in selling products derived from his farm, orchard and garden, that is, flowers, shrubs, fruit trees and plants from an established place of business located on his farm, where such products are grown; that said act "is discriminatory, arbitrary and unreasonable in attempting to levy a tax against him as a florist and nurseryman for gross receipts or proceeds derived from the sale of said raw products made directly to consumer and user from said established place of business located on his farm and produced on said farm; that said act deprives plaintiff and others similarly situated of their privileges and immunities contrary to the constitution of the United States and the state of Arkansas, and the provisions therein made and provided." The equal protection clauses of both constitutions are also invoked.

Appellant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The court overruled the demurrer. Appellant refused to plead further, but stood on his demurrer, and the court entered a decree enjoining appellant from attempting to collect the tax as prayed. This appeal followed.

The particular section of said Act 386 of 1941 complained of is subsection (n) of § 4, which provides: "Gross receipts or gross proceeds derived from the sale of any cotton or seed cotton or lint cotton or baled cotton, whether compressed or not, or cotton seed in its original condition; gross receipts or gross proceeds derived from the sale of raw products from the farm, orchard, or garden, where such sale is made by the producer of such raw products directly to the consumer and user; gross receipts or gross proceeds derived from the sale of livestock, poultry, poultry products, and dairy products of producers owning not more than five cows; exemptions granted by this subdivision shall not apply when such articles are sold, even though by the producer thereof, at or from an 'established business'; neither shall this exemption apply unless said articles are produced or grown within the state of Arkansas. Provided, however, nothing in this subsection shall be construed to mean that the gross receipts or gross proceeds received by the producer from the sale of the products mentioned herein shall be taxable when the producer sells at an 'established business' located on his farm commodities produced on the same farm. The provisions of this subsection are intended to exempt the sale by livestock producers of livestock sold at special livestock sales. The provisions of this subsection shall not be construed to exempt sales of dairy products by any other businesses. The provisions of this subsection shall not be construed to exempt sales by florists, nurserymen and chicken hatcheries."

It was appellee's contention in the court below and is here that the act, as interpreted by appellant, is unconstitutional because the classification made by the legisla-

ture in subsection (n) of § 4 of said act is unreasonable, discriminatory and arbitrary. It is conceded that, "If the classification is reasonable and is not arbitrary or capricious, then there is no unconstitutionality." Appellee's brief. The concession is well taken. The tax levied by the act is an excise or privilege tax. *Wiseman* v. *Phillips*, 191 Ark. 63, 84 S. W. 2d 91; *Ark. Power & Light Co.* v. *Roth*, 193 Ark. 1015, 104 S. W. 2d 207. It is difficult to perceive what right appellee has to complain of the tax levied by the act as he is not required to pay the tax in the first instance, because the third paragraph of § 7 provides: "The seller, or person furnishing such taxable service, shall collect the tax levied hereby from the purchaser." So, appellee is not taxed. As we said in the Wiseman case, "He is a tax collector." But assuming, for the purpose of this opinion, that he has such right, we cannot agree that the classification made by the act is unreasonable or arbitrary. Subsection (n) provides for exemption from the tax on gross receipts from sale of certain farm produce including cotton, cotton seed; raw products from farm, orchard or garden; livestock, poultry, poultry products and dairy products of producers owning not more than five cows. Also exempt from the tax are the gross receipts received by the producer from the sale of the above products "when the producer sells at an 'established business' located on his farm commodities produced on the same farm." The concluding sentence of this paragraph is: "The provisions of this subsection shall not be construed to exempt sales by florists, nurserymen and chicken hatcheries."

It is true that the products exempted by the act are agricultural products and that agriculture, in its broadest sense, includes horticulture, and that horticulture includes floriculture and viticulture. The florist is engaged in floriculture, and, according to Webster, is "a cultivator of, or dealer in, ornamental flowers or plants." Appellee is both a cultivator and a dealer in ornamental flowers and plants. He operates a florist shop in the city of Little Rock and he concedes he is liable for the tax on gross receipts of sales made there. But, as to those he sells on his farm, where he grows the flowers and plants,

he contends the classification is arbitrary because farm products as defined in the act are exempt. Appellee is also a nurseryman. That business is a branch of horticulture, says Webster, and is "a place where trees, shrubs, vines, etc., are propagated for transplanting or for use as stalks for grafting; a plantation of young trees or other plants." Simply because the legislature saw proper to exempt certain farm produce and livestock, agricultural products, from the tax imposed, and specifically refused to exempt florists' and nursery products, is no reason to say the classification made is arbitrary, unreasonable and capricious. It is true that all grow from the soil, but the products grown by farmers are entirely separate and distinct from the products grown by florists and nurserymen. It is not contended by appellee that the act discriminates against him in favor of other florists and nurserymen, and it does not, because it applies to all in his class alike by requiring the tax to be paid.

In *Williams* v. *City of Bowling Green,* 254 Ky. 11, 70 S. W. 2d 967, the Supreme Court of Kentucky said: "Whether a particular classification offends or does not offend the equal protection clause of the Fourteenth Amendment has been the subject of numerous decisions by the United States Supreme Court. The principles established by those decisions are in brief as follows: The restriction imposed by the Fourteenth Amendment does not compel the adoption of an iron-clad rule of equal taxation, nor prevent a variety of differences in taxation, or discretion in the selection of subjects or the classification for properties, businesses, callings or occupations. The fact that a statute discriminates in favor of certain classes does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it." The above quoted statement is in substance the holding of the United States Supreme Court in *State Board of Tax Commissioners of Indiana* v. *Jackson,* 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464, 75 A. L. R. 1536, and it was there further held that the legislature may not only classify, but, for taxation purposes, it may subdivide classes into particular classes. It was there

said, to quote headnote No. 7: "An Indiana statute lays an annual license tax on stores, increasing progressively with the number of stores under the same general management, supervision or ownership—such that, in the present case, the owner of a 'chain' of some 225 stores selling groceries, fresh vegetables and meats, was obliged to pay $5,443, whereas the owner of a single store only, though it involved a much greater investment and income, would pay but $3. Held not violative of the equal protection clause, in view of the distinctions and advantages which combine and are exerted in a single ownership and management of a series of like stores in different locations, as compared with mere cooperative associations of independent stores, or with department stores selling many kinds of goods under the same roof."

Therefore, even though the business of the florist and nurseryman are subdivisions of agriculture, it is not difficult to distinguish their business from that of the farmer. Farming—the growing of grain, cotton, livestock, poultry and other produce—is absolutely essential to the life of the nation, while the growing of flowers and plants and of fruit trees and shrubs is not. Nor do we mean to minimize the importance of the latter. We merely point out one distinction to show that the classification made by the legislature is not arbitrary or unreasonable, and especially is this true in view of the well settled rule that the law must be sustained, "if any state of facts reasonably can be conceived to sustain it." Other distinctions might be pointed out, but we deem it unnecessary to do so.

We think it unnecessary to cite and comment on the numerous cases cited by the parties, as to do so would greatly extend this opinion to no practical purpose.

Appellee makes the further argument that the act does not apply to him. He evidently thought it did when he brought this suit and we think it does. He alleges that he is a florist and a nurseryman, and the act specifically says his sales shall not be exempt from the tax.

The decree will, therefore, be reversed, and the cause remanded with directions to sustain the demurrer, and for further proceedings not inconsistent with this opinion.

HOLT, J., (dissenting). I am so thoroughly convinced that the decree of the trial court should be affirmed, that I am impelled to dissent.

I think the learned chancellor was correct in his view that that part of the Gross Receipts Tax Law in question, under which appellant sought to force appellee to pay the tax, when similar sales by other farmers, or agriculturists, were exempt, though made exactly in the same circumstances—that is from locations on their farms—was class legislation, arbitrary, discriminatory and void.

Article 14 of § 1 of the Constitution of the United States guarantees to appellee the equal protection of the laws and under the Constitution of Arkansas all taxes imposed upon any one class of citizens of this state must be equal and uniform. The tax sought to be imposed here is an excise tax and cannot be upheld if the legislature's classification of appellee is arbitrary, discriminatory or unreasonable.

The facts are not in dispute. It is conceded here by all parties that the appellee is a farmer or one engaged in agricultural pursuits. He confines his farming operations to raising many varieties of fruit trees, flowers, vegetables and berry plants. He sells plants for the production of grapes, strawberries, blackberries, and many other kinds of berries. He sells many types of fruit and nut trees such as apple, cherry, plum, pecan, etc. A large part of his business consists of the sale of vegetable plants to the farmer and the gardener. Appellee sells these farm products from an established place of business which is located on his floral and nursery farm.

Appellee also maintains in Little Rock, Arkansas, a place of business where cut flowers are sold, on which he pays the two per cent. sales tax. Appellee makes no contention that he should not pay this tax on sales from his flower shop.

The act exempts from the tax sales of products made by the farmer to the consumer, or user, from a place of business on the farm. When sales are made to a consumer from a place of business located on the farm by the ordinary grain farmer, cotton farmer, stock farmer,

fruit farmer, truck farmer, floral farmer, or nursery farmer, the two latter sales are taxed, but the sales of each of the former are not taxed, even though all may sell raw products from the farm, including products sold by appellee.

I am unable to distinguish between the sale of a fruit tree, or a strawberry plant, and the sale of the fruit from the tree or the plant. It seems to me to be splitting hairs, and a strained construction, to distinguish between the sale of vegetable plants and the sale of the vegetables themselves after full growth. If the majority opinion be correct in holding that the legislature's classification of appellee is reasonable, then there is nothing to prevent subsequent legislatures from subdividing for taxing purposes, the farming industry into as many classifications as there are products produced on farms. Such classifications should be based upon commonsense and reason. We cannot get away from, or escape the fact that one who tills the soil and produces grains, cotton, vegetables, or fruits, flowers, fruit trees, berry or vegetable plants therefrom, is a farmer and so classed, and I believe that appellee's constitutional rights have been invaded when the legislature singles him out as a man who only produces flowers, nursery products and plants, and forces him to pay the tax, and exempts farmers who do not confine what they produce on their farms to those produced by appellee, and attempts to exempt them from the tax imposed on appellee.

The general rule on classification for legislative purposes is stated in *Fountain Park Co.* v. *Hensler,* 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518: "In determining the legality of classifications, the subject to be regulated, the character, extent and purpose of the regulation, the classes of persons or corporations legally and naturally affected by the regulation should all be considered. One of the essential requirements in order that the classification may not violate the constitutional guaranty as to equal protection of the laws is that it must be reasonable and natural and not capricious or arbitrary. 12 C. J. 1128-1130; 6 R. C. L. 373-386, and cases cited.

"The law requires something more than a mere designation of characteristics which will serve to divide into groups. Arbitrary selection or mere identification cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 17 S. Ct. 255, 41 L. Ed. 666; *Rosencranz* v. *City of Evansville,* 194 Ind. 499, 143 N. E. 593; *McKinster* v. *Sager,* 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268. The characteristics which can serve as a basis of a valid classification must be such as to show an inherent difference in situation and subject-matter of the subjects placed in different classes which peculiarly requires and necessitates different or exclusive legislation with respect to them. (Citing cases.)

"A proper classification must embrace all who naturally belong to the class, all who possess a common disability, attribute or qualification, and there must be some natural and substantial difference germane to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched. (Citing cases.) The legislature cannot take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and thereupon enact different rules for the government of each. *State* v. *Julow,* 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *State* v. *Miksicek,* 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507."

And in *Chicago* v. *Ames,* 365 Ill. 529, 7 N. E. 2d 294, 109 A. L. R. 1509, the Supreme Court of Illinois said: "The general assembly may properly select a certain class and impose a tax upon it to the exclusion of all others, provided there is in such discrimination a reasonable basis of difference when considered in relation to the purposes of the act, but the general assembly may not properly exclude from a classification persons or things which in fact belong to such class. It may not legislate against the fact. *Winter* v. *Barrett,* 352 Ill. 441, 186 N. E. 113, 89 A. L. R. 1398."

As said before, appellee is in fact a farmer belonging to a particular class and as said in the Ames case, *supra,*

the legislature cannot legislate against a fact. Here the legislature, as I view it, has attempted to divide a natural class of persons, the farming class to which appellee belongs, and this, I think, it does not have the power to do.

This court in *Waters-Pierce Oil Co.* v. *Hot Springs,* 85 Ark. 509, 109 S. W. 293, 16 L. R. A., N. S., 1035, said: "It does not palliate the discriminatory effect of the ordinances to say that all persons who use wagons for the delivery of oil are taxed, for there is no sound reason why those who use wagons for that purpose should be taxed for such use when those who use the same kind of wagons for other purposes are exempted entirely or are allowed to escape with a substantially smaller tax. The fact that a discriminatory tax applies to all persons of a given class does not render it any the less obnoxious as an unjust discrimination against a class of citizens."

Appellant argues that appellee is not called upon to pay the tax, but that he is a tax collector. This is only partially true. Appellee is required, under the act, to collect the tax from the purchaser, but in the event the purchaser fails to pay, then appellee himself is required to pay the tax. In any event, the appellee, by virtue of the tax, is certainly being discriminated against unfairly when he under the act is required to sell his farm products to customers at a greater price than other farmers similarly situated selling the same products.

The economic well-being of this nation depends upon its farmers. As has been aptly said, if the farmers were to cease to produce, the grass would grow in the streets of our cities. But for the products and food, fruits and vegetables the farmers produce the city dweller would starve. It is my view that the decree should be affirmed.

Mr. Justice HUMPHREYS joins me in this dissent.

4-6789 162 S. W. 2d 899

Opinion delivered June 15, 1942.

[redacted]

Arthur R. Macom and *M. F. Elms,* for appellant.

Frances Drake Holtzendorff and *W. A. Leach,* for appellee.

GREENHAW, J. The present appeal is a continuation of the litigation reported in the case styled *Luebke* v. *Holtzendorff,* 203 Ark. 141, 157 S. W. 2d 770, in which the opinion was rendered November 24, 1941.

The case is a very anomalous one. The anomaly arises out of the fact that it involves the right to the possession of a tract of land to which neither of the litigants has the original or record title. The record does not disclose who owns the original or record title, but it appears, from the opinion upon the former appeal, that this owner permitted the land to sell under a decree foreclosing the lien of a road improvement district for delinquent taxes due the district, and, as stated in that opinion, Holtzendorff acquired this title, through *mesne* conveyances, from the improvement district to which the land was sold under the foreclosure decree. This, as stated in the former opinion, was not only color of title, but would have been the actual title but for the opinions in the cases of *Todd* v. *Denton,* 188 Ark. 29, 64 S. W. 2d 331, and *Tri-County Highway Improvement District* v. *Taylor,* 184 Ark. 675, 43 S. W. 2d 431. Those opinions were to the effect that since the passage of the Martineau

Road Law of 1927 and act 153 of the Acts of 1929 road improvement districts were without authority to sell lands for the nonpayment of delinquent road taxes.

It was further said in the opinion on the former appeal that Holtzendorff had acquired an interest in the land which warranted its redemption from other tax forfeitures, and entitled him to intervene in the confirmation proceeding in which confirmation of the sale to the state was prayed. A decree was rendered in that case denying confirmation of the sale to the state. Luebke, who had purchased this land from the state, was made a party to that proceeding upon the motion of Holtzendorff, and the finding was made that Luebke, subsequent to his purchase from the state, had made improvements on the land of the value of $588.

The effect of the former opinion, affirming the decree from which that appeal had been prosecuted, was that Holtzendorff had an interest superior to that of Luebke, but that Holtzendorff had this interest subject to Luebke's claim to be reimbursed for his improvements and for the taxes which § 6 of act 119 of the Acts of 1935 required Holtzendorff, as an intervener in the confirmation proceeding, to pay to defeat the confirmation. These facts more fully appear in the former opinion.

The decree affirmed in the former opinion found that the sale to the state was invalid, and that Holtzendorff had such interest in the land as entitled him to redeem from the sale to the state, but that Luebke had made improvements and had paid taxes for which he should be reimbursed by Holtzendorff as the condition upon which he might redeem the land, and that Holtzendorff, as intervener, should be permitted to redeem by payment to Luebke of the sum so adjudged, and that if the same were not paid within thirty days the land should be sold in satisfaction of Luebke's claim, but that the possession of the land should not be disturbed, and that if intervener, Holtzendorff, should seek to gain possession of same it would be required that he bring a proper action in a court of law for that purpose.

From that decree Luebke prayed and was granted an appeal. This decree was affirmed with a modification that Luebke was not entitled to recover the price of a dollar per acre which he had paid the state for the land, but was entitled to recover only the sum required by § 6 of act 119, *supra,* to effect a redemption from the sale to the state, in addition to the value of his improvements.

We held in this former opinion that Holtzendorff had acquired an interest in the land, but that to protect that interest he would be required to pay subsequent taxes as they accrued, and that otherwise he would lose that interest just as any landowner might lose his title by failing to pay taxes.

After the first decree had been affirmed, with the modification in regard to the sum paid the state by Luebke for his deed from the state, Holtzendorff filed, in the court below, a petition, in which Luebke was tendered the full amount adjudged in his favor on the first appeal, it being alleged that, under the first decree and the opinion of this court affirming it as modified, with the tender there made, "this interest of the said Luebke, together with the right to the possession thereof, passed to this petitioner by way of purchase."

A demurrer to this petition was filed, in which it was averred that the chancery court was without jurisdiction to entertain an action for possession of the land, because it was an action cognizable only at law.

The demurrer was overruled, and Luebke standing thereon, it was decreed "that the clerk of this (the chancery) court upon the request of the intervener, J. F. Holtzendorff, after he shall have paid into the registry of this court the sum adjudged in the decree heretofore rendered in this action as the value of the improvements made by the said defendant, F. C. Luebke, and the taxes paid on the lands hereinafter to be described, without interest from the date of said decree, shall issue and deliver to the said intervener, J. F. Holtzendorff, a writ of assistance directing and commanding the sheriff of Prairie county to take from the possession of the said

defendant, F. C. Luebke, the possession of the following described lands . . .," and there follows a description of the land here in litigation. This appeal is from that decree.

For the reversal of this decree we are cited to cases of our own and from other jurisdictions to the effect that a writ of assistance may only issue to place one in possession of property the title to which has been awarded to him by an order of court, and not otherwise. The decree here appealed from awarded to Holtzendorff a writ of possession, although it was not adjudged that he had title to the lands. But it was adjudged that he had a right to possession superior to that of Luebke, whose only interest in the land is the right to reimbursement for the taxes paid and the improvements made.

After the intervention in the confirmation proceeding by Holtzendorff, the litigation became, as between him and Luebke, an adversary proceeding as related to the land here in controversy. In his answer to the cross-complaint filed against him by Holtzendorff, Luebke claimed title under the deed to him from the State Land Commissioner dated November 24, 1939, and no other claim to or interest in the land was alleged. The confirmation proceeding was filed in 1939; Holtzendorff's intervention was filed in 1940; so that Luebke could not have acquired title by possession.

The equity of the case warranted the court in the decree from which is this appeal to award a writ of assistance to place Holtzendorff in possession of the land. As was said in the former opinion, Holtzendorff must continue to pay the taxes to protect the interest which he has acquired, otherwise he would lose that interest just as any landowner would lose his title to land if he failed to pay taxes. If Holtzendorff should continue this payment of taxes for as much as seven years he would not thereby perfect his title, because the land is not wild and unoccupied, but is in the actual possession of Luebke, whose title would eventually ripen and be perfected by adverse possession.

The adjudication that Luebke should be reimbursed for his taxes and improvements is not questioned, and he has no other right to or interest in the land, and Holtzendorff has made a tender in satisfaction of that claim.

It is true the owner of the record title was not made a party to this proceeding except by the confirmation proceedings, but he may be prodded into action when the party is placed in possession who has paid and is paying the taxes on the land. What action the record owner may take is a question not presented by this record.

The decree of the court below accords with the equity of the case, and it is, therefore, affirmed.

MAIN *v.* DRAINAGE DISTRICT NO. 2 OF MONROE COUNTY.

4-6777 162 S. W. 2d 901

Opinion delivered June 15, 1942.

Smith & Judkins, for appellant.

W. W. Sharp and *Burke, Moore & Walker,* for appellee.

SMITH, J. It appears, from the somewhat imperfect and incomplete record in this case, that a decree was rendered, in the chancery court of Monroe county, on April 7, 1941, foreclosing the lien of Drainage District No. 2 of Monroe county against certain lands on which betterment assessments had not been paid. The suit appears to have been for the taxes for two years, but it does not appear what those years were.

A sale was had under the authority of this decree, a report of which was made by the commissioner appointed for that purpose. Certain owners of lands lying within the district intervened and objected to the confirmation of the sale, for reasons which will be recited. A demurrer to this intervention was sustained, and the commissioner's report was approved, from which decree is this appeal.

Attached to the intervention, as a part thereof, are certified copies of the orders of the county court of Monroe county establishing the district. Interveners alleged that the district was not legally formed, because there was never any hearing on the engineer's report, or notice published of such hearing; that there was never any hearing upon, nor proper notice given of, the assessment of benefits; that the county court of Monroe county did not take the steps required by law to acquire jurisdiction to levy any assessments against interveners' lands, and that the attempted levy of such assessments was void and created no lien against the lands here involved.

It was further alleged that the collection of the delinquent assessments is barred by the statute of limitations, and that proper notice was not given of the suit to collect them to confer jurisdiction upon the court to render the foreclosure decree.

It is insisted that the demurrer to the intervention, which the court sustained, admits the truth of these

allegations, and that the decree should, therefore, be reversed. But not so. We have many times held that a demurrer admits only facts which are well pleaded, and that legal conclusions are not admitted by a demurrer. A recent case to that effect, which cites others to the same effect, is that of *Wilburn* v. *Moon,* 202 Ark. 899, 154 S. W. 2d 7.

The orders of the county court, made exhibits to the intervention, recite adjudications essential and sufficient to establish the district, proper notice of all of which was found to have been given. Among other orders is one approving the assessment of benefits, which shows that it was made after proper notice had been given, and that no exceptions were filed by any one, except a railroad company.

The intervention constitutes a collateral attack upon these orders of the county court, which have long since become final. The district was created under the general drainage act, No. 279 of the Acts of 1909, which, with amendatory acts, appears as §§ 4455 to 4507, Pope's Digest. These acts provide for a hearing upon all the questions now raised by interveners, and limit the time within which that hearing may be had, and the time within which an appeal may be taken. A headnote to the case of *Taylor* v. *Board of Commissioners of Cache River Drainage District No. 2,* 156 Ark. 226, 245 S. W. 491, reads as follows: "The method provided by statute for attacking the validity of an assessment of benefits is exclusive, and a collateral attack upon an assessment which has become final because of the failure to attack it within the time and manner provided by law will not lie unless the assessment is void on its face."

The same rule is as applicable to districts formed under general laws as to those formed under special acts. In the case of *Lamberson* v. *Board of Commissioners of Drainage District No. 16,* 150 Ark. 624, 234 S. W. 986, it was said: "Appellants contend that the court erred in sustaining the demurrer to the answer. We think not. The defenses interposed were collateral attacks on the order establishing and creating the drainage

district and assessing the benefits on account of the improvements against the several parcels of land within said district. In a suit to enforce a lien against lands for benefits assessed against them in a drainage district theretofore organized, all defenses except a plea of payment are necessarily collateral. It is not contended that the assessments were paid. The matters as set forth in the answer attacking the validity of the assessment cannot be inquired into in this proceeding because they constitute a collateral attack on the judgments of the county court creating the district and confirming the assessment of benefits. (Citing cases.)"

It is not contended that the record of the assessment of benefits here sought to be enforced is void upon its face.

There is no showing that the assessments here sought to be enforced are barred by any statute of limitations. As has been said, the record does not show for what years the assessments sought to be enforced were levied, nor when they became delinquent. In the order of the county court approving the assessments levied appears this recital:

"It is further considered, ordered and adjudged that the said tax hereinbefore assessed shall be divided into installments, and that the said installments shall be due and payable as follows: In each of the years 1923 to 1927, inclusive, 3.7 per cent. of the face of the assessed benefits; and in each of the years 1928 to 1942, inclusive, 6.5 per cent. of the face of said assessed benefits; said collections to be credited first upon the interest accruing upon said levy."

The right to distribute the collection of these assessments over a period of years, rather than to require their immediate payment at the time they were approved by the county court, is not questioned, and has been recognized in many cases and is expressly authorized by statute. Section 4507, Pope's Digest.

The insistence that the notice of the pendency of the proceedings to foreclosure the tax lien was not in com-

pliance with the statutory provisions, and that notice of the sale was not given by the commissioner which the law requires, may be answered by saying that interveners do not point out in what respect the notices were insufficient. The mere allegation that they were not in compliance with the law does not suffice. This allegation is a mere conclusion of law, which must be disregarded in the absence of any record showing that the notice required by law was not given.

We conclude, therefore, that the demurrer to the intervention was properly sustained, and that the decree must be affirmed, and it is so ordered.

PAYNE *v.* MOSLEY.

4-6780 162 S. W. 2d 889

Opinion delivered June 15, 1942.

R. H. Peace, for appellant.

L. B. Smead, for appellee.

HUMPHREYS, J. Appellees are father and son. The father brought suit on March 19, 1941, against appellant in the municipal court at Camden, Arkansas, for damages to his automobile, injuries to himself and amount expended for physicians' services to his son in the total sum of $175 and, as next friend of his son, $100 on account of injuries to him growing out of a collision between his and appellant's automobiles through the alleged negligence of appellant in driving his (appellant's) car into the intersection of two streets in the town of Bearden, Arkansas. Appellant filed an answer denying each material allegation of the complaint and pleading contributory negligence on the part of appellee, John Mosley, as the sole and only proximate cause of the injuries complained of.

The trial resulted in a verdict and judgment in favor of John Mosley against appellant for $75 and a verdict and judgment in favor of John Mosley, Jr., by his next friend, John Mosley, in the sum of $100, from which verdicts and judgments an appeal has been duly prosecuted to this court.

Appellant's first contention for a reversal of the verdicts and judgments is that there is no substantial evidence to support them.

Appellee, John Mosley, testified that he was going north on the Holly Springs road and entered the intersection of that road with a cross-road in Bearden and was on his own side of the road in the intersection when appellant entered the intersection from the east and struck the front side of his automobile, or front fender, and knocked his car into the northeast corner of the intersection, and broke out the windshield, tore up his radiator and smashed the headlights to his damage in the sum of $75; that he received bruises and cuts over

his body for which he claims no damages, and that his son received severe cuts and bruises to his head and that on that account he was compelled to pay $25 to the physicians who dressed his wounds for which he claims damages in that amount; and that he claims damages as the next friend of his son on account of the personal injuries to his son in the sum of $100; that at the time of the collision appellee, John Mosley, was in the exercise of ordinary care for his own safety and the safety of his son.

Appellee testified that he entered the intersection before appellant did and did not apprehend that appellant would enter the intersection until he was out of his way, but that appellant came into the intersection and negligently and unnecessarily ran into his car before he could get out of the way; that when he realized appellant was approaching him, he turned to the right to avoid the collision, but his car was struck before he could do so; that he expended for repairs on his car the sum of $47.75 and $25 to the physicians for services they rendered to his son; that his son's injuries were very painful and that it was about a month before he recovered; that the gash or cut received by his son on his head was several inches long and that his son has a scar on his head as a result of the injury; that his son is entitled to $100 damages on account thereof.

Appellee was corroborated as to his version of the collision by Red Crawford whose testimony is, in substance, that he was standing on the porch of a warehouse about fifty yards from the intersection; that John Mosley was going toward Holly Springs and entered the intersection first; that appellant and appellee, John Mosley, came together about the center of the intersection; that John Mosley was traveling on his right side; that they wound up in the northeast corner of the intersection; that John Mosley's car had entered the intersection when he first saw him, and that appellant was fixing to enter the intersection when he first saw his car; that John Mosley was clear up in the intersection when he saw his car, and that after he was up in there he noticed appellant's car at the outside of the intersection; that John

Mosley got to about the center when appellant was coming into the intersection, and that John Mosley turned over to the right and tried to avoid the collision; that they struck past the center line, but that he could not give the exact number of feet.

Appellant and his sister, who was riding with him on the front seat, both testified that they entered the intersection before John Mosley did, and that John Mosley then came into the intersection and ran into appellant's car. Appellant further testified that he did not stop because he felt that he had the right-of-way, having entered the intersection first.

The evidence as to which entered the intersection first and which had the right-of-way was in sharp conflict, and the jury under correct instructions concluded that appellant was to blame for the collision and resulting injuries to appellees.

We cannot agree with appellant that the undisputed evidence shows that appellee, John Mosley, was to blame for the collision. To say the least of it as to which one was to blame under the conflicting testimony was a jury question. The jury has found that appellant was to blame, and there is substantial evidence in the record to sustain the verdicts of the jury.

Appellant contends that the verdict in favor of John Mosley for $75 is contrary to the undisputed evidence for the reason that the cost of repairs was $47.75, and that the amount paid the physicians was $25, and the total amount is $72.75 instead of $75 for which the jury returned the verdict in favor of appellee, John Mosley. It is true the undisputed evidence shows that the two items amount to $72.75, and that the two items became the basis for the jury verdict. It is apparent that the jury made a mistake in adding the two amounts. The difference is so little that we think the mistake may be corrected without injury to appellant by reducing the verdict of $75 to $72.75, so the verdict and judgment in favor of John Mosley is modified to that extent and, as modified, is affirmed.

Appellant also contends that the court instructed that the measure of damages would be the difference between the market value of the automobile before and the market value after the collision. It is argued by appellant that there is no evidence in the record as to the market value of the automobile before and after the collision, but we think the jury was warranted in finding the cost of the repairs represented the difference between the market value of the car before and after the collision.

Appellant also contends for a reversal of the verdict and judgment in favor of John Mosley, Jr., because the court instructed the jury that, "if John Mosley, Jr., while in the exercise of reasonable care on his own part, received injuries, and the proximate cause of those injuries was negligence upon the part of the defendant (appellant), as alleged in the complaint, then John Mosley, Jr., would be entitled to recover, regardless of the fact that you may or may not find that the plaintiff, John Mosley, Sr., (appellee) was negligent."

Irrespective of whether the instruction was erroneous it was harmless for the reason both in finding for John Mosley, Jr., and John Mosley, Sr., the jury found that John Mosley, Sr., was not guilty of negligence.

The judgment is, therefore, affirmed in favor of John Mosley, Jr., by his next friend, and the judgment in favor of John Mosley is reduced to $72.75, and as modified is affirmed.

WOODS *v.* GRIFFIN.

4-6774 163 S. W. 2d 322

Opinion delivered June 8, 1942.

L. C. Kirby, Donald S. Martz and *Sam M. Wassell,* for appellant.

Gordon Armitege and *G. P. Houston,* for appellee.

SMITH, J. Appellant Woods brought suit against appellee Griffin to recover a certificate for five shares of the capital stock of the Arkansas National Bank located in Heber Springs. He alleged that by fraud he had been induced to assign this stock to Griffin. Kessinger intervened and alleged that subsequent to the assignment of this stock to Griffin by Woods he had purchased the stock from Griffin and was an innocent holder thereof for value.

The chancellor dismissed the complaint as being without equity, and from that decree is this appeal.

The chancellor prepared a written opinion, in which he reviewed the testimony and gave his reasons for the

conclusion which he reached. He recited in this opinion that the testimony was in irreconcilable conflict; and so it is. The decision of the question raised on this appeal—one of fact—depends entirely on the testimony which is believed.

According to the testimony of Woods, and that of his wife, he was swindled out of the stock. The testimony may be briefly summarized as follows. Woods had been reared in Heber Springs, but enlisted, while living there, as a soldier in the first World War. After the war he removed to the state of Oregon, where he married and has since resided for seventeen years, without returning to Heber Springs.

Woods' mother was found dead in her home in Heber Springs on March 31, 1941, and Griffin was the county coroner, and the inquest which he held indicated that Mrs. Woods' death resulted from natural causes.

Everyone knew Mrs. Woods had a son, but no one knew where he was. The sheriff of the county and Griffin began a search through Mrs. Woods' desk to find the son's address. Two safety boxes were found, one of which was locked, the other not. The sheriff was asked if the locked box was opened under Griffin's direction, and he answered, "I don't know whether it was or whether it was at my suggestion." The sheriff testified that "Mr. Griffin carried the two boxes, but I brought the deeds and other stuff to my safe." The question was raised whether the sheriff, or Griffin as coroner, should take possession of the boxes and papers, and it was agreed without controversy that Griffin should have possession.

Woods' address was finally learned, and Griffin advised Woods by telephone that Mrs. Woods was dead. Griffin took charge of the body and had an undertaker prepare it for burial, but he did not buy a casket.

Woods and his wife arrived in Heber Springs April 4th about 4 p. m. They went to a hotel, where they "freshened up," after which they went to Mrs. Woods' home, which they found locked. Woods met a Mr. Dial, whom he had previously known, and he and his wife

went with Dial to Dial's home. While there, Woods received a telephone call from Griffin asking him to come to Griffin's place of business, a drugstore. He went there, accompanied by Dial, and when he and Dial arrived Griffin told Dial he wanted to talk with Woods about personal matters, and Dial left. This statement was not corroborated.

Woods testified that Griffin told him that they had been "war buddies," but that he had never met Griffin before. Griffin proceeded to tell Woods what he had done, and Woods thanked him for his interest and attention and proposed to pay Griffin for his trouble. Griffin said he made no charge, but that the deceased had some stock of doubtful value, which might some day be worth fifteen or twenty dollars, which Woods might assign him if he wanted to pay anything. Woods knew nothing about the stock except what Griffin told him, and, without investigation or inquiry, Woods signed an assignment of the stock to Griffin. This was done by filling out the blank space on the certificate prepared for that purpose. No consideration was paid. Woods admitted that he can read and write. So, it would appear, according to Woods' testimony, that, within a very short time after meeting Griffin he assigned to him the stock certificate without knowing what it was or, as explained by him, "I just knew it was stock."

Griffin told Woods that an administrator would be needed, and volunteered his services as such. On the following day they went to the office of an attorney, who advised that an administrator should be appointed, and Woods testified that "I signed the papers for Griffin to be appointed," and Griffin was appointed.

The testimony establishes very clearly that Woods was dominated by his wife. According to the testimony by both Woods and his wife, she attended to all the business of her husband, yet Woods appears to have had at least one other business transaction without his wife's consent, this being the sale of some timber for $36 which Mrs. Woods testified was worth $250.

Mrs. Woods did not like the idea of having an administration, and she employed an attorney to have the appointment canceled. A session of the probate court was held on the morning of the 10th, being presided over by the chancellor, who rendered the decree from which is this appeal. Woods and Griffin appeared before the chancellor sitting in probate, and the chancellor, in his opinion, states that "I do know that the administration was set aside without objection on Mr. Griffin's part." Just here arise the questions of fact which are pivotal.

Woods testified that he and the attorney he had employed went to Griffin for the papers belonging to the deceased, and that inquiry was made about the bank stock, and Griffin said that he had not seen any. There is no corroboration of this testimony except that of Woods' wife. On the contrary, the testimony of Woods as to the conversation which he had with Griffin immediately following Griffin's discharge as administrator appears very equivocal and is to the following effect: "Q. You was there on the 10th? A. Yes, sir. Q. And I believe he mentioned to you about the stock on that day? A. Yes, sir. Q. And you didn't answer him back? A. I didn't when he called me out. Q. Why didn't you answer him? A. When my wife came out there he was asking what I was going to do about it. Q. You didn't let her hear anything about it? A. No, sir, but I wouldn't have cared. Q. Why didn't you answer him then? A. I come back because the business transaction was there in the office. Q. If you had transferred it on the 4th day of April, 1941, why was it necessary to mention the stock at that time? A. I don't know why he called me out. Q. Didn't you go back the second time to W. R. Griffin's store? A. Not that I remember of, no, sir. Q. How did it happen to be signed the 10th and dated the 10th if it was done the 4th? A. That certificate was signed when I went there the first time. Q. If it was on the 4th, why was it dated on the 10th? A. I don't know."

Now, Woods testified that within a few minutes after meeting Griffin he assigned to Griffin, without

money consideration, stock of a value unknown to him. The par value of the stock was $100 per share; its book value was greater. The cashier of the bank testified that its book value was $815, but that the stock was worth more than that. Griffin testified that he did not know its value, but that he knew it was worth what Woods asked and what he paid.

Now, Griffin categorically denies the testimony of Woods as to the assignment of the stock on the 4th. He denied telling Woods they had been buddies during the war. He stated that he first met Woods in 1920, after the war. He admitted calling Woods at Dial's home, but he stated that he did this at the request of the undertaker, who wished to consult Woods about the selection of a casket. Griffin testified that the stock was purchased and assigned on the 10th. He further testified that Woods proposed to sell the stock, but stated that he did not want his wife to know anything about it; that he had a "plaster" on his car at home, about which his wife knew nothing, and he wanted to discharge the mortgage without letting her know he had given it.

Now, if Woods' version of the transaction is to be accepted as true, he assigned the stock on the 4th, but he did not tell his wife that he had done so, although according to her own testimony, she was following the matter with close interest and attention.

It is an undisputed fact that the assignment is dated, not April 4th, but April 10th, and no satisfactory explanation is made why the assignment should have been dated the 4th if it did not occur until the 10th.

There is a witness in the case to whose testimony the chancellor, as indicated by his opinion, gave much weight; and so do we. This witness was a young man named Charles Shook, who, on April 10th, was employed by Griffin in his drugstore, but who, at the time of the trial, was otherwise employed. The testimony of this witness appears to be candid and disinterested. He testified that he saw Woods sign the assignment, and that he was called to witness Woods' signature. The certificate was lying open, and not folded, on the desk, and that

Woods could have read it had he wished. Woods testified that the certificate was folded when he signed it. Witness Shook did not know what negotiations had preceded. He saw Griffin pay Woods money, in bills, but did not know in what amount.

Now, Woods and his wife were interested witnesses; and so was Griffin; but Shook does not appear to have been. His testimony is either true or false. If true, that of Woods that he assigned the stock on April 4th, without a cash consideration, is false. The chancellor believed Shook, and we are unable to say that he should not have done so, nor that this finding is contrary to the preponderance of the evidence.

The stock, if sold, was sold for less than half its par value, and for less than one-fourth of its book value. But Griffin testified that he did not know its value, but he knew it was worth what he paid.

The chancellor found that no relation of trust and confidence existed between Woods and Griffin. The administrator was discharged on the morning of the 10th, and, according to Griffin and Shook, the stock was purchased that afternoon, and the date of the assignment is corroborative of this testimony. Griffin testified that in offering only $200 for the stock he took into account the services he had rendered and the commissions as administrator which he relinquished, and that he considered he was paying $350 for the stock, although only $200 of it was in cash.

We have the impression and are of the opinion that Woods was not treated fairly; but we are unable to find that he was defrauded. Like the chancellor, we think there was no relation of trust and confidence, and we do not find that false or fraudulent representations were made to Woods which induced him to sacrifice his stock for much less than its value.

We think the testimony supports the finding that Woods was trying to sell this stock without his wife knowing that he had done so, to "hold out" from her the proceeds of the sale to pay the mortgage on his car, as he explained to Griffin, or for some other purpose.

We find but little, if any, testimony to support the contention that the intervener, Kessinger, a former sheriff of the county, was not an innocent purchaser. But this question need not be considered if the finding of the chancellor that Griffin practiced no fraud is affirmed, and as we are unable to say that the finding of the chancellor is contrary to the preponderance of the evidence the decree will be affirmed.

The sale of the stock at the price received for it was not only improvident, but was foolish; but it may not be avoided on that account. At § 7 of the chapter on Fraud and Deceit, subtitle "Unconscionable Advantage," 12 R. C. L., p. 237, it is said: "So the character and subject of the bargain, as being such as no sane person would make, and no honest man would accept, may also furnish strong evidence of fraud. . . . But not all foolish transactions are fraudulent, and it is neither the duty nor within the power of the courts to relieve a person from a contract merely because it is in its terms unwise or even foolish."

A headnote to the case of *Mason* v. *Graves,* 167 Ark. 678, 265 S. W. 667, reads as follows: "A sane person is bound by a contract fairly entered into, however improvident it may be."

With reluctance and regret, the decree must be affirmed, and it is so ordered.

HUMPHREYS and MCHANEY, JJ., dissent.

MCCAIN, LABOR COMMISSIONER, *v.* COLLINS.

4-6848 164 S. W. 2d 448

Opinion delivered June 15, 1942.

P. A. Lasley, for appellant.

Chas. B. Thweatt, for appellee.

MEHAFFY, J. The appellant is the Commissioner of the Department of Labor of Arkansas, and the other appellants are the members of the merit system council and the merit system supervisor. The appellee was the qualified director of the employment security division of the department of labor of Arkansas.

The appellee was discharged by the Commissioner of Labor and appealed to the merit system council from said dismissal. The merit system council, after a hearing, approved the action of the labor commissioner and ordered that his dismissal be permanent.

Appellee Collins then applied to one of the judges of the Pulaski circuit court for a writ of certiorari to bring the proceedings of the merit system council before that court for review, and on the hearing before the circuit court a judgment was rendered quashing the order of the merit system council, and an appeal has been duly prosecuted to this court.

On the hearing of the cause before the circuit court the record as made before the merit system council, including all the oral testimony adduced, was considered and parties permitted to introduce additional testimony.

The charges against Collins, as stated by him in his brief, are as follows:

"(1) A poker game has been openly conducted in the offices of the agency for many months, during the noon hour, in which a number of employees of the agency participated.

"(2) The director was a patron of bookie agents and bet on horse races; that bets were generally placed by the director and employees of the agency during business hours; one Delbert Plant, a representative of the bookie agent, called regularly on the employees of the agency to solicit bets on horse races.

"(3) The merit system rules have been ignored in many instances, promotions have been made without regard to qualifications or efficiency, resulting in general dissatisfaction.

"(4) The director has raised the salary of favorites in preference to capable employees who should have been given consideration.

"(5) The plaintiff has unlawfully remitted penalties.

"(6) That plaintiff has been guilty of employer discrimination."

John I. Hogue, who was supervisor of the Arkansas Merit System Council, testified in substance that the employment security division of the Department of Labor, the state Department of Public Welfare and the State Board of Health are agencies that the merit system applies to, and agencies to which the federal government contributes expenses and personnel. Witness became connected with the merit system on February 15, 1940. The council at that time had certain rules and regulations governing the operation of the district. A copy of the rules and regulations was then introduced in evidence. Witness does not know of any promotions or employment in the security division that have not been in keeping with the rules; that is, no formal promotions. A list of promotions was introduced in evidence, by agreement. Witness said it is not in keeping with the rules and regulations of the merit system to promote a person to a position that carries with it an increase in salary and at the same time require that person to divide the increase in salary with someone else who does not receive a promotion. If such a case had been called to witness' attention, he would have had to take an exception to it; does not recall when Wahlgreen and Neighbors were promoted or that there was any information coming to him as to an agreement whereby the one receiving a promotion and increase in salary was to turn over a portion of the increase to the other. Inasmuch as this practice of dividing the increase in salary of the one promoted is not in keeping with the merit system, it would probably have a tendency to destroy the merit system. If by agreement the party promoted is required to share the raise with someone else, then false records are made. The Commissioner of Labor is the one who actually appoints, promotes and raises salaries.

Ben C. Shipp, chief of the benefits section of the employment security division, testified that he had been with the agency all the time that the appellee had been director; knew that a poker game was carried on during the noon hour on the second floor of the agency; those participating in the game were employees of the agency, and the game was carried on openly; could have been

seen by anyone on the second floor; during the game there would be onlookers; witness participated in the game once or twice; it was generally understood by the employees that appellee was a patron of the bookies and bet on the horse races; witness had seen racing forms on appellee's desk quite frequently during business hours. This witness also testified about Mrs. Wahlgreen and Mrs. Neighbors; that one of them received a promotion on condition that she split the increase in salary with the other; the bookie agent was frequently in conversation with Hicks.

A number of witnesses testified about the poker game and the betting on horse races, and the division of the increase in salary.

Witness Horace Wilson testified that he had been in appellee's office many times during business hours and had seen and heard Hicks and appellee discussing the races and studying racing forms. The poker games stopped shortly after the first of the year, but betting on horses continued, although not quite so openly. Witness had seen appellee and Hicks in appellee's office discussing racing and racing cards after the notice was posted prohibiting gambling; these discussions took place during business hours.

Randall Falk testified that in view of the circumstances he could not imagine that the appellee was not cognizant of racing forms being kept on the desk of his secretary.

Another witness, Marvin E. Clark, testified about the bookie agent and having seen racing sheets on the desk of appellee's secretary. He also testified that there was a general feeling among the employees that promotions were given to undeserving employees, and such views were the rule, and not the exception.

H. L. Lambert, cashier of the agency, testified that he has seen poker games in progress on the second floor a number of times, and had seen Delbert Plant, a bookie agent, in the offices of the agency almost daily for months.

C. W. Cobb, tabulating supervisor, testified that he had frequently seen poker games in progress; almost a daily occurrence; had seen the bookie agent with Hicks and racing sheets on Hicks' desk and had seen them on appellee's desk during business hours. The poker playing and horse race betting was carried on for about two months and the betting continued throughout the season at Hot Springs.

H. O. Arendt, an employee of the agency, testified that favoritism was in fact shown.

Marvin Clark, principal clerk in the contributions section, testified among other things that upon instruction from the appellee an employer received credit for taxes which he supposedly paid to the agency. A check for nearly $1,000 was given the agency, which enabled the employer to receive credit, and the check was returned unpaid. Appellee instructed that the check of the employer be held up until April 30, 1941. In the meantime the agency had certified that the employer had paid his taxes, when as a matter of fact such tax had not been paid and had not been paid at the time the witness testified.

There is evidence of witnesses who did not see the gambling and did not know of it, and also some evidence contradicting the evidence above set forth, but we are of opinion that there was substantial evidence to support the finding of the council.

The case of *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041, construes the statute and reviews the authorities on the subject of certiorari. It would serve no useful purpose to again review those authorities, since there has been no change in the statute (see § 2865, *et seq.,* Pope's Digest) and none in the decisions of this court since the decision in that case, in which the court said: "Again, it is very plainly settled, we think, that the writ of certiorari is available for the purpose of giving opportunity to review the decision of the board in removing an officer pursuant to the terms of the statute." The following cases were cited in support of the above statement of the law: *Pine Bluff Water & Light Co.* v. *City of Pine Bluff,*

62 Ark. 196, 35 S. W. 227; *State, ex rel.,* v. *Railroad Commission,* 109 Ark. 100, 158 S. W. 1076.

The court in the Bledsoe case also said: "It has been expressly held by this court that the scope of the writ of certiorari at common law is not enlarged by the statutes of this state on that subject." Citing authorities.

In the Bledsoe case, the court quoted with approval from the case of *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064, stating: "According to the well-settled practice in this state the writ of certiorari can be used by the circuit court in the exercise of its appellate power and superintending control over inferior courts in the following classes of cases: (1) Where the tribunal to which it is issued has exceeded its jurisdiction; (2) where the party applying for it had the right to appeal, but lost it through no fault of his own; and (3) in cases where the superintending control over a tribunal which has proceeded illegally, and no other mode has been provided for directly reviewing its proceedings. But it cannot be used as a substitute for an appeal or writ of error, for the mere correction of errors or irregularities in the proceedings of inferior courts."

On hearing the writ, the court does not proceed *de novo* and try the case as if it had never been heard in the inferior court. The office of the writ is merely to review the errors of law, one of which may be the legal sufficiency of the evidence. As the court said in the Bledsoe case: "for the purpose of testing out that question the circuit court is, by the statute, empowered to hear evidence *de hors* the record in order to ascertain what evidence was heard by the inferior tribunal, and to determine whether or not the evidence was legally sufficient to sustain the judgment of that tribunal."

All of the evidence has been accurately preserved, and the question here is whether the council acted arbitrarily and without legally sufficient evidence. We have set out sufficient evidence to show that there was substantial evidence upon which the council based its finding, and neither the circuit court nor this court has any authority to pass on the question of the preponderance of the evidence.

As said in the Bledsoe case: "We are not called on to decide primarily whether or not the decision of the board was correct. The lawmakers have placed that authority in the board of control, and it would be clearly an encroachment by the courts upon the authority of another department of government to undertake to substitute the judgment of the judges for that of the members of the tribunal vested with authority to manage the institutions of the state and to appoint and remove those who are placed in charge. When all the testimony in the case is considered and viewed in the strongest light to which it is susceptible in support of the board's findings, it cannot be said that there is an entire absence of evidence of a substantial nature tending to establish the charge of inattention and neglect of duty on the part of the superintendent. This being true, it becomes the duty of the courts, upon well-settled principles of law, to leave undisturbed the action of the tribunal especially created by the lawmakers to pass upon those questions. Any other view would make the board of control a mere conduit through which a decision on the removal of an unfaithful or inefficient superintendent would be passed up to the courts instead of leaving the matter where the lawmakers have placed it, in the hands of the board."

In the Bledsoe case there was a dissenting opinion written by the late Judge Hart which was concurred in by the late Judge Wood. In that opinion it is said: "Of course I do not think the circuit court should weigh the evidence to decide where the preponderance lies, but I think the finding of the board is subject to review if there is no evidence to reasonably support the charges from any fair viewpoint." It seems, therefore, that under the principles announced in the dissenting opinion, we do not decide where the preponderance lies, but it is subject to review if there is no evidence to reasonably support the charges from a fair viewpoint.

There were many persons employed by the agency and, of course, it would be difficult for the director to know everything that occurred among so many employees; but there is substantial evidence to the effect that there was gambling going on, both poker games and

horse race betting, and the evidence shows that these things were carried on in such a manner that the director, if attending to his duties, would be bound to have knowledge of them. We do not judge the weight of this evidence, however, for it is a matter for the council.

Having reached the conclusion that there was sufficient evidence to justify the action of the council, it follows that the circuit court erred in quashing the order.

The judgment is, therefore, reversed, and the writ of certiorari dismissed.

MEHAFFY, J., ON REHEARING. Appellee calls our attention to the fact that the salary question was raised in the original case and discussed, but that the court did not pass on it. In this the appellee is correct, and the only question raised in his petition for rehearing is this one.

The rules under which Collins was working provide, among other things: "The appointing authority, after notice in writing to an employee stating specific reasons therefor, may dismiss an employee who is negligent," etc.

It is also provided that after notice the appointing authority may suspend an employee. Notice, of course, is required to be given so that the employee may have a hearing and that he may present any defense he may have. In this case the notice was not given and Collins really had no opportunity to have a hearing and present his defense until he appealed to the Merit System Council.

"It is thoroughly settled that where an officer does not hold at pleasure, but holds during good behavior or subject to removal for specific causes, then before he can be removed, there must be notice and a hearing given to him." *Lucas* v. *Futrall,* 84 Ark. 540, 106 S. W. 667; Mechem's Public Officer, § 454; 23 Amer. & Eng. Enc. of Law 437, 438; *State* v. *Hixon,* 27 Ark. 398; *Lee* v. *Huff,* 61 Ark. 494, 33 S. W. 846.

This court has uniformly held that where an employee or officer holds subject to removal for specified causes, and where notice and hearing are required, there must be the notice and hearing before the discharge.

After he appealed to the Merit System Council, Collins had a hearing and the council approved the finding

of the commission and ordered that his dismissal be permanent. This order of the council was treated as taking effect on October 8th, when it should have been held to be effective on December 10th.

We are, therefore, of opinion that until there was notice and hearing, Collins was entitled to his salary; that his dismissal did not become effective until the finding of the council, and he should have his salary up to that time. Since the judgment in this case has been reversed and writ dismissed, the cause is remanded to the circuit court with directions to ascertain the amount of salary for the period herein indicated, and to give judgment therefor.

McNew *v.* Wood.

4-6792 163 S. W. 2d 314

Opinion delivered June 15, 1942.

[redacted]

C. L. Farish and *M. H. Dean,* for appellant.

John D. Thweatt and *W. W. Sharp,* for appellee.

SMITH, J. The nature of this suit and the decisive issue of fact is reflected in an instruction numbered 1, given at the request of appellee, who was the plaintiff below, over the objection and exception of appellant, the defendant below. This instruction reads as follows: "The jury is instructed that if you find from a preponderance of the testimony that on Sunday morning, April 13, 1941, the plaintiff, Joe Wood, was riding in an International truck, owned by the plaintiffs, Joe Wood and H. D. Sowell, and at the time being driven by Austin Sartin, traveling east on highway 70, on their own right-hand side of the road, using due care for their own safety, and when they reached a point about a mile and a half east of the town of Biscoe, they met the defendant, Cecil McNew, driving west on said highway, and that as they met the said Cecil McNew turned from his own right-hand side of the road across in front of the plaintiffs' truck without giving any warning of his intention to do so turned over onto the plaintiffs' right-hand side of the pavement and in front of them, so that the car and truck collided, and that the act of the defendant, McNew, in turning his car over onto the plaintiffs' right-hand side of the pavement in front of the plaintiffs' truck was the sole and proximate cause of the damages to the plaintiffs, if any, you find they have suffered, and you find from a preponderance of the testimony that the plaintiff, Joe Wood, and the driver of said truck, Austin Sartin, at the time of the accident were using due care for their own safety, then your verdict will be for the plaintiffs and against the defendant."

This instruction was given with the explanation by the court: "That instruction means this, gentlemen of the jury, if both were negligent in the operation of their vehicles neither can recover. One must be negligent in the operation and the other must be free from negligence in the operation of his vehicle."

As a result of this collision the plaintiffs' truck had been overturned and damaged, as was a lot of grapefruit which it was conveying, and the plaintiffs sued for damages in the sum of $3,800.

The defendant, McNew, filed an answer, denying that he was guilty of any negligence contributing to the collision, and he filed a cross-complaint, in which he alleged that the collision resulted from the negligence of the truck driver. He prayed judgment in his cross-complaint in the sum of $11,053 to compensate the very serious personal injury which he sustained and the damages to his automobile which was wrecked.

The case presents no legal question of any difficulty. The controlling question in the case is the one of fact, that is, which driver was responsible for the collision. According to the testimony offered on behalf of plaintiffs, the defendant was driving on the wrong side of the road, and drove his car head-on against the truck. Such was the testimony of the plaintiff, Wood, and of his driver, Sartin, and this testimony was corroborated by that of Mrs. Anna Mae Bartrand and Mrs. Vera Bryer. These ladies testified that they were eyewitnesses, and according to their testimony Sartin had driven the truck as far to the right as he could safely do when the automobile, traveling on the wrong side of the road, ran into the truck.

The testimony of these ladies makes a clear case of liability against McNew, but the motion for a new trial alleged that evidence had been recently discovered which contradicted that of these ladies, and especially that of Mrs. Bartrand. An affidavit was filed by one, Will Sherbert, who had testified in the case. He and the other witnesses had been placed under the rule, and none of these witnesses heard the testimony of any other. Sherbert heard the argument of counsel before the jury, in which the testimony of Mrs. Bartrand and that of the lady with her was discussed. Sherbert then recalled that Mrs. Bartrand was the driver of a pick-up truck which arrived at the scene of the collision after it had occurred, and that he guided her truck around the place where the

collision had occurred. Sherbert after the trial told counsel for appellant what he had seen, and, according to his affidavit, the testimony of the ladies was false.

Mrs. Bartrand and Mrs. Bryer and another lady were returning from Little Rock in a pick-up truck. Mrs. Bartrand and Mrs. Bryer testified at the trial. The third lady was ill in her home at the time of the trial and did not testify. The ladies who did testify corroborated the testimony of Sartin, the driver of the truck. The plaintiff, Wood, one of the owners of the truck, was asleep when the collision occurred, but was awakened by the collision. There was some contradiction in the testimony of these witnesses as to the place where the collision occurred with reference to certain curves in the road; but it was, of course, a question for the jury to pass upon the credibility of the witnesses. This statement applies also to certain contradictions between the testimony of these ladies and two witnesses who came to the scene of the collision after it had occurred. However, plaintiffs' witnesses all agreed that Sartin was as far on the right side of the road as he could safely go, and that defendant was on the wrong side of the road when he ran into the truck. It appears, however, that defendant, McNew, and the lady who had been his companion sat through the trial and heard all the testimony, and neither was called to contradict the testimony of these two ladies who did testify. A continuance had been granted at a former term of the court on account of the absence of the lady who had been defendant McNew's companion. The lady witnesses who did testify had been subpoenaed, and were present at the term of the court at which the continuance was granted, and no reason is shown why appellant, McNew, might not have ascertained what their testimony would be. He had until the next ensuing term of court in which to do so.

The newly-discovered evidence is what may be called impeaching testimony, that is, its purport was that the ladies had testified falsely. And what was said of such testimony in the case of *Arkansas Power & Light Co.* v. *Mart,* 188 Ark. 202, 65 S. W. 2d 39, is applicable here. We quote from that opinion as follows:

"The most that can be said about this newly-discovered evidence is that it discredited and impeached Powell. It is not claimed that he, at any time, made any statements about the accident in conflict with his testimony at the trial of the case. . . .

" 'This court has many times held that motions for new trial on account of newly-discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant unless an abuse of such discretion is shown.' *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. 2d 20.

" 'Moreover, the testimony of Johnson and his wife on the matter set out in their affidavits was in the nature of impeaching testimony of the Smiths; and it has been held by this court that newly-discovered evidence which goes only to impeach or discredit a witness is not ground for a new trial.' *Bradley Lbr. Co.* v. *Beasley,* 160 Ark. 622, 255 S. W. 18; *Freeo Valley R. Co.* v. *Rowland,* 164 Ark. 613, 262 S. W. 660.

"The granting of new trials on the ground of newly-discovered evidence is always within the discretion of the trial court. *Banks* v. *State,* 133 Ark. 169, 202 S. W. 43; *Hinkle* v. *Lassiter,* 142 Ark. 223, 218 S. W. 825." See also, *Missouri Pacific Transportation Co.* v. *Simon,* 200 Ark. 430, 140 S. W. 2d 129.

In view of the facts recited we are unable to say that the court abused its discretion in refusing to grant a new trial on account of this newly-discovered evidence.

As has been said, the case on its merits presents no question of legal difficulty, yet the court gave a number of instructions at the request of both plaintiff and defendant, but refused to give instructions numbered 5 and 7 requested by the defendant. The error assigned in the refusal to give these instructions may be disposed of by saying that they were covered by other instructions which were given.

The objection to the instruction numbered 1, above recited, was "that such instruction could be, and probably was, construed by the jury that it was necessary only for the plaintiff to use due care for his own safety, and not

the safety of others, and that it further suggested to the jury that the wreck occurred a mile and one-half east of the town of Biscoe."

We think the instruction was not open to the objection made to it, and that it was not an erroneous declaration of law.

The verdict in this case was not unanimous, and was returned only after the jury had reported disagreement and had been admonished by the court as to the desirability of reaching a verdict. The jury retired and after deliberation lasting forty-five minutes returned with the verdict upon which the judgment was pronounced from which is this appeal. We find no error in this respect. The practical administration of the law requires that trial judges shall have this power, and its exercise has been upheld in many cases, and we find no abuse of that power here. *Graham* v. *State,* 202 Ark. 981, 154 S. W. 2d 584. There is an extensive note on this subject in the annotations to the case of *Meadows* v. *State,* 1915D Ann. Cas. 663.

The verdict was for $1,000, and is not complained of as being excessive. The testimony would have supported a much larger recovery, in view of the damage done to the truck and to its cargo, and was probably made as small as it was because of the much greater damage which McNew sustained to himself and to his car.

We find no error, and the judgment must be affirmed, and it is so ordered.

STEWART, EXECUTRIX, *v.* WHEELER.

4-6797 163 S. W. 2d 316

Opinion delivered June 15, 1942.

T. A. French, for appellant.

E. G. Ward, for appellee.

HOLT, J. Wm. N. Wheeler died testate in July, 1930. A daughter, Nettie Stewart, was named executrix in his will, which was probated August 4, 1930. The bond of the executrix was approved and letters issued to her October 18, 1930. Shortly after Nettie Stewart qualified, and in 1930, she removed to Texas where she has since resided. She acted as executrix, however, until September 10, 1941, when she was removed and I. B. Langley was appointed to succeed her.

April 2, 1941, appellee, Mrs. J. R. Wheeler, niece of Wm. N. Wheeler, filed suit in the probate court of Clay county, seeking to establish a claim against the estate. She alleged in her complaint that she furnished board to Wm. N. Wheeler from January 1, 1928, to June 30, 1930, at the rate of $10 per month, or a total amount of $300, which she alleged he was due her at the time of his death.

She further alleged that she presented this claim to Nettie Stewart, the executrix, on October 18, 1930; that said claim was in proper form, duly itemized and verified; that Nettie Stewart allowed the claim; that it was duly filed with the clerk of the court, duly presented, approved and allowed by the probate court on October 20, 1930.

She further alleged that "the clerk failed and neglected to enter the order of said court therein in the records of said court," prayed that a *nunc pro tunc* order be made correcting the records so as to reflect the filing, approval and allowance of her claim of October 18, 1930, and, it appearing that all personal property of said estate

had been exhausted, a lien be declared on the following real property belonging to said estate: "South half of north half of block two; also all of the south half of said block two; all in Huston's Addition to the town of Piggott, Clay county, Arkansas," and that said property be sold to satisfy her claim.

Appellant answered denying every material allegation in appellee's complaint and specifically denied plaintiff's claim, denied that it had ever been presented to, approved, or allowed by the executrix, Nettie Stewart, and denied that any such claim was ever presented to and allowed by the probate court.

Upon a hearing, the trial court on parol testimony entered a *nunc pro tunc* order by which appellee's claim was reinstated and allowed, a lien was declared upon the real property, *supra,* and its sale ordered in satisfaction of appellee's claim. This appeal followed.

The primary question presented, and which is decisive of this cause, is: Did the trial court err in attempting to correct, by *nunc pro tunc* order, records alleged to have been made in 1930 and thus allow appellee's claim, reinstate it and direct its payment out of the proceeds of the sale of certain real property belonging to the estate? We agree with appellant's contention that this action of the court was error.

The record reflects that the trial court in making this *nunc pro tunc* order relied solely on parol testimony. A different judge was in office in 1930 when the orders and records affecting appellee's claim were alleged to have been made. Before such action of the court can be sustained on parol testimony, the evidence established in support of such action must be clear, decisive, convincing and unequivocal. A preponderance of the testimony is not sufficient. In *Dickey* v. *Clark,* 192 Ark. 67, 90 S. W. 2d 236, it is said: "The purpose of a *nunc pro tunc* order is to make the record reflect the transaction which actually occurred, and which is not reflected by the record because of inadvertence or mistake. Its province cannot be extended to make the record show what ought to have been done. In *nunc pro tunc* pro-

ceedings the record may be corrected or made to speak the truth upon parol testimony alone, but the evidence thus established should be decisive and unequivocal. *Midyett* v. *Kerby,* 129 Ark. 301, 195 S. W. 674; *Tipton* v. *Phillips,* 176 Ark. 308, 4 S. W. 2d 507; *Tracy* v. *Tracy,* 184 Ark. 832, 43 S. W. 2d 539."

The evidence before us reflects that there is no record evidence whatever in the office of the probate clerk of Clay county that the claim of Mrs. J. R. Wheeler, appellee, was ever filed, approved or allowed. No such claim was found in the files of that office. There is no record evidence that the executrix or the probate court approved or allowed the claim.

B. O. Dalton, county and probate clerk, testified: "Q. Have you searched the claim record book to see if any claim has been filed as against the estate? A. Yes, I have, and find no claims in the claim record book. Q. Have you searched to try to locate a claim which Mrs. J. R. Wheeler filed and which ought to be in the files? A. Yes, I have. Q. Have you been able to locate it? A. No, I haven't."

He further testified from the records in his office showing allowance against various estates, that on October 20, 1930, seven claims were allowed and duly recorded against other estates, but that no claim was filed, recorded or allowed against the estate of Wm. N. Wheeler by Mrs. J. R. Wheeler, or anyone else, on that date.

J. R. Wheeler, claimant's husband, testified that Wm. N. Wheeler owed his wife the amount of the claim at his death; that his wife prepared the claim; that he took it to the office of the then clerk, Mr. Langley, who told him that it was necessary to make the claim out on a regular form which Langley gave him. He then filled out the claim and "Q. What did you do with the claim? A. I handed it to Mrs. Stewart and she read it and signed it and laid it on the desk. I said, is there any further need for me to stay here, or anything else to do? Mr. Langley said no. I just left and went back to my place

of business after he told me there was nothing else for me to do." This was on October 20, 1930.

He further testified: "Q. After this claim was left with the clerk, you didn't know if the executrix made any payments? A. She wrote me a check for $100 on the board bill, but she didn't have any money in the bank to cover it. Q. Why didn't she? A. The bank closed at that time. The money was in the First National Bank at Rector. Q. Did you get any other credit? A. We owed the Bank of Piggott a balance of a note of $85 and she agreed to let the bank give us credit for this amount to be credited on the board bill. Q. When was the $100 check sent to you, before or after the First National Bank closed? A. It was about the time it closed. It was September or October that she mailed me the check; the same year Mr. Wheeler died. Q. Have you received any payments in any way since that time? A. Yes, sir. She had whoever was living in the house to pay me five months' rent of $5 per month. Q. You turned it over to your wife on that account. A. Yes, sir."

E. G. Ward, appellee's attorney, testified that he prepared Mrs. J. R. Wheeler's claim and kept a carbon copy of the claim in his office; that he presented the claim to the probate court on October 20, 1930; that T. A. French, appellant's counsel, was probate judge at that time; that the judge indorsed, approved, dated and signed the claim in his presence on that date; he left the claim with L. B. Langley, the clerk, and at the request of L. B. Langley and T. A. French, he prepared an order to be entered. He delivered the original order to the clerk and kept a carbon copy. He heard nothing further in regard to the claim until this suit was filed April 2, 1941.

Bert Wheeler, witness for appellant and a son of Wm. N. Wheeler, testified that he was a surety on Nettie Stewart's bond, and (quoting from his testimony): "Q. Did he (meaning Wm. N. Wheeler) stay around the restaurant of the plaintiff, Mrs. J. R. Wheeler? A. He stayed down there some. Washed dishes, carried in coal, made garden, and things like that. Q. Did he quit staying down or working around the Wheeler restaurant a

short time before he died? A. Yes, sir. . . . Q. At the time when he discontinued his stay or occupation there, did he make any statement in regard to the obligation of himself toward the Wheelers? A. Well, he came home that afternoon and came up to my house and talked to me and my wife. He said he wasn't staying down there any more, and that he had settled up with them and didn't owe them a cent. Q. Did he make any statement in regard as to how the settlement was made? A. He said Jim owed him $100 and told him to go ahead and take it."

Mrs. Nettie Stewart, executrix, testified that she received approximately $700 from the sale of ten shares of preferred stock in a Virginia corporation, the property of the estate, out of which she paid all claims presented against the estate, including $575 for expenses of last illness and burial expenses. The balance of the money was lost in bank failures.

She further testified that no creditors of Wm. N. Wheeler's estate filed any claims against the estate in written verified form; and that neither Mrs. J. R. Wheeler, her husband, J. R. Wheeler, nor anyone else for her, on the 18th day of October, 1930, or at any other time, filed any claim against the estate of Wm. N. Wheeler.

She further testified (quoting from her testimony): "Q. Did you make any payment to either J. R. Wheeler or to Mrs. J. R. Wheeler for claim for board against Wm. N. Wheeler, deceased, and if so to which one of them? A. Yes, to J. R. Wheeler. Q. If your answer to the above question is 'Yes,' state the circumstances and information from which you arrived at the amount to be paid, due and owing to Mr. or Mrs. J. R. Wheeler, by the deceased, Wm. N. Wheeler? A. Jim (J. R.) Wheeler told me my father owed him $300 for board—not room—he never roomed there. I told him that my father had told me before he died that he had let Jim have $200 and it had not been paid back. Jim acknowledged he got the money but said he had paid part of it back. I told him I had my father's word he hadn't and if he owed $300, to take $200 from that left $100. I gave him a check

for that amount and he took it in full payment, but the bank at Rector closed before he collected it. Then I paid it, as I told you before, on the note at the bank. There never was any other thing done about it. I never signed any kind of paper—after several years he started writing me he was so hard up he thought I ought to send him some more money. My father told me he paid Jim all along while he was down there during the day. He slept at home all the time.''

We deem it unnecessary to set out more of the testimony here. It suffices to say, that after a careful review of the record, we think the evidence falls far short of that character of oral testimony required to uphold the court's *nunc pro tunc* order, *supra*. Here appellee has waited more than ten years to establish and collect her alleged claim. Mr. W. E. Spence, and his father, R. E. Spence, attorneys who represented the executrix when she was appointed and qualified, and for some time thereafter, are both dead. Mr. Langley, the clerk at that time, does not appear as a witness. A search of the books and files of R. E. and W. E. Spence fails to disclose any evidence of Mrs. Wheeler's claim.

On the whole case, the order is reversed, and the cause remanded with directions to set aside and revoke the *nunc pro tunc* order in question, deny appellee's claim, and to proceed in conformity with this opinion.

THE SECURITY BANK OF BRANSON, MISSOURI, *v.* SPEER.

4-6795 162 S. W. 2d 891

Opinion delivered June 15, 1942.

Virgil D. Willis, for appellant.

Shouse & Shouse, for appellee.

HUMPHREYS, J. This is an appeal from a decree dismissing appellant's motion to set aside a decree rendered on the 31st day of December, 1940, by the chancery court of Boone county. The decree sought to be set aside was one canceling all the proceedings in a foreclosure suit between appellant and appellees during the September term, 1940, of the chancery court. The cancellation of the foreclosure proceedings included everything had and done therein at said September, 1940, term of court and amongst other things the cancellation of the deed of the commissioner of the said court conveying the lands described in the mortgage to appellant who was the purchaser of the lands at the mortgage sale, which sale and deed were confirmed by the court. These proceedings were canceled on March 1, 1941, which was the last day of the September, 1940, term, without notice to appellant and appellees were permitted to redeem the lands by paying into court the debt, interest and costs.

Appellant was notified of the action of the court by registered letter whereupon it filed a motion to set aside the court's decree canceling the foreclosure proceedings on the ground the court was without authority to set aside the foreclosure proceedings without notice or a hearing.

Later the appellant filed a motion to set aside the decree canceling the foreclosure proceedings because after acquiring its foreclosure deed it entered into a binding written contract to sell the lands to an innocent third party.

Answers were filed to both motions and the first motion was tried by the court resulting in a decree to the effect that it had control of the foreclosure proceedings during the term of the court at which all orders were made therein and had power and authority to cancel the proceedings and permit appellees to redeem the lands.

From this holding and decree an appeal was prosecuted to this court and was tried and an opinion rendered therein by this court on January 19, 1942, under the style of *The Security Bank of Branson, Missouri,* v. *Speer,* 203 Ark. 562, 157 S. W. 2d 775.

During the pendency of this appeal appellees filed a motion in this court to abate the appeal until the motion and answer thereto tendering the issue as to whether appellant had entered into a written contract of the sale of the lands to an innocent third party was tried in the chancery court. In order to prevent a continuance or abatement of the trial of the case on appeal appellant represented to the court that it had taken a nonsuit on its motion tendering the issue that it had sold the lands to an innocent third party after acquiring and recording its foreclosure deed.

This court overruled the motion to abate the appeal on the ground that appellant had taken a nonsuit of the issue tendered in its motion as to the sale of the lands to an innocent third party.

In due course this court rendered an opinion affirming the action of the chancellor in annulling and canceling all the foreclosure proceedings and permitting appellees to redeem said lands. The opinion appears in the 203 Ark. 562, 157 S. W. 2d 775.

After this opinion was handed down appellant filed the motion involved on this appeal to set aside the order and decree rendered by the chancery court on December 31, 1940, which, in substance, is the same motion that appellant took a nonsuit upon in the chancery court during the pendency of the appeal above referred to in 203 Ark. 562, 157 S. W. 2d 775. The trial court sustained a demurrer to the motion on the ground that it was *res adjudicata* of an issue between appellant and appellees to cancel and annul the order or decree of the court setting aside the foreclosure proceedings and permitting appellees to redeem the lands. We think the court properly sustained the demurrer to the motion because it was in tenor and effect the same motion involving the same issue which appellant dismissed or took a nonsuit upon

to prevent the continuance of the appeal until the issue was determined by the chancery court. Each of the two motions tendered the issue of whether appellant had sold the lands after acquiring its foreclosure deed to an innocent third party. The motion involved on this appeal presents no new issue between appellant and appellees, but involved the same issue contained in its original motion upon which it took a nonsuit during the pendency of the former appeal of the case to this court.

No error appearing, the decree is affirmed.

CALL *v.* WHARTON.

4-6788 162 S. W. 2d 916

Opinion delivered June 15, 1942.

Buzbee, Harrison & Wright and *Lee Miles,* for appellant.

J. S. Abercrombie, for appellee.

HOLT, J. Appellants, C. K. Call, Jr., and others, resident landowners in Oak Forest Subdivision, adjacent to the city of Little Rock, Arkansas, proceeding under the provisions of §§ 9495-9496 of Pope's Digest, filed petition in the Pulaski county court for annexation of the property described in their petition. Appellees, A. F. Wharton and others, answered the petition protesting annexation. Upon a hearing, the county court granted the petition and ordered annexation.

Appellees then filed petition in the Pulaski circuit court, third division, for review of the county court's action and sought to prevent annexation. In this petition appellees, among other things, alleged: "There is no question of fact. Petitioners do not claim to have a majority of the landowners of the said territory who live in Pulaski county, and remonstrants do not deny that the petition contains a slight majority of the resident landowners of said territory. The sufficiency of the number of legal voters living within the said territory is not questioned. The controversy is purely a question of law —remonstrants contend that the county court erred in its holding which permits a majority of the resident owners of the territory proposed for annexation to ignore the wishes of property owners of the territory who do not live therein but who do live in Pulaski county."

Appellants in their answer to appellees' petition in the circuit court admit, "as stated in the petition of the remonstrants, that no question of fact is presented in this controversy. The petition for annexation in the county court contained a majority of the resident property owners of the affected territory, but did not contain a majority of the landowners of the affected territory who live in Pulaski county; and the sufficiency of the number of legal voters living within the affected territory who signed the petition is conceded."

In addition to the allegations contained in the pleadings, the parties stipulated that the petition for the proposed annexation filed in the county court by appellants contained the signatures of a majority of the landowners residing in the affected territory, but did not contain a

majority of the landowners in the affected territory irrespective of their residence and did not contain a majority of the signatures of the landowners in the affected territory who live within Pulaski county.

Judgment was entered in the circuit court in favor of appellees (remonstrants) and this appeal followed.

The facts are not in dispute. The question presented here is one of law. Appellants present the issue in this language: "It is admitted that the annexation petition was signed by a majority of the resident qualified electors owning real estate in the affected territory. It is also admitted that a majority of the real estate owners residing in and out of the affected area did not sign the petition, but protested favorable action of the county court.

"If, under the language of §§ 9495-6, the resident electors who own real estate control in the annexation, this court will decide for appellants. If the majority of the owners of real estate in the area whether residing in or out of the area control, this court will decide for appellees."

The sections of Pope's Digest, *supra,* are as follows:

"Section 9495. Whenever a majority of the real estate owners of any part of a county, contiguous and adjoining any city or incorporated town, shall desire to be annexed to such city or town, they may apply by petition in writing to the county court of the county in which said city or town is situated and they reside, and shall name the person or persons authorized to act on behalf of the petitioners.

"Section 9496. When such petition shall be presented to said court, they shall cause the same to be filed, and like proceedings shall be had for the hearing thereof as is prescribed in §§ 9787 and 9788. After such hearings, if the court shall be satisfied that at least six qualified voters, having a freehold interest in the territory proposed to be annexed, actually reside within the limits prescribed in the petition, and that said petition has been signed by a majority of them; that the said limits have been accurately described, and an accurate map thereof made and filed, and that the prayer of the petition is

right and proper, and that said petition should be granted, then it shall make and indorse on said petition, an order, to the effect that the territory described may be annexed to, and become a part of the city or town named in said petition, which said order, shall be recorded by the clerk of the county."

In interpreting and construing the meaning of statutes, the guiding rule is very clearly announced by the late Judge HART in *Berry* v. *Sale,* 184 Ark. 655, 43 S. W. 2d 225, in this language: "This court has uniformly held that, in the construction and interpretation of statutes, the intention of the legislature is to be ascertained and given effect from the language of the act if that can be done. In doing this, each section is to be read in the light of every other section, and the object and purposes of the act are to be considered. *Miller* v. *Yell and Pope Bridge District,* 175 Ark. 314, 299 S. W. 15; and *Berry* v. *Cousart Bayou Drainage District,* 181 Ark. 974, 28 S. W. 2d 1060.

"The reason is that statutes are written to be understood by the people to whom they apply, and their words and phrases are considered and used in their plain and ordinary, as distinguished from their technical, meaning, where the language is plain and unambiguous. In such cases it is said that, where the intention of the legislature is clear from the words used, there is no room for construction, and no excuse for adding to or changing the meaning of the language employed."

We think it clear under the first section of the statute, *supra,* that when annexation is desired of any part of a county, contiguous to a city or incorporated town, the first step required is the filing of a petition with the county court, which petition must be signed by a majority of the real estate owners of the subdivision sought to be annexed and also signed by a majority of the real estate owners of the affected area who are residents within the county in which the municipality and subdivision are located.

After the preparation and filing of the petition, then under the terms of § 9496, when it is presented and heard

by the county court, and the court shall be satisfied that at least six qualified voters own property in the territory sought to be annexed and in addition reside within said territory, and it shall further find that a majority of the six resident landowners have signed the petition, and other conditions set out in the section complied with, it would be the duty of the court to grant the petition for annexation.

On the undisputed facts here, appellants constitute a majority of the resident landowners in the territory sought to be annexed, but do not constitute a majority of the landowners within the subdivision who live in Pulaski county. We think the judgment of the circuit court was correct, and accordingly it is affirmed.

BURTON *v.* STATE.

4263 163 S. W. 2d 160

Opinion delivered June 22, 1942.

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

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

SMITH, J. Appellant was found guilty of voluntary manslaughter and given a sentence of four years in the penitentiary upon his trial under an information charging him with the crime of murder in the first degree, alleged to have been committed by shooting one Newt Chandler. The shooting was admitted and self-defense was pleaded.

The testimony was voluminous and sharply conflicting in many essential respects, but that offered by the state is sufficient to sustain the verdict of the jury, indeed, it would sustain a higher sentence. It is to the following effect. An automobile driven by appellant collided with another driven by one Overholt. A fight ensued, and Overholt was badly beaten. Chandler, the deceased, and his father, were seated in an upstairs room in a building in the city of Fayetteville situated across the street from the scene of the fight, and they witnessed it, and they went to the scene of the fight for the purpose, as stated by deceased's father, of stopping it. The deceased said to appellant: "Burton, you haven't got any business beating that old man up." When appellant said: "It is none of your d—— business," and began striking deceased. Deceased and appellant clinched, and during the struggle appellant shot deceased. According to the testimony offered in behalf of appellant, the de-

ceased took up the fight where Overholt left off, and attempted to take appellant's pistol from him, and in the struggle for its possession the pistol was fired, without any intention of firing it, and the deceased was killed. Appellant was a deputy sheriff, and at the time of the collision of his car with that of Overholt he was taking two prisoners to the municipal court. These issues of facts were submitted to the jury under appropriate and correct instructions.

For the reversal of this judgment it is insisted that the verdict is contrary to the law and the evidence, and that appellant was not given the benefit of the reasonable doubt raised by the testimony. These assignments of error are answered when we say that it was the province of the jury to weigh the testimony and to decide what testimony should be believed, and that offered by the state is sufficient to support the verdict.

It is assigned as error that the trial court erred "in admitting in evidence the alleged extra-judicial confession of the defendant, and in failing to instruct the jury that it should not be considered unless found to be freely and voluntarily made."

The statement referred to as an extra-judicial confession was one which appellant had signed shortly after having been arrested and placed in jail. We find nothing in this statement substantially conflicting with the testimony given by appellant at his trial. But, even so, the statement was introduced without objection.

We have frequently defined the practice where it is contended that a confession offered in evidence was not freely made. This practice is for the court to hear, as a preliminary matter, in the absence of the jury, testimony as to the circumstances under which the confession was made, and to exclude it from the jury if it were not freely made. If, however, there is an issue of fact as to whether the confession were freely made, that question should be submitted to the jury after having heard the testimony as to the circumstances under which it was made, and the jury should be told to disregard the confession if it were found not to have been voluntarily

made. That was not done here, nor was it requested that it should be. No instruction on this question was given, but none was asked. One may not complain of the inaction of the court who does not request the court to act. It is the duty of one who wishes the court to submit an issue to the jury to ask an instruction which does so. See, *Brashears* v. *State,* 203 Ark. 600, 160 S. W. 2d 505.

The action of the court in excluding the testimony of Harrison Leach and Johnnie Pennell is assigned as error. Deceased's father was asked on his cross-examination if his son were not of a pugnacious nature, and the answer was "No." The father was then asked if his son did not shoot one Harrison Leach. The father answered that when his son was 15 years old he had shot at Leach to scare him. Leach and Pennell were called to prove that this was not a boyish prank, but the court excluded that testimony.

The only error in this respect was in permitting the introduction of any testimony in relation to the incident; but appellant is in no position to complain, as he was the offending party who injected that question into the case. It would have been proper to show that deceased was of a violent and turbulent disposition; but this could only have been done by proof of his general reputation to that effect, and not by proof of specific acts of violence having no relation to the offense charged. It was held in the case of *Shuffield* v. *State,* 120 Ark. 458, 179 S. W. 650, that neither good nor bad character can be proved by specific acts or deeds. See, also, *White* v. *State,* 164 Ark. 517, 262 S. W. 338.

Error is assigned in permitting the prosecuting attorney to ask appellant on his cross-examination if he had not been arrested and required to give bond "for shooting a man at Lincoln." It was said in the case of *Parnell* v. *State,* 163 Ark. 316, 260 S. W. 30, that: "The next assignment relates to the ruling of the court in permitting the prosecuting attorney to interrogate appellant, on cross-examination, concerning arrests on other charges. This was done over the objection of appellant,

and exceptions were duly saved. We have frequently held that it is improper to permit a witness to be interrogated concerning mere accusations, or indictments for crime. There are so many of those decisions that it is unnecessary to cite any of them in support of this statement of the law."

While the admission of this testimony last referred to was error, it was invited error. In support of his good character, appellant had voluntarily stated that he had never been arrested. Having made that statement, it was not error to permit the state to show by the cross-examination of appellant himself that the statement was not true.

The testimony supports the verdict, and as no error appears the judgment must be affirmed, and it is so ordered.

GOTTFRIED *v.* JOHNSON.

4-6791 163 S. W. 2d 162

Opinion delivered June 22, 1942.

W. J. Dungan, for appellant.

Ross Mathis, for appellee.

McHaney, J. Appellees are the widow and heirs at law of Rufus Johnson who died intestate on June 26, 1938. Intestate was the record owner of the 80 acres of land in controversy, described as south half, northeast quarter, section 2, township 5 north, range 2 west, in Woodruff county. Not having paid the taxes thereon for 1932, payable in 1933, the land forfeited for said taxes and was sold to the State, June 12, 1933. No redemption from said sale was made in the time provided by law, and, after the expiration of the two-year redemption period, the land was certified to the state in 1935. Suit was brought by the State in October, 1936, to confirm the State's title to this and other lands, which resulted in a confirmation decree on May 10, 1937. Thereafter, on November 2, 1937, appellant purchased said land from the state for a consideration of $81 and received a deed to same from the Commissioner of State Lands. Nine days later, November 11, 1937, said intestate, Rufus Johnson, filed a pleading in court styled "Motion for Intervention" in the confirmation proceeding in which he set up his ownership of the land, the confirmation decree based on the tax sale in 1933, and that the tax sale was void for the reason that the notice of the delinquent list of lands was not published as required by law. He also set up appellant's claim of title based on his deed from the State as aforesaid, and that the amount of taxes, penalty and costs and cost of redeeming amount to $9.24 (should be $49.24), which sum he had tendered appellant for a quitclaim deed, which was refused. He prayed an order set-

ting aside said confirmation decree and that he be permitted to redeem from the state. This pleading was not signed by anyone. Appended thereto was the form of an oath, as follows: "State of Arkansas, County of Woodruff. Comes Rufus Johnson and on his oath says that he believes that the statements of this motion are true and correct, and that he had no notice or knowledge of the pending of this action to confirm the title to said lands in the State of Arkansas until after the decree was made and entered therein. ..... Subscribed and sworn to before me this 10th day of November, 1937. ..... Notary Public." Neither he nor the notary signed in the blank spaces provided. On July 28, 1939, appellees filed an amendment to the "Motion for Intervention," above set out, in which they alleged that Rufus Johnson had no notice of the confirmation decree of May 10, 1937, and set up a number of additional grounds of invalidity of the tax forfeiture and sale of said lands in 1933; that they are the widow and six minor heirs of said Rufus Johnson; that appellee, Susie Johnson, brings this suit as the mother and next friend of said minors; and she prayed an order of revivor in her name as such. In the decree rendered the case was revived.

On January 8, 1940, appellant filed an answer to the intervention and amendment thereto in which he set up his deed from the State based on said confirmation decree and alleged that the intervener did not tender into court the amount necessary to redeem from the confirmation decree, within the time required by statute, or at all; that he failed to file a proper intervention as required by Act 119 of 1935, or at all; that he failed to file the affidavit as required by said statute and has in nowise complied with said act; and that it is too late to redeem from the confirmation decree. The answer denied all the allegations in the motion and amendment and asserted they did not set up a meritorious defense.

Trial resulted in a decree setting aside the confirmation decree as to the 80-acre tract of land here involved and holding that the tax sale was invalid for the reason that proper notice then required by law was not published, and the sale was set aside, the State's deed to

appellant was canceled, and the title was confirmed in appellees, heirs of Rufus Johnson, subject to the dower and homestead rights of appellee, Susie Johnson, the widow. The court also found that Jonas T. Dyson (now deceased) as attorney for Rufus Johnson tendered into court and has kept alive a tender of $49.24, which was the sum necessary to redeem said lands, being the amount of the taxes, penalty, interest and costs for which the said lands sold. This appeal followed.

To reverse this decree appellant first says that Rufus Johnson did not file the intervention or motion that is required by Act 119 of 1935 and cites *Angels* v. *Redmon,* 198 Ark. 980, 132 S. W. 2d 170, to sustain him in his construction of § 9 of said act. That section in part reads as follows: "The owner of any lands embraced in the decree may, within one year from its rendition, have the same set aside in so far as it relates to the land of the petitioner by filing a verified motion in the chancery court that such person had no knowledge of the pendency of the suit, and setting up a meritorious defense to the complaint upon which the decree was rendered. . . ."

We held in *Angels* v. *Redmon, supra,* that the affidavit required by § 9 of said Act 119, as to the lack of knowledge of the pendency of the confirmation suit should be made by the owner of the land at the time the confirmation decree is rendered and not by the subsequent grantee of the owner because such grantee's knowledge was unimportant, and that the grantee's affidavit that the grantor had no knowledge thereof was hearsay and did not meet the requirements of the statute. That holding while technical, is sound, but it is not controlling here. Rufus Johnson did file a pleading within the year allowed, setting up a meritorious defense and in the form of affidavit attached thereto stated that he had no knowledge of the pendency of the confirmation suit until after the decree was rendered. His attorney neglected to sign this pleading and he neglected to have Johnson sign the affidavit or oath, above copied, and neglected to have a notary or other officer attest same. Was this neglect fatal? We do not think so. The signing and attestation

were formalities and were no doubt the result of neglect or oversight. Our statute, § 1437 of Pope's Digest, provides: "Every pleading must be subscribed by the party or his attorney, and the complaint, answer and reply must be verified by the affidavit of the party to the effect that he believes the statements thereof to be true . . ." In *Coleman* v. *Bercher,* 94 Ark. 345, 126 S. W. 1070, construing this statute, this court held, to quote a headnote: "The primary object of the Code of Practice is the trial of causes upon their merits, and that the rights of suitors may not be sacrificed to technical mistakes, omissions or inaccuracies." It was further held, in construing what is now § 1463 of Pope's Digest, relating to amendments to pleadings at any time in furtherance of justice, that: "The omission of the plaintiff or her attorney to sign the complaint, and the omission of Hiner in the affidavit attached thereto to state that he was plaintiff's attorney, were mere formal defects or clerical mistakes which could not affect the rights of the parties in a trial on the merits of the case; and the motion to correct same, having been seasonably made, should have been allowed by the court as a correction of a mistake, under § 6145, Kirby's Digest (now 1463, Pope), and thus have cured the defect." This case has been subsequently followed, the latest being *State* v. *Midland Valley Rd. Co.,* 197 Ark. 243, 122 S. W. 2d 173, where it was said: "The pleadings of appellee were not verified, but this was a mere formal matter and if motion had been made the court would doubtless have required a verification."

So, here, the pleading filed, while styled a motion to intervene, was in effect an answer to the confirmation suit and a cross-complaint against appellant, and a notice was served on appellant on November 12, 1937, a notice for a restraining order, and that Rufus Johnson was filing an intervention in the Woodruff chancery court to set aside the decree of confirmation. Appellant did not make timely appearance in the action, but waited until July 20, 1939, more than a year after the death of Rufus Johnson, when he filed a motion to be made a party to intervention and a demurrer thereto on the ground that it did not

state a defense to the confirmation suit. No mention was made therein that the intervention and affidavit were defective because not signed and verified, but he waited until January 8, 1940, to file his answer in which he alleged the insufficiency of the intervention in the respects stated, and about six months after appellees had filed their amendment to the intervention which was properly verified. Moreover, appellant's demurrer was overruled July 20, 1939, and he was given five days in which to answer, but he waited until January 8, 1940, nearly six months. If appellant had promptly moved to dismiss the intervention, or at any time during the life of Rufus Johnson, the court would have doubtless required him to sign his complaint and execute the affidavit. By this long delay, we think appellant waived the defects complained of and that the requirements of § 9 of said Act 119 are no more binding and jurisdictional than the requirements of § 1437 of Pope's Digest. This requirement of § 9 of said act had been omitted from Act 423 of 1941 and was not effective when the decree herein was rendered. But assuming that the former act was the applicable law in this case, appellant waived the technical omissions by his delay.

Appellant also contends there was no proper order of revivor in the name of appellees. We cannot agree as the decree herein does revive the action in their names.

It is also argued that no meritorious defense was alleged. The original intervention alleged insufficiency of the publication of the notice of the delinquent list of lands—that it was not published as required by Act 16 of 1933 Special Session. Section 5 of said Act 16 of the special session of 1933 amends Act 250 of the 1933 regular session and requires a notice of the delinquent list as therein specified to be published and that the lands on said list will be sold at the time specified. It provides a form of notice to be used and the clerk is required to attach his certificate, at the foot of the record of said list, stating in what newspaper said notice was published and the dates of publication "and such record, so certified, shall be evidence of the facts in said list and certificate contained." This record was introduced and it failed

to show that the notice was published in any paper and the certificate of the clerk fails to show the statutory requirements. The certificate is "that the above is a true and correct copy of notice of delinquent tax sale appearing in the delinquent tax sale record for 1932, Vol. 2, p. 155." This was insufficient and the court properly found that it was.

The decree is accordingly affirmed.

McLeod, County Judge, *v.* Richardson.

4-6870 163 S. W. 2d 166

Opinion delivered June 22, 1942.

Harry Ponder, Jr., for appellant.

D. Leonard Lingo, for appellee.

Griffin Smith, C. J. McLeod, as county judge, has appealed from an order of the circuit court commanding him to hear and determine a contest between Roy Richardson and Lloyd Cochran, who at an election March 21, 1942, were opposing candidates for school director.[1] Richardson undertook to contest, thinking county court was the proper forum. That tribunal held it was without jurisdiction. The controversy reached circuit court on Richardson's petition for mandamus to compel the county court to act.

[1] Cochrane received 237 votes, and Richardson 234.

Section 24, art. 19, constitution of 1874, authorizes the general assembly to provide by law the mode of contesting elections not specifically provided for. An Act containing 101 sections was approved January 23, 1875. Some of its provisions are still in force.[2] Section 71 appears as § 4837 of Pope's Digest. It is copied in the margin.[3]

In *Ferguson* v. *Wolchansky,* 133 Ark. 516, 202 S. W. 826, it was held that § 2860 of Kirby's Digest (now § 4837 of Pope's Digest) was applicable to school election contests. The decision was that since no specific statutory or constitutional provision covered such contests, the office was included within the term "county offices." This view, says the opinion, was confirmed by the fact that certain provisions of the school law required school election returns in cities and towns to be made to the county clerk, whose duty it was to deliver a certificate to the person elected.

Validity of Act 234, approved March 11, 1919, was upheld in *Stafford* v. *Cook,* 159 Ark. 438, 252 S. W. 597. (See § 11 of the Act). The right of appeal from a final order of any county board of education was given by Act 183, approved March 21, 1925. Although this Act has not been expressly repealed, it does not appear in the current Digest—this, no doubt, upon the assumption it had been repealed by implication. It was held in *Gibson* v. *Davis,* 199 Ark. 456, 134 S. W. 2d 15 (December, 1939) the Act had not been repealed.

Act 247, approved March 29, 1933, abolished county boards of education and the office of county superintendent. Examiners were substituted for superintendents. Powers and duties formerly exercised by boards of education were transferred to county courts. It was

[2] The Act, as it appears in the published volume for 1874-75, is entitled "An Act providing a general election law." Although the last section is numbered 102, there are in fact but 101 sections because of the omission of § 34.

[3] "When the election of any clerk of the circuit court, sheriff, coroner, county surveyor, county treasurer, county assessor, justice of the peace, constable, or any county or township officer, the contest of which is not otherwise provided for, shall be contested, it shall be before the county court." [The remainder of the section relates to procedure.]

in effect until repealed by Act 184, approved March 22, 1935, which was passed without the emergency clause. Pope's Digest, § 11667-11674.

Act 154, approved February 28, 1939, provides that in districts where there are contests for the office of school director, any ten qualified electors may petition the county examiner to supply duplicate ballots and duplicate ballot boxes for use in the election.[4]

Act 319, approved March 25, 1937, made each school district, for the purpose of elections, a political township.

Act 184 of 1935, transferred to county courts ". . . the powers and duties formerly exercised by the county board of education." It expressly repealed Acts 26 and 247 of 1933, and §§ 29, 31, 32, 33, and 35 of Act 169 of 1931. Boards of education were again (as in 1933) abolished, as was the office of county superintendent.

This was the law's status when Act 327 was approved March 26, 1941. It is entitled "An Act to provide for the more efficient supervision of public schools, to create the office of county supervisor, to create a system of county boards of education, to improve the rural schools, and for other purposes."

Section 19 expressly repeals § 11667 and certain succeeding sections of Pope's Digest, also § 11468.

Section 1 of Act 327 created county boards of education composed of five members. Section 13 authorizes employment of a supervisor. Section 11 invests boards with authority and makes it their duty to supervise employes. In addition, ". . . all powers, duties, and the responsibilities respecting the public schools . . . which heretofore have been vested in the several county courts . . . are hereby transferred to and vested in

[4] The supplies were to be delivered to judges and clerks of the election ". . . as now provided by law." The duplicate box was to be sealed and transmitted to the county treasurer, ". . . who shall safely keep the same until the time for filing contests in school elections has expired, but in case of a contest said treasurer shall not destroy said ballots until ordered to do so by the court having jurisdiction of the contest. The original ballot box shall be returned to the county judge and by him safely kept until the time for contesting an election has expired and in case of a contest shall preserve the said ballot box and ballots."

the respective county boards of education." An exception is that ". . . canvassing of returns and certification of results of all school elections . . . shall continue to be vested in the county courts."

Section 12 is: "In executing the powers herein conferred upon the county board of education, said board shall exercise such powers and jurisdiction with reference to the making of orders and enforcing the same as were formerly conferred upon the county courts of the state."

In construing Act 247 of 1933, it was said in *Shimek* v. *Janesko,* 188 Ark. 418, 66 S. W. 2d 626, that the county court, in canvassing votes and declaring results of a school election, did not act judicially. Its duties were similar to those of a county board of education functioning under Act 169 of 1931:—"No appeal could be taken from this order, but any person who had been voted for for school director might file a contest, and it was the duty of the court to hear the contest, make its findings, and render its decision, and from this order an appeal could be prosecuted to circuit court."

The difficult question is, Did the general assembly, in transferring powers to boards of education, but reserving to county courts exclusive authority to canvass returns and certify results of a school election, intend that such courts, and not the newly-created boards of education, should hear and determine contests?

Following the matter we have quoted from § 11 of Act 327, it is said: "Specifically, these duties, *among others,*[5] shall include the following." The reference is to seven subdivisions. Appellee argues, and not without force, that "among others" has reference to like duties. *Harrington* v. *Blohm,* 136 Ark. 231, 206 S. W. 316.

By express enactment, county courts are vested with but two powers respecting school matters: canvassing returns and certifying results. There is no provision for contests. It follows that jurisdiction must be implied; and, all powers, duties, and responsibilities formerly inhering in county courts (other than canvassing returns and certifying results) having been placed with county

[5] Italics supplied.

boards of education, and the general plan of legislation in 1941 appearing to have been to undo what was done in 1933 and 1935, it is not illogical to assume that the intent of Act 327 was to return to boards the authority they had under Act 169 of 1931. What seems more reasonable is that those who framed the 1941 measure overlooked contests and therefore failed to affirmatively provide for them. The result is that the deficiency must be implied from the spirit of the Act: from what was intended in effect, but not said.

It is not without misgivings that we reverse the judgment and hold that the board of education had jurisdiction. Let the writ be quashed.

Mr. Justice MEHAFFY dissents.

CITY OF LITTLE ROCK *v.* COMMUNITY CHEST OF GREATER LITTLE ROCK.

4-6857 163 S. W. 2d 522

Opinion delivered June 22, 1942.

John Sherrill and *Howard Cockrill,* for appellant.

Wallace Townsend and *Owens, Ehrman & McHaney,* for appellee.

McHaney, J. Appellee is a benevolent corporation, caring for the sick and needy in the city, and brought this action against appellants, city of Little Rock and the board of commissioners of the Little Rock Municipal Water Works. The complaint alleged that the city owns the waterworks system and that the commissioners have full and complete authority to manage and operate the waterworks system and, under Act 288 of 1941, have authority to obligate the city by making subscriptions to appellee and to obligate the city for payment of same from the waterworks funds; that the commissioners executed a pledge for $1,350, which is past due, unpaid and payment refused; that all principal and interest maturities on outstanding obligations of the waterworks have been paid and all sinking fund requirements met; and that payment of the pledge could be made without impairing other outstanding obligations.

Appellants answered, first, that they are prohibited by § 5 of art. XII of the constitution of this state from appropriating public money to appellee; second, that on February 1, 1936, the city issued its trust indenture to a named trustee whereby it pledged all its income and revenue from its waterworks system to secure the payment of $6,590,000 of water revenue bonds, the greater part of which are still outstanding in the hands of investors; that by the terms of said trust indenture it is provided that, after setting aside sums for repairs, replacements and depreciation to cover costs of mainte-

nance and operation, all income and other funds of the plant shall be placed in the Water Revenue Bonds Fund and used solely for the purpose of paying principal and interest upon the bonds, issued and secured by the trust indenture; that no funds derived from the waterworks are to be used for any other purpose than operation, maintenance and payment of bonds; that all bonds and interest maturities have been paid, but bonds maturing from 1943 to 1976, inclusive, are outstanding and unpaid, and appellants cannot make gifts to charity until said bonds are retired; that the laws in force at the time of the execution of the trust indenture became a part of the indenture and no subsequent act can impair same; and that Act 288 of 1941 is unconstitutional in that it contravenes § 5, art. XII, of the constitution of this state and § 10, art. 1, constitution of the United States.

The case was submitted to the trial court upon stipulation as follows: "It is hereby agreed and stipulated that the trust indenture securing the bonds of the Little Rock Municipal Water Works provides in § 1 of art. III that certain rates therein set out shall be charged for water furnished by the waterworks system; that § 2 of said art. III provides, in part, as follows: '. . . provided, however, that if at any time after February 1, 1921, the moneys in the Water Revenue Bonds Fund shall equal or exceed the total amount required for making all principal and interest payments during the succeeding twelve months on account of the bonds issued under and secured by this indenture and then outstanding, such rates may be reduced by such percentage thereof that, on the basis of the average annual earnings of the waterworks system for the three fiscal years immediately preceding, such reduced rates will produce funds sufficient to provide for the payment of the bonds, both principal and interest, as the same fall due, and also sufficient to provide funds for depreciation and for operation and maintenance equal to the average annual expenditures for each of such purposes, etc.

"'. . . and provided further that the minimum rates which may be charged at any time while any of the bonds issued under and secured by this indenture shall

be outstanding, shall be and are hereby fixed at sixty-six and two-thirds per centum of the rates set forth in § 1 of this article.'

"It is further stipulated that in accordance with the above provisions of said trust indenture the water rates in the city of Little Rock were reduced in an average amount of approximately $75,000 per year, or an average rate reduction of about twelve per cent; that the gross reduction allowed under the trust indenture is 33 1/3% of the rates outstanding and in effect at the time of the execution of the trust indenture; that on March 31, 1942, the said Little Rock Municipal Water Works had on hand $315,055.06 in the bond reserve fund, meeting the full requirements of § 6, art. III, of said trust indenture. Section 9, art. III of said trust indenture requires that a fund equivalent to a full year's operation and maintenance cost must be on hand in this fund before any money from this fund may be transferred to the depreciation fund or the Water Revenue Bond Fund; that the full operating expenses for the year 1941 were $202,419.63; whereas the deposit in said maintenance and operation fund on March 31, 1942, was only $127,712.12 and that said fund is not, therefore, built up to the full requirements to entitle the transfer of any of said funds from it.

"There are no funds provided in said trust indenture for capital expenditures; that a great expansion of the plant has been necessary to meet the war needs; that said expense has been met by payments from the maintenance and operation fund which is the only fund available for said work; that since the taking over of said plant capital investments in expansion of the plant have been made as follows:

"1936	$ 12,706.51
1937	25,902.80
1938	22,716.07
1939	74,570.42
1940	112,933.52
1941	90,744.21.

"During the current year the Little Rock Municipal Water Works has been engaged in the installation of an additional clear well at an estimated cost of approxi-

mately $100,000. Of this cost the United States will advance fifty per cent., but this sum added to the various and sundry other items necessary will cause a large capital expenditure for the year 1941, indicating that after all maintenance and operation, debt service charges, maturities and property expansion requirements are met the net income for the current year will be approximately $56,000; that this sum added to the present maintenance and operation fund will still leave said fund short of the amount necessary to permit transfers from said fund."

Upon this state of facts the court rendered judgment against appellants for $1,350, from which is this appeal.

Act 288 of 1941, § 1, amends § 9583 of Pope's Digest and as amended it provides: "It shall be unlawful for any city official or employee of any municipal corporation in this state to furnish or give to any person, concerns or corporations any property belonging to the said municipal corporation or service from any public utility owned or operated by said municipal corporation unless payment is made therefor to said municipal corporation at the usual and regular rates and in the usual manner, except as provided in § 9582; provided, however, that the Waterworks Commission of cities of the first class shall be authorized to make donations of money from the revenue of municipal waterworks systems to local Community Chests, or other city-wide non-sectarian, incorporated, charitable organizations." The only change made by the amendment was to add the proviso at the end of said section. Section 2 of said act amends § 10023 of the Digest and § 3 amends § 9584 of the Digest to the same effect. We think the act, although its purpose was laudable, was ineffective to authorize the city or the commissioners to make a binding subscription to appellee payable out of the waterworks revenues. These funds were pledged for the payment of the revenue bonds in the trust indenture, and the payment of such a pledge therefrom would be a diversion of the security and an impairment of the obligation. Certainly it could not be done without the amendatory act and we think the legislature was without power to authorize the impairment of the contract. It is no doubt true that there is and will be

ample revenue from the waterworks system, over and above the small pledge here involved, to pay all its obligations as they mature, but this fact cannot alter the situation. If appellants can make this donation, they could make a much larger one, and the statute is broad enough to authorize such pledges to many organizations now seeking contributions, such as the USO, the Navy Relief, and others. Section 9583, without the amendment, was the law in effect at the time of the execution of the trust indenture, and it is well settled that the law in effect at the date of the contract becomes a part of it, and that the law cannot thereafter be changed so as to alter the contractual rights of the parties thereto to their detriment. *Jacoway* v. *Denton,* 25 Ark. 625; *Brodie* v. *McCabe,* 33 Ark. 690; *Worthen* v. *Kavanaugh,* 295 U. S. 56, 55 Sup. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905.

But, say appellees, appellants cannot raise the question; that only a bondholder or the trustee could do so. We cannot agree. We think both the city and the Waterworks Commission are under the duty to see that the terms of the trust indenture are not violated, § 7 of which provides: "The city covenants and agrees that so long as any of the bonds secured hereby are outstanding, none of the gross revenues of the waterworks system shall be used for any purpose other than as provided in this indenture, and that no contract or contracts will be entered into or any action taken by which the rights of the trustee or of the bondholders might be impaired or diminished."

Appellee cites and relies on the case of *Bourland* v. *Pollock,* 157 Ark. 538, 249 S. W. 360, but we think it has no application to the facts in this case, but does have a direct bearing on the companion case of *Neel* v. *City of Little Rock,* post, p. 568, 163 S. W. 2d 525.

We think appellants were without power to make the donation, and the judgment should be reversed and the cause dismissed. It is so ordered.

NEEL *v.* CITY OF LITTLE ROCK.

4-6866 163 S. W. 2d 525

Opinion delivered June 22, 1942.

[redacted]

Linwood L. Brickhouse, for appellant.

Cooper Jacoway, for appellee.

McHANEY, J. Appellant, a citizen and taxpayer of the city of Little Rock, brought this action against appellee to enjoin it from appropriating and paying $5,000 to the Community Chest of Greater Little Rock. The complaint alleges that such payment would be in violation of § 9583 of Pope's Digest as amended by Act 288 of 1941. Appellee answered admitting that it had passed an ordinance appropriating $5,000 as a contribution to the Community Chest; that the Little Rock Community Chest is a non-profit association or institution which provides funds for carrying on various types of social and welfare work in greater Little Rock, and it realizes funds from contributions from the citizens of both cities and other sources; and that the Community Chest supplies funds to 22 different social and welfare agencies, such as Ada Thompson Home, Florence Crittenton Home and others, naming them and setting out the work of such agencies.

The answer then sets out the purposes and objects of the Community Chest and that the city has in its treasury sufficient general funds to pay said donation. It denies that the payment of said amount is forbidden by any provision of statute and particularly those cited. Appellant demurred to this answer, which was overruled. He declined to plead further, and his complaint was dismissed as being without equity, and he appealed.

This is a companion case to case No. 6857, *City of Little Rock et al.* v. *Community Chest, ante,* p. 562, 163 S. W. 2d 522. We think § 9583 of Pope's Digest, quoted in the other case, does not have the meaning contended for by appellant. It was § 2 of Act 230 of 1919 and was in effect when the decision in the case of *Bourland* v. *Pollock,* 157 Ark. 538, 249 S. W. 360, was rendered in 1923. We are of the opinion that this case is ruled by that.

Affirmed.

CHOTARD, COUNTY TREASURER, *v.* SMITH.

4-6804 163 S. W. 2d 319

Opinion delivered June 22, 1942.

Ed Trice, for appellant.

J. R. Parker and *Ohmer C. Burnside,* for appellee.

GRIFFIN SMITH, C. J. The appeal is from a circuit court order directing the county treasurer to pay two warrants: one in favor of Frank Masters for $84, the other in favor of Rowland Smith for $58. It is appellant's contention the law as declared in *White* v. *Chotard, County Treasurer,* 202 Ark. 692, 152 S. W. 2d 552, is being violated. The opinion was delivered June 9, 1941, the holding being that the initiated salary act did not authorize the Chicot county judge to employ a road superintendent at a fixed salary of $150 per month. It was

said, however, that the court did not intend to lay down a rule under which the county judge would be prohibited from employing competent men to handle county machinery and equipment.

The claim filed by Masters, dated July 1, 1941, was to compensate for fourteen days "servicing county equipment" at $6 per day. Smith's claim covered similar services for thirteen and a half days at $4 per day.

The cause was heard by the judge, a jury having been waived. Factual findings were that Masters had performed the services, rate of pay being sixty cents per hour for a ten-hour day. Masters' contract of employment required him to prepare claims for other road workers and to keep their time; also to receive and account for shipments of materials ordered by the county judge, etc. He "looked after" machinery in a warehouse, and performed various engineering tasks incident to work done by men who used a large amount of machinery. Other duties required of Masters were mentioned by the circuit court.

Smith's duties required him to transport county road employes to and from work. He also assisted in maintaining road machinery.

County Judge Warfield testified that work done by Masters was of a technical nature ". . . and absolutely necessary to prevent destruction of machinery or 'botching up' roads and bridges." These activities, said the judge, were akin to engineering, as distinguished from supervisory work.[1]

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[1] The question was asked:—"Isn't it a fact that Masters does not perform any mechanical labor for the county, but that he acts as a kind of coördinator with the WPA, and that [his classification is that of a deputy] to you?" Answer:—"He can't be a deputy. He does all the things you mention. Masters has a full-time job. It takes more than ten hours a day. He gets up at daylight and comes to the county road office, checks over all the machinery, sees whether the units are properly oiled and greased, checks to see that the operators keep the machines tightened up. I am down there myself most of the mornings —not every morning, but when I can I am down there to lay out the day's program. If I am not down there, I have previously planned and gone over the program with Masters. He never puts the machines anywhere until I have told him where they are to go."

There are approximately 800 miles of roads in Chicot county. The judge testified that twenty miles of new highways had been completed under his administration, in addition to twenty or thirty miles of "dumps." Seventy-five or eighty miles of dirt road had been repaired and graded, and, generally speaking, essential machinery had been over all county roads "one to three or four times" during the year. Equipment consisted of two caterpillar tractors, two graders, three diesel patrols, two "jeeps," three large trucks, and three pickup trucks.

WPA apportioned $114,000 to the county on condition one-fourth the sum should be matched. Money was not available, but an arrangement was made whereby the county was credited with allowances for use of machinery. "In this way this year," said the county judge, "we have . . . received $86,000 worth of expenditures in nine months and our contributions have run $29,254.50. That [represents] rental on machinery and what cash we could pay for materials furnished. For twelve months last year the total amount of expenditures received [from WPA] was $61,478.64, and the county's contribution amounted to $13,357."

In letting machinery to WPA, the county supplied operators. There was testimony that the work done by Masters was of a character requiring mechanical and engineering ability, and the judge did not have requisite technical knowledge.

In deciding that the county judge, under the initiated act for Chicot county, was not authorized to employ a road supervisor, this court recognized the practical difficulties that might arise and expressly disclaimed an intent to substitute its mandate for discretion of the county judge. What we held was that the county judge could not relieve himself of duties enjoined upon him as road commissioner by shifting them to an appointed superintendent and adding to the county budget a fixed salary not contemplated by the electorate. To prevent impracticable limitations upon authority, there was the very positive statement that the judge could not be denied

authority to employ competent men to handle machinery and equipment.

Prima facie it appears that Judge Warfield is doing by indirection what this court said he could not do directly. But there is this difference: In the White-Chotard case essence of the controversy was that a superintendent had been employed at $150 per month to perform duties assigned the judge.

In the case at bar payment of $84 representing services rendered by Masters for fourteen days at sixty cents an hour is the principal issue. Incidentally, it is shown that Masters is regularly retained. This employment, however, is distinguishable from that involved in the previous case. Whether continuous use of Masters has been necessary is not the question. The dispute submitted to the court had to do with the warrant for $84. The result, in substance, was a finding that Masters served in the capacity of a foreman, and that insofar as the controverted item was involved, services had been rendered. In other words, the claim was not fraudulent; nor was the county judge without power to authorize the work to be done, in consequence of which it was his duty to approve the claim.

There is substantial evidence to support the judgment. Whether subsequent employment was necessary is a different question, even though the record indicates that it was. Conduct of the county judge in the employment of a foreman, or "coördinator," as his position is denominated in the testimony, would justify disallowance of a claim if evidence should show that services alleged to have been rendered were fictitious, that the amount claimed was absurd, that the transactions were fraudulent, and that the county was being cheated.

These elements are not present in the instant case. Hence, the judgment is affirmed.

Humphreys, J. (Dissenting). It seems to me that appellant, R. C. Chotard, county Treasurer, was justified in refusing to pay the warrants issued in favor of Frank

Masters in the amount of $84 and the one issued in favor of Rowland Smith for $58 for servicing the county's road machinery. It is clearly a violation of Initiated Act No. 1, commonly called the County Salary Act, especially § 2 thereof.

That section is as follows: "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 the 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."

I think anyone capable of operating any of the county's machinery must necessarily know how to oil, grease and tighten up the taps on the piece of machinery he operates. In my opinion it is unnecessary to employ a man by the day at $6 per day the year through to oil, grease and screw up the taps on the machinery used on the roads. As stated above the operator of the machinery is capable of performing those duties if he has the ability to operate the machinery. The initiated act makes it the duty of the county judge to serve as road commissioner and such duties as Frank Masters and Rowland Smith are performing are the duties imposed on the county judge under the county salary act. Such duties as are being performed by Frank Masters and Rowland Smith are just such duties as were being performed by them before the case of *White* v. *Chotard,* 202 Ark. 692, 152 S. W. 2d 552, was handed down by this court and the attempt to pay them for oiling, greasing and tightening up taps on the road machinery is to all intents and purposes an attempt to circumvent and destroy the tenor and effect of the case of *White* v. *Chotard, supra.* I regard it as a subterfuge to strike down the initiated act No. 1, commonly called the county salary law, and the

construction placed upon that act by this court in the case of *White* v. *Chotard, supra.*

Mr. JUSTICE MEHAFFY and Mr. JUSTICE HOLT join me in this dissenting opinion.

KARCHER CANDY COMPANY *v.* HESTER.

4-6859 163 S. W. 2d 168

Opinion delivered June 22, 1942.

Fred A. Isgrig and *Carl E. Langston,* for appellant.

E. H. Bostic, Guy E. Williams and *Wm. J. Kirby,* for appellee.

HOLT, J. August 13, 1941, Rex Chastain, a minor, sixteen years of age, while working as a helper on a beer truck belonging to appellant, Karcher Candy Company, was fatally injured.

August 16, 1941, the Karcher Candy Company filed with the Workmen's Compensation Commission "Em-

ployer's First Report of Injury," in which it stated that Rex Chastain was an employee of the candy company at the time of his injury and death, and on the back of this report is this statement: "Employee was hired by L. D. Montgomery, one of our truck drivers, as a helper on his truck and he was paid by Mr. Montgomery."

The candy company's insurance carrier resisted the claim before the Workmen's Compensation Commission on the following grounds: "1. Claimant not an employee of Karcher Candy Company. 2. Claimant had no surviving dependents. 3. If partial dependency exists, it is not sufficient to warrant the payment of minimum set out in the act."

The Commission held that Rex Chastain, at the time of his injury and death, was an employee of the Karcher Candy Company, but denied compensation on the ground that he had no dependents.

Mrs. Lona Mae Hester, mother of Rex Chastain, filed petition for rehearing before the Commission on two grounds: (1) that the Commission erred in holding that Chastain was an employee of the Karcher Candy Company; (2) that the Commission erred in holding that claimant was not entitled to compensation because there was no dependency upon the deceased employee."

From the order of the Commission denying Mrs. Hester's petition for rehearing, an appeal was prosecuted to the Pulaski circuit court, second division. Upon a hearing on this appeal, the circuit court reversed the findings and order of the Commission and dismissed the cause, holding that Rex Chastain was not an employee of the Karcher Candy Company at the time of his fatal injury and that the Commission was without jurisdiction. Appellant comes here and seeks to uphold the jurisdiction and order of the Workmen's Compensation Commission.

The essential facts presented are not in dispute. The sole question for determination, as stated by appellee, is: "Was Rex Chastain, under the circumstances of this case, an employee of the appellant, Karcher

Candy Company, within the meaning of our Workmen's Compensation Act, at the time he was killed while working on one of its beer trucks as the driver's helper?''

Section 2 (b) of act 319 of 1939, the Workmen's Compensation Act, provides: '' 'Employee' means any person, including a minor whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession or occupation of his employer. . . .''

The essential facts presented are: Mrs. Hester testified that her son, Rex Chastain, was working for the Karcher Candy Company at the time of his death. He began work about two months before he was killed and earned $6 a week.

Frank J. Iseman, vice-president and secretary of the Karcher Candy Company, testified: ''Q. Mr. Iseman, was Rex Chastain working for the Karcher Candy Company when he was killed in August? A. Not directly. Q. Not directly—just what do you mean by not directly? A. Well, the boys that drive these trucks have authority to pick up help whenever they need it and they pay for the use of them out of their own pockets because they are on a commission—the more they sell the bigger their pay will be. Q. But he was working for the Karcher Candy Company with your knowledge and consent? A. Yes, sir, on the truck. Q. And with your knowledge and consent? A. Yes, sir. . . . Q. And you did say he was considered an employee? A. Yes, indirectly.''

He further testified that the candy company paid no unemployment compensation on Rex Chastain, but paid it on other employees and that the truck driver had the authority to hire and discharge boys working in the same capacity as Rex. At one time the candy company paid Rex direct for a few hours services. At the time Rex lost his life ''he was helping Montgomery make deliveries off the truck.''

He further testified: ''Q. But you did pay these drivers enough commission so that they could hire these

helpers? A. Yes, sir, we did. Q. It is a universal custom of these people to hire and fire, but still they are considered employees of the company? A. It is a custom. . . . Q. Did you recognize, or your company recognize, the fact that a driver of one of these trucks was unable to do the work and needed the helper? A. Yes, sir. Q. And for that reason you paid him enough salary or commission to hire a helper? A. Yes, sir. Q. And you left it to him—that was the custom? A. Yes, sir. Q. The help would come to your warehouse with the truck driver—come on the premises with him? A. At times he did. . . . Q. Did you have actual knowledge that this boy was acting as Montgomery's helper? A. Yes, sir. Q. Did you know he was acting in that capacity? A. Yes, sir." All truck drivers were not required to hire helpers; the company was interested in results, but if the drivers have more deliveries than they can make without a helper, "then you want them to have a helper? A. Yes, sir."

L. D. Montgomery, the driver of the truck from which Rex Chastain fell and was killed, testified: "Q. Mr. Montgomery, did you hire Rex to help you? A. Yes, sir. Q. What were you paying him? A. One dollar a day and his dinner. Q. Did he work regular? A. Yes, sir. Q. Was he a good hand? A. Yes, sir. Q. Just what kind of arrangements did you have with the Karcher Candy Company in regard to these helpers? A. Well, we were making three cents a case and we didn't feel like we could hire a helper, so us boys got together and got the boss to give us a raise, so in about two weeks, he gave us a raise—one cent a case, and told us to get a boy to work regularly. He said that was the reason he was giving us a penny on the case so we could give that to the boy to help us. Q. And you hired Rex Chastain to help you? A. Yes, sir."

We think it clear from the testimony that the relationship of employer and employee, or master and servant, existed between appellant candy company and Rex Chastain within the terms of the act, and that the trial court erred in holding otherwise.

It is undisputed that appellant's employee and truck driver, Montgomery, had been directed by appellant to employ the necessary help in his beer deliveries. The cost of delivery was a part of the sale price of the beer. Appellant knew that Montgomery had employed Rex as a helper and the primary purpose of this employment was for the benefit of appellant. Appellant not only knew of, and approved, this employment but allowed Montgomery an additional one cent on each case that he delivered, out of which, Montgomery was directed to pay his helper, Rex Chastain, for services which Chastain was directly performing for the benefit of appellant candy company.

The fact that appellant had given to Montgomery, the truck driver, the privilege to hire and discharge his helper is not sufficient to destroy the relationship of employer and employee between appellant and Rex Chastain, the facts remaining that Rex was performing services for the benefit of appellant and with appellant's knowledge and consent.

In *Western Union Telegraph Company* v. *Lillard,* 86 Ark. 208, 110 S. W. 1035, 17 L. R. A., N. S. 836, it is held (quoting headnote No. 2): "The relation of master and servant between two persons may be shown by proving that the one performs services for the other." In this case is cited with approval *St. L., I. M. & S. Ry. Co.* v. *Hendricks, Admr.,* 48 Ark. 177, 2 S. W. 783, 3 Am. St. Rep. 220, in which this court said: "Indeed, it would be difficult, in most of these cases, to prove the relation of master and servant except by the fact that the one is known to perform service for the other, or from their course of dealing."

In 35 American Jurisprudence 450, § 8, the textwriter says: "The relationship of master and servant or employer and employee is a contractual relationship. As between the parties themselves, at least, there must be something to indicate on the part of the supposed master or employer that the supposed servant or employee is to act for him subject to his control, and such supposed employee or servant must act or agree to act in the

other's behalf. In this respect, the rules applicable to the creation and existence of the relationship of principal and agent are equally applicable. The relationship may be created by express contract, but this is not essential; it may be created as well by conduct which shows that the parties recognize that one is the employer, or master, and that the other is the employee or servant. Moreover, when one is sought to be held responsible for the tortious act of another under the principle *respondeat superior,* the question of responsibility will not depend entirely upon the existence of some actual contractual relationship of master and servant. It is sometimes allowable to prove the relation of master and servant by the fact that one performs service for another." In support of this text the Lillard case, *supra,* is cited.

And Mr. Schneider in volume 1, second edition, of his Workmen's Compensation Law, p. 204, § 22, announces the rule in this language: "The agent who with authority express or implied, employs help for the benefit of his principal's business, thereby creates the relation of employer and employee between such help and his principal. So it has been held that where a driver, employed to solicit sales of beer and make delivery, was permitted to employ helpers, a helper who was injured while in the performance of his duty was entitled to compensation from the brewery."

For the error indicated, the judgment is reversed, and the cause remanded with directions to proceed in a manner not inconsistent with this opinion.

HALBROOK *v.* LEWIS.

4-6802 163 S. W. 2d 171

Opinion delivered June 22, 1942.

J. E. Brazil and *J. W. Johnston,* for appellant.

Opie Rogers, for appellee.

SMITH, J. This suit was brought by Halbrook to enjoin Lewis and Lewis' employees from cutting and removing the timber from a 40-acre tract of land in Van Buren county. The complaint was dismissed as being without equity, and from that decree is this appeal.

Prior to 1921, the land was owned by C. E. Reed, who failed to pay the 1921 general taxes due thereon, and the land was sold and forfeited to the state June 6, 1922. This sale was duly certified to the State Land Commissioner June 6, 1924, and on July 2, 1934, a decree was rendered confirming the state's title under this tax forfeiture.

Lewis sought to buy the land, and was advised by the clerk of Van Buren county that C. E. Reed was the last record owner, and that the land had forfeited to the state as being assessed to Reed. Lewis applied to the State Land Commissioner to purchase the land, but was advised by that official that the land was situated in the Federal Forest Reserve, northwest Arkansas, and might be redeemed from the state, but could not be sold by the state, whereupon Lewis obtained a quitclaim deed from Reed, and upon presentation of this deed to the land commissioner he obtained from that official a redemption deed.

Thereafter Lewis began cutting the timber on the land, and this suit was brought by Halbrook to enjoin him from doing so. The deed from Reed to Lewis was filed for record December 12, 1940.

Appellant Halbrook deraigns title as follows: A deed to him from G. E. Ring, filed for record May 22, 1941. A deed from Z. O. Ring to G. E. Ring, filed for record May 22, 1941. A deed from C. E. Reed to Z. O. Ring, filed for record May 22, 1941. The deed from Reed to Ring was dated November 3, 1923, but, as appears from the facts above stated, was not filed for record until after the deed from Reed to Lewis had been filed for record. The land was wild and unoccupied, and no one paid taxes thereon after its sale to the state in 1922 until Lewis purchased from Reed.

It appears that the state conceded the right of Reed and his grantee to redeem the land, and upon the assumption that Lewis was that person a redemption deed was executed to him by the State Land Commissioner. This deed recites the conveyance of "all right, title and interest of the state, as authorized by §§ 10096 to 10104, C. & M. Digest."

Appellant Halbrook contends that he—and not Lewis—had the right to obtain this deed from the state, the basis of the contention being that prior to the execution of the deed from Reed to Lewis, Reed had conveyed the land to Halbrook's predecessor in title.

It further appears, from the facts above stated, that the first deed filed for record conveying Reed's title was the deed from Reed to Lewis, although Reed had previously conveyed his title to Halbrook's predecessor in title.

Section 1847, Pope's Digest, reads, in part, as follows: "Effect of deed—necessity of record. No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof: . . . unless such deed, bond, or instrument,

duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."

This statute is unlike the statute relating to mortgage liens (§ 9435, Pope's Digest), which reads as follows: "When lien attaches. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

It has been uniformly and frequently held that, under the statute last quoted, the lien of a mortgage does not attach until the mortgage has been filed for record; but a deed is effective to convey title upon its delivery to the grantee, whether recorded or not, and is good and valid against a subsequent purchaser for a valuable consideration who has actual notice thereof, although not recorded. In other words, a subsequent purchaser who places his deed of record may, and does acquire a title superior to a prior purchaser who does not file his deed for record until after the subsequent purchaser has filed his deed for record, provided the subsequent purchase was for a valuable consideration and made without actual notice of the prior conveyance. *Long* v. *Langsdale,* 56 Ark. 239, 19 S. W. 603; *Kendall* v. *J. I. Porter Lbr. Co.,* 69 Ark. 442, 64 S. W. 220; *Bogenschultz* v. *O'Toole,* 70 Ark. 253, 67 S. W. 400; *Penrose* v. *Doherty,* 70 Ark. 256, 67 S. W. 398; *Bell* v. *South Ark. Land Co.,* 129 Ark. 305, 196 S. W. 117; *Tisdale* v. *Gunter,* 194 Ark. 930, 109 S. W. 2d 1267; *Sturgis* v. *Nunn,* 203 Ark. 693, 158 S. W. 2d 673.

The parties claim from a common grantor, and the deed to Lewis was first filed for record. It is conceded that Lewis paid a valuable consideration for his deed, but it is denied that he purchased without actual notice of the earlier deed. The decision of this case depends, therefore, upon the question whether Lewis purchased without actual notice of the deed from Reed to Halbrook's predecessor in title.

To sustain the contention that Lewis was not an innocent purchaser, Reed, his grantor, was called and gave testimony as follows: "Q. Will you kindly state to the court the statement made to you by Mr. Lewis at the time he procured this deed? A. Well, he came over and told me that there was forty acres of land that went back to the state in my name and he wanted to get a quitclaim deed or fix it in a way he could redeem it. And I told him I did not remember what disposal I had made of this forty—that I had let different tracts of land go back for taxes along that time and after he gave me the check I got to studying about it and returned the check to him as I could not get into my mind what disposal I made of the land. He came back in a day or two and assured me that it was legal and right for me to give him a quitclaim deed. I told him I did not know if I had any interest because I just could not recall what I had done with that and he reassured me there would be no litigation about it. He told me the clerk recommended that was legal and he got a statement from the clerk the next day that it was legal and in my rights. The land went back to the state in my name. Q. After that you executed a quitclaim deed to him? A. Yes, sir."

In the opinion of the chancellor, this testimony was insufficient to show that Lewis had actual notice of the prior deed executed by Reed, and as that finding is not contrary to the preponderance of the evidence the decree, based on that finding, is affirmed.

RAY *v.* STROUD.

4-6801 163 S. W. 2d 173

Opinion delivered June 22, 1942.

S. L. Richardson, for appellant.

W. E. Beloate, Sr., for appellee.

GRIFFIN SMITH, C. J. The form of action is unlawful detainer. Stroud alleged that as owner he rented certain land to Ray, the latter having taken possession in 1936. A similar contract for 1937 and 1938 was made at a later date. Rent for 1939 was not paid, although appellant held over. Requisite notice to vacate was given.

The answer admitted the 1936 contract, but claimed there were no improvements on the property. It was agreed appellant should erect buildings not to exceed $100 in cost, and that Ray should retain possession until there had been reimbursement. Retention of 1936 rents did not suffice; therefore, says appellant, a new agreement was made for 1937. At the close of the second year of occupancy, rents had been insufficient to repay appellant, the deficiency amounting to $32.50.

It was then alleged that when appellant rented the land he did so upon appellee's false representations of ownership. Taxes for 1932 were not paid, and in 1933 there was forfeiture to the state. Default was certified to the land commissioner at Little Rock. The state's title was confirmed in 1936. Act 119 of 1935.

In February, 1938, appellant received information that appellee did not own the land. He immediately asked Stroud to take such steps as might be necessary to preserve the property. There is the assertion by appellant that he told appellee the rental agreement could not be continued unless title should be cleared. In March, 1938, appellant purchased from the state.

It is contended the rental agreement was void for want of consideration, appellee's title having been lost.

The question is, May one who enters under a contract creating the relationship of landlord and tenant challenge such landlord's title?[1]

Appellant, in support of his argument that Stroud was a trespasser in his attempt to exercise dominion over the land, relies upon *Prioleau* v. *Williams,* 104 Ark. 322, 148 S. W. 101, and other cases shown in the footnote.[2]

In *Bettison* v. *Budd,* 17 Ark. 546, 65 Am. Dec. 442, it was said that the rule prohibiting a tenant from disputing his landlord's title does not reach beyond the particular title under which the tenant enters, and if the landlord is divested of his title. ". . . the defendant may make it appear, and protect himself in a suit by his landlord for possession." It was further said that a tenant is not bound by the relationship to see that taxes are paid, ". . . and if the land be forfeited for the non-payment of taxes, and offered for sale [by the state], and the tenant becomes the purchaser, he may set up such title against his landlord."

The holding in *Pickett* v. *Ferguson,* 45 Ark. 177, 55 Am. Rep. 545, is that a tenant who is not under obligations to pay taxes may purchase, at a tax sale, the lands he is in possession of and may assert such title; and the sale, if otherwise valid, extinguishes the landlord's title and cuts off the lease. Also, a tenant may purchase the demised premises at an execution or judicial sale. In a subsequent controversy relating to possession or the payment of rent, it may be shown that the landlord's title has expired and that the estate has vested in the tenant.

These cases would control the instant appeal in Ray's favor but for testimony regarding transactions between appellant and appellee in 1938.[3]

[1] *Earle's Administratrix* v. *Hale's Administrator,* 31 Ark. 470; *Garrett* v. *Edwards,* 168 Ark. 243, 269 S. W. 572; *Burton* v. *Gorman,* 125 Ark. 141, 188 S. W. 561; *Morris* v. *Griffin,* 146 Ark. 439, 225 S. W. 634; *Smart* v. *Alexander,* 201 Ark. 211, 144 S. W. 2d 25.

[2] *King* v. *Duncan,* 62 Ark. 588, 37 S. W. 228; *Williams* v. *Petty,* 168 Ark. 642, 271 S. W. 9; *State* v. *Hicks,* 53 Ark. 238, 13 S. W. 704; *Eager* v. *Jonesboro, Lake City & Eastern Express Co.,* 103 Ark. 288, 147 S. W. 60; *Mushrush* v. *Downing,* 181 Ark. 85, 24 S. W. 2d 972, and other cases of like import.

[3] Each side asked for an instructed verdict, and did not request other instructions. This had the effect of taking the case from the jury.

Stroud testified, as did Ray, that cost of the house was to be paid from rents. However, Stroud's version was that after crops had been gathered in 1938 a settlement was had. It included an allowance of $42 to compensate the sum Ray paid for the state deed. Stroud testified that ". . . after we settled I owed him $32.41. I told him I would get the money at once and pay him if he would move out; or, if he stayed, he could hold it out of the rents. He said that was all right, and he turned the place back to me."[4]

Stroud's testimony was that he told Ray he could not retain the place during 1939, and that Ray replied, "All right, I don't know what else to do. I'll just stay here, I guess." When appellee later demanded possession, appellant refused to move.

Appellant testified that when he learned appellee did not own the land, he had his wife write appellee, who called for the purpose of discussing the matter. Appellee remarked that if anyone paid the taxes, he [Stroud] would take the property away from him. After procuring the deed appellant saw appellee and told him what had been done. Appellee is quoted as having said, "What are you going to do about it?" Appellant replied, "Give me back my money and take it." Appellee said "All right." Appellant then testified: "But he hasn't given the money to me yet." At another place in appellant's testimony there is this statement: "I had already agreed to let him have the place back if he paid me, but he has never paid me a cent."

The evidence establishes a contract between appellant and appellee by which appellant recognized appellee as his landlord after having acquired the state's title. If, in fact, the relationship of landlord and tenant existed after Ray procured his deed, he could not question

[4] Continuing his testimony, appellee said: "In a few days I came to town and saw Mr. Beloate and asked him what it would take to get this place straightened up. He told me he would have to see Ray's papers before he could tell exactly. So when we settled up [Ray] showed me his title. He got his cotton receipts and we settled on just what he had there, and it left me owing him $32.41. When I got up to leave I didn't think about getting the deed from him. I don't know whether he would have given it to me, or not. I didn't ask him for it then."

Stroud's right to rent the land, nor challenge appellee's right to possession on expiration of the term. After surrendering possession, appellant may seek to assert his title. He may sue in ejectment, or resort to equity in an effort to cancel appellee's claims to the property as a cloud on his title.

Judgment affirmed.

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

4-6820 163 S. W. 2d 175

Opinion delivered June 22, 1942.

Lamb & Barrett, for appellant.

Leo J. Mundt, for appellee.

MEHAFFY, J. The appellee, Leah Holwerk, brought suit in the Phillips county circuit court against the appellant, Berryman Henwood, trustee for St. Louis Southwestern Railway Company, alleging that on July 31, 1941, she had purchased a ticket from the said railway company from Forrest City, Arkansas, to Pine Bluff, Arkansas, having paid the passenger fare required by the company. She became a passenger at that time, and while undertaking to board the train she was, through the carelessness and negligence of the servants, agents and employees of the said company, injured in the manner set out in her complaint. The complaint alleged that she is an elderly woman of very little physical strength; that she presented herself at the proper place to board the train, carrying her baggage; that the conductor in charge of said train failed in the manner provided by law to properly assist her, but permitted her alone to take her baggage and enter the car; her baggage was placed on the platform, and from thence forth she was left unassisted; she picked up her baggage and while making an effort to open the door that leads to the coach, she found it in such shape that it was difficult for a woman of her physical strength to take her baggage and get into the train; that while undertaking to enter the coach and while she was in the act of going into the car for the purpose of finding a seat, unattended and unassisted by any employee on said train, the train gave a violent and unusual jerk and jar, throwing her violently down and so injuring her that she has not fully recovered; she is about 65 years old and very slight of build; that as a result of said injuries she had inflicted upon her bruises and abrasions about the head, the right arm and leg; as she fell she struck the right side of her head and since the injury has suffered pain in the leg and arm and has continually suffered with headaches resulting from said injuries. There continues to be tenderness or pressure over the right occipital bone just behind the ear; there were contusions on her head, right arm and right leg; she suffered great mental pain and anguish and incurred medical bills; she has since been unable to prosecute her work; she is a seamstress, earning approximately $2.50 a day, and there has been a com-

plete loss of time from her occupation since the date of her injuries; she prays damages in the sum of $2,500.

Appellant filed answer admitting that he operates a line of railway in the state of Arkansas; denied each and every material allegation contained in the complaint, and specifically denied that plaintiff was injured by reason of any negligent conduct of the defendant's employees; states that the alleged injury to plaintiff, if any, was due solely to the negligence of plaintiff and want of care for her own safety.

There was a jury trial and a verdict and judgment for $500 in favor of appellee.

Appellant filed motion for new trial, stating that: "1. The court erred in refusing to instruct the jury to return a verdict for the defendant at the close of plaintiff's testimony.

"2. The court erred in refusing to instruct the jury to return a verdict for the defendant at the close of all the testimony.

"3. The court erred in giving plaintiff's requested instruction No. 3, over the objections and exceptions of the defendant.

"4. The court erred in giving plaintiff's requested instruction No. 6 over the objections and exceptions of the defendant.

"5. The verdict of the jury is contrary to the law.

"6. The verdict of the jury is contrary to the evidence.

"7. The verdict of the jury is contrary to both the law and the evidence."

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

Appellant states in his brief that the errors relied on by him are three in number, although for practical purposes numbers one and three are the same:

"1. Refusal of the court to instruct a verdict in appellant's favor.

"2. The giving of plaintiff's request for instruction No. 3.

"3. That there is no substantial evidence to sustain the verdict."

Of course, No. 1 and No. 3 relied on are the same, and it is contended under them that the evidence is insufficient to support the verdict.

It is undisputed that appellee was a passenger on the train; that she boarded the train at Forrest City. It is also undisputed that she fell and was injured. She testified that when she approached the train a brakeman put the stool down and put her suitcase on the platform, but no one undertook to assist her. She picked up the suitcase and tried to open the door, but before she got it open the train jerked and threw her to the floor; the train started just as she was opening the door and the jerk threw her in; she was preparing to enter the coach but did not have a chance to do so; all she remembers is that the gentleman from Texas, Mr. Murphree, picked her up; they took her to the first seat from the door. When the conductor came in to collect the tickets, Mr. Murphree told him about appellee's falling. When appellee reached the station in Forrest City, she was told that the train was coming, and she went as quickly as she could and boarded the train; none of the agents, servants or employees of the railroad company undertook to assist her in any way; she had her suitcase in her hand and was preparing to enter the coach when the train gave the jerk and she fell. She cannot say whether the jerk was forward or backward; she was too sick to know; knows it was a violent jerk. She was 63 years old and was on her way to Dallas, Texas, to attend her son's wedding.

Since there is no controversy about the fact that appellee fell, and no contention that the verdict is excessive, it is unnecessary to set out the testimony as to her injuries and treatment by physicians.

C. J. Murphree was examined by deposition and testified that he lived in Dallas, Texas; he is 45 years old and B. & B. foreman; was a passenger on the Cotton Belt

Railroad on July 24, 1941, riding a pass to Dallas by way of Brinkley, Arkansas; he saw appellee coming up the steps of the coach; she had a suitcase; did not see the conductor or any other train employee assist her; the conductor was on the other end of the coach, and no one employed by the railroad assisted her with her luggage or in opening the door leading into the coach; she had not been given time to reach a seat before the train started; she reached down to pick up her suitcase when the train started; witness opened the door, and she fell through it; the train started with a jerk; no one connected with the train assisted her after the fall; witness himself opened the door; the jerk was violent, harder than passenger trains usually start; witness picked her up after the fall and helped her to a seat; when he first saw appellee he was talking to the brakeman and saw her coming up the steps with a small, heavy suitcase; the brakeman set her suitcase up in the vestibule; witness did not see him assist her. Witness does not know whether other passengers were disturbed by the jerk of the train.

It is contended by the appellant that to controvert any inference of negligence that might be drawn from the above testimony, appellant has set out the testimony of four members of the train crew. It is true that the members of the train crew testified, and that their testimony was in conflict with that of appellee and Murphree. But it is argued that to sustain the verdict, the jury has to disregard not only the testimony of appellant's employee, but also the testimony of passengers Ferguson, Koppel, and Mrs. Short, and that the jury had no right to do this. Appellant cites the case of *St. Louis-San Francisco Ry. Co.* v. *Porter,* 199 Ark. 133, 134 S. W. 2d 546. In that case the court said: "It was not negligence for the train to start and to apply as much steam pressure in the cylinders of the locomotive as was necessary for the purpose of starting the train." In that case appellee's testimony alone was relied on and one witness who boarded the train immediately behind appellee, testified that the train started so easily that he did not know when it started. Here, the evidence of both appellee and Mr.

Murphree, who was the foreman of B. & B. in Texas, showed that there was a violent jerk of the train which threw the appellee down and injured her.

We do not agree with appellant that to sustain the verdict of the jury, the jury would have had to disregard not only the testimony of appellant's employee, but also the testimony of three passengers. One of those passengers, Mr. Koppel, testified that he was a passenger on the train, and that his attention was attracted toward the rear door by some commotion in the rear of the car; he saw two men supporting a lady who was standing on her feet; at that time the train was standing still and remained still for one or two minutes; appellee asked witness' name, and she later communicated with him concerning Mrs. Holwerk's injury. He does not say that there was no violent jerk, but says he recalls nothing unusual; he was reading his paper and paid no attention. Mrs. Short, who was the wife of a locomotive engineer, testified that she did not notice anything unusual and knew nothing of the lady's being injured. The other witness, J. R. Ferguson, testified that he is employed by the B. & O. Railroad, and has been for sixteen years; his attention was attracted by unusual noise while the train was standing at the station. There is nothing in the testimony of any of these witnesses that contradicts the evidence of appellee. Mr. Ferguson, however, did testify that he knew she fell, but he did not see her fall; assisted her to a seat.

We think there is substantial evidence to show that the train started with a violent jerk before appellee had time to get to a seat, causing her to fall and injuring her. It is true that the railroad employees testified, and their testimony was in conflict with that of appellee and her witnesses.

This court said in a recent case: "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." *Harmon* v. *Ward,* 202 Ark. 54, 149 S. W. 2d 575.

We also said in a recent case (*Missouri Pacific Transportation Company* v. *Sharp,* 194 Ark. 405, 108 S. W. 2d 575): "In testing the sufficiency of the evidence to support a verdict the appellate court is controlled by general rules of universal application which have been recognized by this court in a long line of decisions. Among these are the following: that juries are the sole judges of the credibility of the witnesses and the weight to be given their testimony; on appeal, 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." In support of this rule, the following cases were cited: *St. L., I. M., etc.,* v. *White,* 48 Ark. 495, 4 S. W. 52; *Richardson* v. *Cohen,* 113 Ark. 598, 167 S. W. 83; *American Surety Co.* v. *Kinnear Mfg. Co.,* 185 Ark. 593, 30 S. W. 2d 825; *So. Lbr. Co.* v. *Green,* 186 Ark. 209, 53 S. W. 2d 229; *East Ark. Lbr. Co.* v. *Moss,* 186 Ark. 30, 52 S. W. 2d 49; *American Co.* v. *Baker,* 187 Ark. 492, 60 S. W. 2d 572. See, also, *Brown* v. *Dugan,* 189 Ark. 551, 74 S. W. 2d 640.

There is a long line of cases to the effect that where the evidence is in conflict, it is the province of the jury, and not the court, to pass on the credibility of witnesses and the weight to be given to their testimony, and if there is any substantial evidence to support the verdict, it cannot be disturbed by this court, although we might believe that the preponderance of the evidence was against the finding of the jury.

As contended by appellant, the carrier is not an absolute insurer of the safety of its passengers, but it is required to exercise toward its passengers the highest degree of care which a prudent and cautious man would exercise, and that which is reasonably consistent with the mode of conveyance and practical operation of its trains.

Appellant objects to instruction No. 3, given at the request of the plaintiff, which is as follows: "You are instructed that it was the duty of the defendant or trustee operating for the railroad company to stop its trains at the station long enough to allow passengers to enter the

car of the train, and it is the duty of the passengers to enter the train with reasonable dispatch. You are further instructed that it is negligence for the defendant company to start its trains after it stops before the passengers have had a reasonable time to enter the train so that if you find from a preponderance of the evidence that the plaintiff, Leah Holwerk, was in the act of entering defendant's coach with reasonable dispatch and exercised due care for her own safety, and that the defendant did not stop its train long enough to permit her to enter it before the train started up, and by reason of this failure plaintiff was injured, then your verdict will be for the plaintiff, provided that the plaintiff herself was not guilty of contributory negligence."

We think instruction No. 3 correctly states the law. Appellant has argued that the mere starting of a train before a passenger reached a seat, but after safely boarding it, does not constitute actionable negligence. The charge of negligence in this case is that the train was started with a violent and unusual jerk.

This court recently said in the case of *Hamburg Bank* v. *Jones,* 202 Ark. 622, 151 S. W. 2d 990: "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."

The only question in this case for the jury, was whether the appellee was jerked or thrown down by the starting, jerking and lurching of the train before she had entered the coach.

We have carefully examined all the evidence and have reached the conclusion that there is substantial evidence to support the judgment. The fact that the evidence is in conflict makes it a jury question, and when the jury has found a verdict, and that verdict is sustained by substantial evidence, it will not be disturbed by this court.

The judgment is affirmed.

MELTON *v.* CARTER.

4-6763 164 S. W. 2d 453

Opinion delivered June 22, 1942.

Harold Kohn; House, Moses & Holmes and *Lee Cazort, Jr.*, for appellant.

Robert Rosenberg and *Owens, Ehrman & McHaney*, for appellee.

GRIFFIN SMITH, C. J. Constitutionality of Act 94 is the issue. The measure became a law February 25, 1941, without the governor's signature.

The controversy goes back to a suit by the state to prevent Gus Blass Company from engaging in the practice of optometry. Collateral issues were involved. *State ex rel. Attorney General* v. *Gus Blass Company,* 193 Ark. 1159, 105 S. W. 2d 853. Act 27, approved February 11, 1935, was before the court. It was entitled "An Act to define and prescribe the practice of optometry; to prescribe procedure for the practice of optometry, the power of the [state board of examiners], and for other purposes." In the decision the following expression was employed:

"We are of the opinion that the legislature did not attempt to classify optometry as a learned profession, but that it used the term 'profession' in its broader and more general meaning. . . . If the general assembly intended to advance optometry to the rank of a learned profession, it would have doubtless said so in express terms."

Act 94 is entitled, "An Act to define the practice of optometry, to regulate the practice thereof, to provide for the creation and powers of the state board, the enactment into one law of the laws relative to the practice of optometry, and for other purposes."

Section 1 is: "The practice of optometry is hereby declared to be a learned profession, and the same rights, powers and duties are hereby declared to attach thereto as attach to any other learned professions."[1]

W. A. Carter instituted the suit from which this appeal is prosecuted, naming the state board of optometry as defendants. Carter is employed by B. Gainsburg, a citizen of Harrisburg, Pennsylvania. Gainsburg conducts an optical department in the Gus Blass department store, where Carter, admittedly a competent optometrist,

[1] The language appearing as § 1 of Act 94 is copied *verbatim* from Act 109, approved February 21, 1939, amending Act 123 of 1915. Following approval of Act 109, suit was brought by W. A. Carter to restrain the state board from enforcing its provisions. A temporary order was issued, but there was no final hearing upon the merits. The National Optical Stores Company sued in federal court to restrain enforcement of the measure, allegation being that it was unconstitutional. District Judges Trimble and Lemley sat with Judge Woodrough of the court of appeals for the Eighth circuit and denied relief.

represents Gainsburg. Gainsburg is engaged in the sale of eyeglasses, spectacles, lenses, frame mountings, and other optical materials.

Section 1 of Act 94 is challenged on the ground that optometry, not being comparable to law, medicine, or theology, is not a learned profession, being limited in its character because those engaged in the practice do not have the background, training, and education characterizing the three professions mentioned. It is further argued that dispensing eyeglasses is a commercial transaction, involving only such knowledge as is necessary to fill prescriptions written by optometrists or oculists.

Section 5, limiting applicants for examination to persons over twenty-one years of age, of good moral character, and requiring that such applicant be a graduate of some "Class-A" school of optometry, is void, say appellees, because the Act does not indicate how Class-A schools shall be designated; hence there is an improper delegation of power.

The objection to § 8 (3) is that it gives to the board power to determine what acts on the part of a licensed optometrist shall constitute unprofessional conduct. It is feared mere opinion or caprice may control members of the board.

Section 9 (3) is alleged to be fatally defective in that it authorizes the board to revoke the license of an optometrist who accepts employment from a person, firm, or corporation engaged in any business or profession ". . . to assist it, him, or them in practicing optometry in the state [if the employer is not himself a licensed optometrist]." Such provision, it is argued, bears no relation to the public health, safety, morals, or other phase of the general welfare. The right of Carter to continue his present employment is, it is urged, a valuable property right. "The practice of optometry," says the complaint, "is merely an occupation calling for the use of mechanical skill, [and] so long as optometrical services are actually rendered by a registered optometrist, no restrictions may be imposed upon the right to

employ an optometrist." Effect of enforcement, it is said, is to deny equal protection of the law to those so affected, in violation of the Fourteenth amendment to the federal constitution, and of § 8, art. 2, of the state constitution.

Section twelve is void because (a) subsection (2) makes it unlawful for any optometrist, physician, or surgeon, to advertise in any manner . . . any fraudulent, false, or misleading statements as to the skill or method of practice ". . . of himself or of any other optometrist, physician, or surgeon, or to advertise in any manner with intent to mislead, deceive, or defraud the public." Title of the Act, say appellees, defines the practice of optometry and its regulation, and ". . . the foregoing intends to regulate the conduct of physicians or surgeons who practice their profession not because of the optometry Act nor because of the exemption contained in § 16, but because a physician or surgeon, by virtue of his license under the medical Act, has the right to perform all the duties given to an optometrist under the provisions of this Act."

(b) Subsection (3) of § 12 makes it unlawful for any person, firm, or corporation, or any optometrist, physician, or surgeon, to advertise, either directly or indirectly, free optometrical service or examinations, or to advertise by any means whatsoever any definite or indefinite fee for professional services rendered or for materials furnished by an optometrist, physician, or surgeon. Appellees think the provision is void because physicians and surgeons are not amenable to the optometry Act, and that prohibition against advertising is an arbitrary enactment, interfering with a lawful business or permissive occupations. The further objection is that articles that may be lawfully sold cannot be advertised.

The flaw in subsection (6) of § 12, making it unlawful for any optometrist, physician, or surgeon, to accept employment from any unlicensed person, firm, or corporation, ". . . or in any other manner assisting . . . in the unlawful practice of optometry" is that it bears no relation to public health, safety, morals,

or welfare, but is an unreasonable and unnecessary restriction placed upon appellee Carter and others similarly situated, preventing them from pursuing lawful occupations.

Section 13, denouncing violations of the Act as a misdemeanor, is void because, in the Act's title, optometry is the subject intended to be regulated; and, since physicians and surgeons fall within the measure's terms, the title is misleading and constitutionally insufficient.

The Gus Blass Company and Gainsburg were made parties to the action.

The complaint was amended. Section 1 of the Act, it was said, provides that ". . . the prescribing, dispensing, adapting, or duplicating of lenses, prisms, or ocular exercises are a part of the acts which constitute the practice of optometry; and § 16 of the Act does not apply to physicians and surgeons, nor to persons who sell glasses wholesale on prescription where no attempt is made to practice optometry. B. Gainsburg is also engaged in such acts, and since he is not exempted from the provisions of the Act, he is denied the equal protection of the law."

A temporary injunction restraining the board from revoking Carter's license was granted February 26, 1941.

The answer admitted that Gainsburg advertised prices, and the terms upon which glasses would be sold, but alleged that these advertisements were published in the name of Gus Blass Company.

There can be little doubt that the general assembly had power to declare optometry a learned profession, and this it has done on two occasions since Mr. Justice Butler stated in his opinion of May 11, 1937, that if the lawmaking body had intended such designation it would have made the classification by express language.

The decree from which this appeal comes holds that Act 94, insofar as it attempts to prohibit optometrists from accepting employment from unlicensed persons, or insofar as it prohibits unlicensed persons from employing licensed optometrists, and in its pronouncement against advertising prices, is unconstitutional because

the purpose is not to promote the public peace, health, or welfare.

Appellees insist that optometry is a business, as distinguished from a profession, and that it depends for its success ". . . upon the choice of a good business location, the use of efficient advertising methods, intelligent buying, and effective selling. This commercial background brands optometry as a mercantile business."

Attention is directed to the July 6, 1928, issue of Public Health Reports, then published by the treasury department, where it was said: "An optician, or optometrist, or eyesight specialist, is not a graduate physician or doctor of medicine; and he does not diagnose or treat diseases of the eye. He is trained to grind and measure lenses and to fit frames properly. . . ."

This summary, it will be noted, speaks of "eyesight specialists." Marked progress has been made during more than thirteen years that have intervened since the treasury publication distinguished between optometry, medicine, and surgery. Whether the article was written by a physician, an optometrist, a surgeon, or a layman, is not disclosed.

Typical of some of the testimony regarding methods of examination and required knowledge is that of Dr. Carl F. Shepard, an instructor in the Northern Illinois College of Optometry. An examination, he says, is divided into three parts. First, there is the case history. The patient is questioned about diseases that might affect vision; about environment, lighting conditions, and the nature of work the patient is required to do. The second part is the objective phase, ". . . in which we use such instruments as the retinoscope, ophthalometer, and ophthalomoscope. We also determine that there are no diseases of the eye. This involves a study of the eye while it is in use at a near point and at a distance. The third phase is called the subjective procedure. The extent of the tests which we make depends upon the condition of the eyes. If we encounter conditions that call for certain other types of tests, we test the sets of

muscles in the eyes. As we make the findings in the course of our examination, we write them down."

Dr. K. W. Cosgrove made interesting comments in testifying. He is a practicing physician; a member of the American Medical Association, associate professor of pathology at the medical school of the University of Arkansas, state board of health consultant in trachoma, a member of state and national associations, and is connected with the state public welfare department. He is an ophthalmologist and prescribes lenses, but does not use "drops" in the eyes in all cases. Such practice is known as cycloplegia and has reference to paralysis of the muscles of the eye which are affected by curvature of lenses. As a rule cycloplegia is not used where patients are more than thirty years of age. . . . It often occurs that patients with diseased eyes are referred to Dr. Cosgrove by optometrists, and, conversely, Dr. Cosgrove refers patients to optometrists in order that examination may be made with an ophthalometer, an instrument not used by Dr. Cosgrove.

It was conceded by appellee Carter that refraction of the eyes, or examination, whether by a physician or an optometrist, is a professional act, but, it is argued, sale of glasses after a prescription has been procured is a commercial transaction.[2]

Regarding the right of a professional man to advertise, the Supreme Court of the United States said in *Semler* v. *Oregon Board of Dental Examiners,* 294 U. S. 608, 55 S. Ct. 570, 79 L. Ed. 1086:

"It is no answer to say as regard to appellant's claim of right to advertise his professional superiority

[2] In their brief appellants say: "In fairness to the Blass Company we wish to say that the men who are employed there as optometrists are capable. . . . However, the company has been repeatedly advised that if it would lease the department directly to a licensed optometrist, relinquish control over the manner in which the department is operated, and allow the optometrist to carry on his own practice, there would be no violation of the law. In this manner the real party in interest would be directly responsible and answerable to the public. The optometrist examining the eyes would be responsible to the patient. As the situation now exists, the optometrist is the servant or employe of an undisclosed non-resident master whose sole interest is the volume sale of glasses."

or his performance of professional services in a superior manner, that he is telling the truth. In framing this policy the Legislature was not bound to provide for determination of the relative proficiency of particular practitioners. The Legislature was entitled to consider the general effect of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in instances there might be no actual misstatement."

It seems perfectly clear that Mr. Justice BUTLER and other members of the court who made the opinion in the state's suit against Blass in 1935 intended to say that if the general assembly, by express language, should classify optometry as a learned profession, such determination, being an expression of public policy, would not be in excess of legislative powers. Those interested in the profession were justified in believing that an Act defining the practice and placing necessary safeguards around it would not be overridden by the judicial department.

It is true that Act 94 deals with subjects not discussed in the court's former opinion, and a long forward step has been taken in collecting and reëxpressing provisions found in former laws and adapting them to present conditions. If optometry were a business rather than a profession requiring a high degree of skill and knowledge, the rights of appellees would be property, and subject only to reasonable regulation under the police power. *Stuttgart Rice Mill Company* v. *Crandall,* 203 Ark. 281, 157 S. W. 2d 205.

Appellees direct attention to this comment made by Mr. Justice BUTLER in the cited case:—"What difference could there possibly be to the public whether their eyes were fitted and glasses furnished by [an optometrist working for himself, or by one working for another?] *To sustain the contention of the appellant would destroy the intent of the legislature.*"[3]

[3] Italics supplied.

Here, again, is an expression indicating that legislative intent would be permitted to control. The intent now having been formulated in language too plain to be misunderstood, a current holding that the lawmaking body was without power to do what the court implied it had a right to do would be arbitrary and would amount to judicial legislation.

We have not overlooked *Liggett Company* v. *Baldridge,* 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204. A Pennsylvania statute provided that every pharmacy or drug store in the state should be owned by a licensed pharmacist. As to corporations and partnerships, all partners or stockholders should be prarmacists. In invalidating the requirement the court said: ["The statute] plainly forbids the exercise of an ordinary property right, and, on its face, denies what the constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them'." See, also, *Schnaier* v. *Navarre Hotel & Importation Company,* 182 N. Y. 83, 74 N. E. 561; *People* v. *Ringe,* 197 N. Y. 143, 90 N. E. 451, 27 L. R. A., N. S., 528, 18 Ann. Cas. 474. Other decisions are cited.

The Liggett case deals with property—the right to hold stock in a pharmaceutical corporation, partnership, or to be sole or part owner. There is nothing in Act 94 prohibiting Gainsburg, Blass, or anyone else from owning stock in an optical company. What the measure prohibits is employment of an optometrist by one who is not licensed. In other words, a layman may not engage in the profession by employing a licensed optometrist.

Section 16 of the Act is printed in the margin.[4]

Unless a particular policy promulgated by the legislature and sought to be enforced is prohibited by the

[4] "Nothing in this Act except as expressly provided otherwise herein shall apply to physicians and surgeons, nor to persons who sell eyeglasses, spectacles, or lenses at wholesale on prescriptions from optometrists, physicians, and surgeons, nor shall it prohibit the sale of ready-made glasses and spectacles when sold as merchandise at established places of business, where no attempt is made to practice optometry."

constitution, either expressly or impliedly, courts will not hold the enactment void.

The challenged Act has for its purpose (or at least the general assembly so found) the protection of those who *might* be (but who in the case at bar were not) imposed upon by unscrupulous practitioners. It is unfortunate that the business of a trustworthy and highly reputable establishment must be restricted, and that an ethical and competent optometrist in the person of Dr. Carter will be adversely affected. But, believing as we do that no constitutional right has been invaded—although the legislative policy may be questioned by those who oppose the measure—we have no recourse but to say that the Act is valid, and that the decree must be reversed. It is so ordered.

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

4-6769 164 S. W. 2d 425

Opinion delivered June 22, 1942.

Thomas B. Pryor, H. L. Ponder, Jr., and *H. L. Ponder,* for appellant.

Horace Sloan, Frank Sloan and *S. L. Richardson,* for appellee.

HOLT, J. Appellees (plaintiffs below) joined in a suit against appellant to compensate personal injuries alleged to have been received by them when an automobile in which they were riding was struck on a crossing by one of appellant's passenger trains. The allegations of negligence are (a) failure of the operatives of the train to give the statutory signals; (b) failure to keep a lookout and the failure to keep a flagman at the crossing in question; (c) operating the train at an excessive rate of speed; and (d) failure of those in charge of the train after they discovered, or by the exercise of ordinary care could have discovered, the perilous situation of appellees, to avoid injuring them.

Appellant answered with a general denial and in addition pleaded the contributory negligence of appellees and of E. M. Johnson, driver of the car in which appellees were riding.

A jury returned a verdict in favor of Ester Johnson in the amount of $2,000 and a verdict for Belle Thorn in the amount of $500. From the judgment on these verdicts comes this appeal.

The principal contention of appellant for reversal is that the evidence was not sufficient to support the verdicts. The testimony viewed in its most favorable light to appellees is to the following effect:

February 1, 1941, at about 3:20 in the afternoon, E. M. Johnson, husband of Ester Johnson and son-in-law of Mrs. Belle Thorn, drove his 1931 Model A Ford Tudor Sedan on paved highway No. 67 south between Walnut Ridge and Hoxie to a point where this highway is intersected at right angles by Georgia street, where he stopped his car because the highway immediately ahead was blocked by freight cars being switched by appellant's switch engine on a switch track which crossed highway No. 67 and lead to a cotton compress to the west. After

waiting two or three minutes, Johnson, the driver of the car, turned off the highway to his left and at a speed estimated by himself at twelve to fifteen miles per hour, and by another witness from six to eight miles an hour, drove east on Georgia street, and at a distance of 48 feet from the highway passed over the compress switch track, and 21 feet farther on passed over the west main track of appellant and without stopping proceeded about 10 feet onto the east main track of appellant where appellant's passenger train from the north, traveling about 50 miles per hour, and running late, struck the rear of the automobile in which appellees were riding, and as a result they were injured.

From a plat in evidence, giving various measurements, the compress switch track referred to above, curves to the west from the west main track 150 feet from the Georgia street crossing. The east main track and the west main track are eight feet apart.

As appellees approached the east main track where the collision occurred, their view, as well as that of the driver, E. M. Johnson, was obstructed to the north by some freight cars standing on the west main track just to their left, and north of Georgia street. There is evidence that the nearest of these freight cars was within 20 feet of Georgia street. On this point the evidence is conflicting, some witnesses placing the nearest car at a much greater distance to the north.

Whether the statutory signals were given is a disputed question of fact. It is undisputed that the driver of the automobile did not stop from the time he left the concrete highway until he drove upon the east main crossing and was struck by the on-coming train.

E. M. Johnson testified that he looked both to the south and the north and listened, but did not see or hear the train that struck his car. He testified that he could not see the train approaching from the north because his vision was obstructed by the standing freight cars immediately to his left on the west main track.

Appellees, who were guests in the Johnson car, testified that they looked and listened, but did not see or hear the train and that their vision to the north was likewise obstructed. They also testified that they relied upon Mr. Johnson, the driver, and were not giving any particular attention at the time. Mrs. Thorn (65 years of age) testified that she had never driven an automobile and did not try to tell the driver what to do or what not to do. Both appellees and the driver, Johnson, testified that they did not hear any whistle or bell or any signals given.

Ester Johnson further testified that just before the collision she saw Jim Haddock drive his wagon over the crossing in question.

It is conceded here that the appellees were guests in Johnson's car. He was the owner and the driver. The rule is well settled that in these circumstances the driver's negligence cannot be imputed to the appellees unless they failed to exercise ordinary care for their own safety.

Whether these appellees, in the circumstances here, failed to use ordinary care for their own safety, and the degree of their contributory negligence, if any, were questions for the jury. As this court said in *Missouri Pacific Rd. Co.* v. *Powell,* 196 Ark. 834, 120 S. W. 2d 349, wherein the occupants of the automobile, and not the driver, were plaintiffs: "There is little evidence that these several plaintiffs might have done anything more than they did as the crossing was approached, but if there were anything they should have done, and did not do which made them guilty of contributory negligence, that was a jury question. It was not a matter of law."

And in *Missouri Pacific Railroad Company* v. *Henderson,* 194 Ark. 884, 110 S. W. 2d 516, this court said: "The appellees, Henderson and Stanfill were invited guests, they had no control over the movement of the automobile in which they were riding, and Ingram's negligence, however gross, cannot be imputed to them. Therefore, we must look to the evidence only as it relates to their failure to exercise ordinary care for their

own safety. It is admitted that no one could see to the south of the crossing until a point was reached not more than 45 feet from the edge of the west track. . . . Suffice it to say that under all the circumstances, a case was presented for the jury both as to the negligence of the appellees and its degree, and we cannot say as a matter of law that their negligence equaled that of the appellant. Primarily, it was Ingram's duty to operate the car so as not to endanger appellees and, in the exercise of ordinary care, they had the right to rely on the assumption that he would perform this duty. It cannot be said that ordinary care would require the exercise of the same attention to the route on their part as was required of Ingram; in fact, it would not be unreasonable to say that passengers in an automobile trust largely, if not wholly, to the skill and care of the driver for their safety."

The question of the degree of the negligence of appellees was for the jury and we are unable to say on the testimony as reflected by this record that their negligence was equal to that of appellant.

Appellant, especially in oral argument before this court, strongly relied upon the recent case of *Missouri Pacific Rd. Co.* v. *Howard,* ms. op. May 11, 1942, p. 868, 161 S. W. 2d 759, as controlling the rights of appellees here and insists that under the rule there announced appellees are not entitled to recover. We cannot agree that that case controls here. A different situation, however, would present itself if, on the evidence before us, appellant were appealing from a judgment in favor of E. M. Johnson, the driver of the car. In such case we think the principles of law announced in the Howard case on the question of negligence of the driver of the car would apply.

Appellant also assigns as error the giving of certain instructions by the court, and its refusal to give others requested by appellant. We have carefully examined these instructions and have reached the conclusion that

no error appears, and that the trial court fully and fairly covered all issues presented.

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

ALLISON *v.* STATE.

4266 164 S. W. 2d 442

Opinion delivered June 29, 1942.

Hibbler & Hibbler, for appellant.

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

GRIFFIN SMITH, C. J. Rape was charged by information. The jury convicted and assessed the death penalty. Pope's Digest, § 3405. The appeal questions sufficiency of the evidence and alleges error in the admission of defendant's confession.

The attorney general, without discussing the matters assigned as errors, rests upon the proposition that the bill of exceptions was not filed within the time allowed. We think the point is well taken.

The verdict was returned February 4, 1942. Defendant's motion for a new trial was filed the following day, and overruled February 13. Appeal was denied. Fifty-eight days were allowed for bill of exceptions. It was approved May 6 and filed with the circuit clerk May 7. Excluding February 13, and allowing all of the fifty-eighth day, Monday, April 13, and not May 7, was the last day.[1]

Section 1 of Act 158, approved May 8, 1899, authorizes circuit courts to grant appeals from convictions for offenses other than capital crimes. Section 2 is: "If the court in which conviction is had shall refuse to grant an appeal to the supreme court, such an appeal may be granted by any judge or judges of the supreme court, in manner as now provided by law." Pope's Digest, § 4240. A headnote prepared by the editor who compiled the Acts reads: "Circuit court to grant appeals for all offenses except capital."

In *Bromley* v. *State,* 97 Ark. 116, 133 S. W. 813, it was held that failure of the defendant to file a transcript in the supreme court within sixty days was fatal to the appeal, no application having been made to this court to compel the circuit clerk to expedite the work. In commenting on the procedure, Chief Justice McCulloch said it had been repeatedly held that the statute limited jurisdiction, and "even in the event of hinderance by reason of unavoidable casualty the court cannot take cognizance of an appeal unless it is perfected within sixty days." The reference was to a misdemeanor. It was also said: "Since then the statute has been amended so as to limit

[1] For methods applicable to computation of time in criminal cases, see *McNutt* v. *State,* 163 Ark. 122, 259 S. W. 1, where it was held that § 3423 of Crawford & Moses' Digest (now § 4266 of Pope's Digest) contemplates that when the last day of the sixty-day period allowed for appeals falls on Sunday, the transcript may be filed the following day. [But the rule is different in civil cases. Also see *Clark* v. *American Exchange Trust Co.,* 189 Ark. 717, 74 S. W. 2d 974; *Bank of El Paso* v. *Neal,* 181 Ark. 788, 27 S. W. 2d 1024].

to sixty days after judgment the time for suing out a writ of error. Act of May 6, 1909. [Pope's Digest, § 4236.] It follows that the transcript has not been filed here in time to give this court jurisdiction."

But, it may be argued, § 4249 of Pope's Digest confers upon a judge of the supreme court power "to extend the time for filing the *record.*"[2]

There is the further provision (Pope's Digest, § 4250) that "The court may act upon and decide a case in which the appeal was not prayed or the record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit."

These sections are from title 9, chapter 1, § 327, of the Criminal Code. Their effect was modified by Act 158 of 1899, which, as heretofore shown, permits circuit courts to allow appeals "for all offenses except capital."

The term "capital offense" was defined by Chief Justice McCulloch in *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851. The first headnote to the Arkansas Reports is: "Crawford & Moses' Digest, § 3404 [now § 4227 of Pope's Digest], requiring appeals to be allowed by a judge of the supreme court in convictions in capital cases, applies only where accused is sentenced to be electrocuted, and in other cases appeal may be granted by the trial court under Crawford & Moses' Digest, § 3396 [now § 4239 of Pope's Digest"].

In *Adams* v. *State,* 203 Ark. 1057, 160 S. W. 2d 42 it was held that while felony appeals must be lodged within sixty days from judgment "unless additional time is given by a justice of the supreme court," time for filing the bill of exceptions cannot be enlarged by this court. The statement that time may be extended appears to be in conflict with the Bromley case. If, as Chief Justice McCulloch said, jurisdiction can only be conferred by filing the transcript within sixty days, the right to give additional time is non-existent because when the sixty-day period has expired there is no method by which jurisdiction can be acquired; yet, for many years, the practice has been for individual judges to

[2] Italics supplied.

grant extensions in cases where it was made to appear that the appellant was without fault in allowing the statutory time to lapse.

In the case at bar jurisdiction was acquired by this court when the judgment was filed April 14th, the sixtieth day after judgment. Certiorari was issued by the clerk directing that the record be brought up. But there is no record upon which error can be predicated. The record proper, according to Stevenson's Supreme Court Procedure, includes the pleadings, exhibits, statement showing service of summons, any material order of the court preceding judgment, the judgment itself, motion for a new trial, order overruling such motion, and the order granting appeal. *Morrison* v. *St. Louis-San Francisco Railway Co.*, 87 Ark. 424, 112 S. W. 975.

Perhaps the only ground upon which the Bromley case and the Adams case can be harmonized is that which distinguishes the court's right to grant additional time when the motion for relief (accompanied by the judgment and such other parts of the record as appellant may care to present) is filed within sixty days, as contrasted with a similar request made after the sixty-day period has expired. Certainly, when the record is filed within sixty days, the supreme court has jurisdiction; and though it may be questionable whether a judge has power to extend time, we prefer, when there is uncertainty, to resolve the doubt in favor of a liberal construction, and to adhere to the practice recognized during the past few years.

It must be remembered, however, that no power reposes in this court to increase the time allotted for filing a bill of exceptions with the circuit court, and unless it is so filed within sixty days—that is, not later than the sixtieth day [3]—only the record can be considered on appeal.

. . . .

It is always unsatisfactory to dispose of an appeal on technical grounds, and this is particularly true in criminal cases when the penalty is severe. But if this pro-

[3] Unless the sixtieth day should fall on Sunday. If this occurs, a filing on Monday, the sixty-first day, would be permissible.

ceeding should be disposed on its merits, rather than on the record alone, it would have to be affirmed.

. . . .

The morning of January 21, Mrs. Annie Benson, who lived at McGehee with her sister, Mrs. Inez Humphrey, was awakened. In the bed with Mrs. Benson was a young nephew. Mrs. Benson, who first thought her brother was attempting to awaken her, turned and looked into the face of a Negro, who demanded money. The intruder was informed there was none. Mrs. Benson testified he was armed with a small pistol, and she was "paralyzed with fear." The Negro, later identified as appellant, directed her to go into an adjoining room, where his lust was satiated.

Appellant admitted he was an itinerant burglar and could not remember how many houses he had entered or attempted to enter the night of January 20-21. After being arrested appellant was brought to Little Rock and questioned by Sergeant Templeton of the Arkansas state police; Prosecuting Attorney Henry Smith, of Pine Bluff, and Sheriff Howard Clayton, of Desha county. When asked how he awakened Mrs. Benson, appellant replied: —"I shook her with my hand. I had a stick so she would think it was a pistol. It didn't take long to get this woman up. I asked her if she had any money she could give me, and she said she did not. Other testimony is printed in the footnote.[4]

Mrs. Benson's explanation of the transaction, in part, is shown below.[5]

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[4] "While this conversation was going on Mrs. Benson was sitting on the side of the bed, in her nightgown. I told her to let's go into the next room. I still had the stick I was using as a pistol. I went into the other room because someone [else] was in the bed in this room. We lay down on the bed. I told her to lie down. . . . I did what I intended to do. . . . She laid down when I told her to. . . . She told me it wouldn't do me any good [and] I told her I wouldn't hurt her. I asked her if she was going to tell anyone about it."

[5] "It was in the neighborhood of four o'clock, judging by the light. I didn't look at a watch. It was before daylight. The first thing I knew—I had my back turned to the side of the bed—I was facing the other side—some one was shaking my shoulder. My brother comes and goes, and I didn't think anything about it: just laid there a few minutes. I was so sleepy I couldn't quite get up. [The in-

The confession of appellant and the testimony of Mrs. Benson—some of which is not copied—were sufficient to establish the crime of rape. A holding in *Threet* v. *State,* 110 Ark. 152, 161 S. W. 139, was that if the female who charged she was raped failed through fear to resist or to make outcry, the assault was against her will. To the same effect is *Jackson* v. *State,* 92 Ark. 71, 122 S. W. 101. To this declaration of the law, however, there was added the statement that if the defendant testifies sexual intercourse was by consent, it would be error to refuse to instruct the jury that if it found the female failed to complain immediately, or to make outcry, such facts should be considered in determining whether there was consent.[6]

There was no testimony to support argument in appellant's brief that his confession was wrongfully obtained. The defendant did not take the witness stand to deny the confession.

There is the suggestion that the judgment be modified by substitution of life imprisonment for electrocution. This we could not do even if the bill of exceptions had been filed in time, although in *Davis* v. *State,* 155 Ark. 245, 244 S. W. 750, the holding was otherwise. The applicable statute is expressed in fourteen words: "Any person convicted of the crime of rape shall suffer the punishment of death." Pope's Digest, § 3405.

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truder] shook my shoulder again. Finally I turned over to see what it was, and I couldn't believe it! I was so scared when I saw him I was paralyzed. I saw a colored man standing there. He had a gun in his right hand: a small pistol. He asked for money and I told him I didn't have any. Then he said, 'Get up.' At first I just sat on the side of the bed. Naturally I was nervous and scared to death, and started shaking. He said I was making too much racket, that I would wake the child up. He made me go into the other room. I was so frightened I didn't know what else to do. . . . He said if I didn't make a racket he wouldn't have to shoot me: that he didn't want to have to shoot anybody. . . . I just hardly know what happened. The next thing (when I knew anything at all) I got up. I couldn't say whether I got down [on the bed] of my own accord, because I was paralyzed with fear. I thought I was going to get killed. I had an orphan nephew living there and I thought more of his welfare than I did of anything else. . . . He said that if I told, he would come back and kill me; that he read the papers and would know whether I reported it or not. . . . He took down his clothes and assaulted me: had intercourse with me."

[6] See *Pleasant* v. *The State,* 13 Ark. 360.

A discussion of the law's evolution is found in *Dennis, a Slave,* v. *The State,* 5 Ark. 230, at page 233:

"By an act of the revised statutes, approved 16th February, A. D. 1838, and which was afterwards put into operation by the proclamation of the governor, it was declared, 'that any person convicted of the crime of rape, should suffer the punishment of death.' The act, in respect to the punishment of the offense, made no distinction between the case of a white man and slave. A subsequent act of the legislature, passed 17th December, 1838, made distinction as to the punishment. It enacted that, whenever a white man should be convicted of the crime of rape, he should suffer punishment for the offense, by confinement for a term of years in the jail and penitentiary house of the state. The act excepts the case of a slave out of this provision, and affirms that, whenever a slave is convicted of the crime of rape, he shall suffer the punishment of death. The first section of the act of the last legislature, approved 14th December, 1842, declares, 'that all persons convicted of the crime of rape, shall suffer the punishment of death.' The second repeals all laws inconsistent with the provisions of the first section. The inquiry then is, what laws were inconsistent with this provision. The answer is at hand, and cannot be mistaken. So much of the act of December, 1838, as changed the punishment of rape, when committed by a white man, from death to confinement in the jail and penitentiary. This is the only law inconsistent with the provisions of the act of 14th of December, 1842; and this the second section of the last act expressly repeals. This last act, so far from repealing the old law or first act in regard to the penalty, reënacts its present provisions, and declares in all cases the punishment for the crime of rape shall be death; which had always been the case upon conviction of a slave, by all the statutes passed on that subject. The motion on this point, as well as on the other taken to the indictment, was properly overruled."

Act 187, approved March 20, 1915, gives the jury a right in all cases where the punishment at that time was death, to render a verdict of life imprisonment in the state penitentiary at hard labor. Pope's Digest, § 4042.

In *Webb* v. *State,* 154 Ark. 67, 242 S. W. 380, it was held that the Act did not repeal the old statute fixing the penalty at electrocution, "but merely gave the power to the jury to reduce the punishment to life imprisonment, and that a verdict finding the defendant guilty of that crime, without fixing the punishment at imprisonment, called for a judgment for the extreme penalty of electrocution."

The trial court instructed the jury that it might fix the defendant's punishment at electrocution, or at life imprisonment.

It will be observed that the discretion conferred by Act 187 relates to the jury, and not to the courts.

No errors are shown by the record proper, and the judgment must be affirmed. It is so ordered.

Mr. Justice MEHAFFY and Mr. Justice HOLT think the judgment should be modified by substituting life imprisonment for electrocution.

PAPA *v.* KITCHENS, SHERIFF.

4-6816 164 S. W. 2d 439

Opinion delivered June 29, 1942.

J. M. Walker and *Jo M. Walker,* for appellant.

Burke, Moore & Walker, for appellee.

HOLT, J. Wharf Improvement District No. 1, embracing the real property within the city of Helena, Arkansas, was organized in 1918 under the general statutes of this state authorizing the formation of improvement districts in municipalities. The validity of this district was approved by this court in *Solomon* v. *Wharf Improvement District,* 145 Ark. 126, 223 S. W. 385. Benefits were assessed, levied and collections begun in 1926 to continue over a period ending in 1944. Five per cent. interest bearing bonds were issued by the district in the amount of $225,000. The proceeds from the sale of these bonds were used in constructing a river and rail terminal at Helena, Arkansas.

Prior to 1938, some of the taxpayers within the district, including appellant, Sam Papa, became delinquent.

March 23, 1938, the district under the powers granted by the terms of act 100 of the Acts of 1933, sold all the property of the Wharf Improvement District to the Inland Waterways Corporation, a government agency operating what is known as the "Federal Barge Lines" on the Mississippi river, for a consideration of $100,000. At the time this sale was consummated, the outstanding bonded indebtedness of the district amounted to $167,000.

Shortly after the consummation of this sale in 1938, the Wharf Improvement District brought suit in the Phillips chancery court against appellant, and other delinquent property owners, to foreclose the respective tax liens. Foreclosure decree was entered and sales made by

the commissioner and duly confirmed, and the decree contained an order authorizing and directing the clerk of the chancery court to issue writs of assistance to enforce compliance with its orders. Appellant made no defense to this foreclosure suit.

On December 21, 1941, appellant filed the present suit against F. F. Kitchens, sheriff of Phillips county, and J. B. Lambert. He alleged in his complaint, among other things, that appellant is the owner of property within the improvement district in question; "That on the 14th day of November, 1941, the circuit clerk, and ex-officio chancery clerk of said Phillips county, issued a writ of possession directed to said F. F. Kitchens, as sheriff of said county, authorizing and directing him to take possession of said real estate of the plaintiff herein (appellant here), and on the 24th day of July, 1939, said defendant, J. B. Lambert, was appointed receiver, and authorized and directed to collect the rents from said real estate of the plaintiff, and apply the same to the payment of delinquent assessments due and owing by the plaintiff to the said Helena Wharf Improvement District.

"Plaintiff alleges that the writ of possession issued by said clerk, and the appointment of said J. B. Lambert as such receiver were void for the following reasons:

"That said Wharf Improvement District was organized pursuant to the laws of the state of Arkansas . . .; that . . . the improvements . . . constituting said Wharf Improvement District were duly constructed and completed . . .

"That by Act 100 approved March 16, 1933, the legislature of the state of Arkansas authorized the sale of 'Wharves, River and Rail Terminals, equipment and appliances incidental to the operation thereof, owned and operated by any Wharf Improvement District in this state.'

"That said act provided among other things that no sale of the property of such district shall be made for less than the amount necessary to pay all of the outstanding indebtedness against the district. . . .

"That the provisions of said Act 100 relating to the adoption of the resolution by the board of commissioners of said district, that it would be to the best interest of the district that said property be sold, and the petition of the majority of the owners of property located within said district, asking that such sale be made, and the publication of the notice of the contemplated sale, and all other preliminary requirements of said act were duly complied with.

"That pursuant to the action of the board of commissioners of said district, and the action of a majority of the owners of property located in the district, ordinance No. 2206 was adopted by the city council of said city of Helena, authorizing the sale of the property constituting the Helena Wharf Improvement District, and directing a deed to be executed conveying said property to the Inland Waterways Corporation.

"That on March 23, 1938, pursuant to the action of said board of commissioners and pursuant to the action of the said city council, a warranty deed was executed by D. T. Hargraves as mayor and R. G. Howard as city clerk conveying all the property of said Wharf Improvement District to said Inland Waterways Corporation for a cash consideration of $100,000.

"Plaintiff alleges that said Wharf Improvement District had no power or authority to sell the property belonging to said district, except in accordance with the terms and provisions of said Act 100, and that upon the sale of said property, the board of commissioners had no power or authority to levy any further assessments on any of the property located in said district, or to collect any assessments that may have been theretofore levied."

And (quoting from appellant's brief) "It further alleges that said F. F. Kitchens as sheriff is threatening to take possession of the property of the appellant by virtue of said writ of possession and that said J. B. Lambert as such receiver is interfering with the possession of the tenants of the appellant, and appellant asks that said writ of possession be quashed and that said receiver be discharged."

To this complaint, appellee filed demurrer alleging "(1) the complaint shows upon its face that the court has no jurisdiction of this cause of action; (2) the complaint does not state facts sufficient to constitute a cause of action." Upon a hearing the demurrer was sustained and appellant refusing to plead further, the complaint was dismissed for want of equity. This appeal followed.

Appellant's primary contention here is stated in his brief in this language: "Said district had no power or authority to sell the property belonging to said district except in accordance with the provisions of Act 100, and that upon a sale of the property, the board of commissioners had no power or authority to levy any further assessments on the property located within the district, or to collect any assessments that may have been theretofore levied."

It is true, as appellant contends, that the power of the district to sell the property in question is derived from Act 100 of the Acts of 1933 (now §§ 7740-7744, Pope's Digest). The sale was duly made under the terms of the act by the district of its terminal property to the Inland Waterways Corporation on March 23, 1938. Appellant does not question the city's power to make this sale under the act in question, but he does question the power of the board of commissioners of the district to collect any delinquent assessments on appellant's property within the district that were due and unpaid prior to the date of sale.

It is our view, however, that under the terms of the act, *supra,* the power was given to the district to enforce payment of all delinquent taxes against property within the district prior to March 23, 1938, the date of sale. We think this power must be inferred from the provisions of § 4 of the act which provides: "If the properties authorized to be sold hereunder should sell for more than the secured and unsecured indebtedness of the district, then such excess shall be apportioned and paid by the board of improvement back to the then owners of record of the real property of the district in the same proportion that each parcel of said property has contributed

in taxes for the acquisition, construction and operation of said improvement."

Clearly this section contemplates that when all indebtedness against the district has been paid, any excess shall be refunded by the district to all taxpayers in proportion to the amount of improvement taxes paid by each. No equitable distribution could be made until all taxpayers within the district had paid all taxes assessed and due at the time of the sale in question.

Here appellant's property was properly foreclosed to satisfy the lien for all delinquent taxes that had accrued prior to March 23, 1938. No effort has been made to assess or collect taxes from appellant subsequent to the date of sale. We find nothing in Act 100, *supra,* which would prevent or bar the enforcement of the payment of these delinquent taxes against appellant which had accrued and were due the district prior to and at the time of the sale of the terminal property on March 23, 1938. Appellant, a recalcitrant taxpayer, cannot be permitted to profit by reason of the fact that other taxpayers in the district have paid their taxes in full in order to discharge the district's obligation.

The question presented has been very thoroughly considered and discussed by this court in the recent case of *Ingram* v. *Board of Commissioners of Street Improvement District No. 5,* 197 Ark. 404, 123 S. W. 2d 1074. That decision is adverse to appellant's contention here. In that case many previous decisions of this court are reviewed and there it is said: "It appears to be true that if the collection of the delinquent taxes here sued for is enforced, the commissioners will then have in their hands a sum greater than is necessary to discharge the obligations of the district, and the court has reserved for future decision the disposal of this excess. But this fact constitutes no defense. When appellant has paid or been compelled to pay the taxes here sued for, he will then have paid no more than any other property owner in the district has been compelled to pay.

"This question has been decided adversely to appellant's contention in several different cases. These pay-

ments by others were not voluntary payments. It was said in the case of *Thibault* v. *McHaney,* 127 Ark. 1, 192 S. W. 183, that 'The ascertainment by the court of the amount necessary to assess against the property was a mere estimate, and the payment by the property owners was upon the implied assurance that the amount in excess of what was required to discharge the obligations of the district would be refunded *pro rata* to the property owners. Now these recalcitrant taxpayers say that they should be permitted to profit by the fact that they held back and refused to pay until the other property owners paid substantially enough to discharge the joint obligations. The position is wholly untenable, and the doctrine invoked has no application, which is based entirely upon the theory of estoppel—that one who pays money voluntarily, and with full knowledge of the facts will not be heard to assert the right to recover it back. In this instance the property owners undoubtedly paid voluntarily with knowledge of the facts, but, as already stated, they paid upon the implied assurance that all of the taxpayers would be required to respond in like proportion, and that any sum in excess of the amount required to discharge the obligations would be refunded.''

There the court, after reviewing the decisions of *Paving District No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795, and that of *Chicago Mill & Lumber Co.* v. *Drainage District No. 17,* 172 Ark. 1059, 291 S. W. 810, concludes with this language: ". . . this result (payment of debts of district) has been achieved by certain landowners paying their taxes, while others declined to do so, and when appellants have paid delinquent taxes against their lands, they will then have done no more than other property owners have already been required to do. . . . When all have paid their taxes the court, as in the Fernandez case, *supra,* may do equity. It cannot do so before.'' See, also, *Haraway* v. *Zambic,* 203 Ark. 550, 157 S. W. 2d 504.

Finding no error, the decree is affirmed.

4-6793 164 S. W. 2d 429

Opinion delivered June 29, 1942.

Beaumont & Beaumont and *J. A. Watkins,* for appellant.

Donham, Fulk & Mehaffy, for appellee.

McHANEY, J. At about 9:45 a. m. on Sunday, July 28, 1940, appellant, Richard Lowe, a lad six years of age at that time was struck and severely injured by an automobile driven west on West Third street by appellee, Mrs. W. P. Ivy, near the intersection of West Third street and Gaines street in the city of Little Rock. Through his mother as next friend, he brought this ac-

tion against appellees to recover damages therefor. Trial resulted in an instructed verdict and judgment for appellees and this appeal followed to reverse said judgment.

While the amended complaint alleged that Mrs. Ivy was driving the car as the "servant, agent and employee and under the direction of her husband, W. P. Ivy," the answer denied the truth of this allegation, as well as all other material allegations, and the proof wholly failed to establish it, being silent in this regard; so, the instructed verdict as to W. P. Ivy must be sustained. It was not shown whose car it was and he was not in the car at the time. *Brotherton* v. *Walden, ante,* p. 92, 161 S. W. 2d 391; *Kurry* v. *Frost, ante,* p. 386, 162 S. W. 2d 48.

We agree with the trial court that the evidence fails to disclose any act of negligence on the part of Mrs. Ivy. The undisputed facts, coming from appellant's witnesses, are to the following effect: Richard Lowe, a little six-year-old boy, was living with his parents in the Beaumont home, at 700 West Third street, which is on the northwest corner of said streets. The house faces south on West Third street and is some 15 feet or more from the door to the north curb line of West Third street. Just what distance the east side of the house is from the west curb line of Gaines is not shown, but the fact is it is some substantial distance west of the sidewalk running north and south on the west side of Gaines. The little boy had started to Sunday school in the Second Presbyterian Church on the southeast corner of said streets. Witness Henthorn, living in the Beaumont home, seems to have observed very closely the boy's movements from the time he ran out of the front door of the home until he was struck by the car. According to this witness the little boy ran out of the front door and continued to run out into the street some distance west of the intersection, ran in front of a panel truck going west on West Third and would have been struck by it had the driver not slackened his speed, and then in front of appellees' car which was in the act of passing the truck, with a distance of about four feet between them; the front

end of the car had not reached or passed the front end of the truck, but was about four feet behind it. He said neither the car nor the truck was traveling very fast; that he supposes they were going at a reasonable speed; that the boy started to cross West Third street about 30 feet west of the intersection; that when the car hit him, "She knocked him a piece, I would say a little ways"; that appellees' car started around the truck in the intersection, at which time the truck was about even with the sidewalk, evidently referring to the sidewalk on the west side of Gaines. Another witness, living at 710 West Third street, and sitting on his front porch, did not see the accident, but heard the noise of brakes on the car, or the tires slide, turned around and the truck obstructed his view. The boy was under the front of the car and was six or eight feet from the south curb. This witness placed the child 40 or 50 feet from the edge of the curb on Gaines, referring to the west curb on Gaines and 10 or 12 feet west of an imaginary line running south from the front of the Beaumont home, or that many feet west of the walkway leading from said home to the sidewalk. Another witness' statement was admitted by agreement, but it added nothing to the testimony of the others.

We think this evidence wholly fails to show negligence on the part of Mrs. Ivy. There is no evidence of speeding or failure to keep a lookout, no evidence that she saw the little boy until he darted past the truck and into her line of vision immediately in front of her at a time and place she could not stop before striking him and no evidence that she did not apply her brakes and stop her car as quickly as possible after discovering his peril. The complaint alleged that Mrs. Ivy "was driving at a fast and at a reckless rate of speed and driving south of the middle of West Third attempting to pass said car, while driving at a rate of speed estimated at approximately 25 to 30 miles per hour." Another allegation is that she struck the boy "while recklessly overtaking and attempting to pass the car, and negligently driving her car in the south lane of said West Third street." Also, that she was negligent in not observing the boy and in not slowing the speed of her car, "and negligent in strik-

ing Richard Lowe with the left bumper," etc. There is no evidence that she was driving 25 or 30 miles per hour, or that she was driving fast or recklessly. There is evidence that she drove south of the middle of West Third street, but that was not negligence, if there was no oncoming car in her way, and there was none. It is not *per se* negligence to overtake and pass another car. Counsel for appellant argue that she attempted to pass in an intersection in violation of a city ordinance, and in violation of § 6718, Pope's Digest. The complaint made no such allegation. No such ordinance was introduced in evidence, or if so, it is not abstracted, and courts do not ordinarily take judicial notice of municipal ordinances. *City of Malvern* v. *Cooper,* 108 Ark. 24, 156 S. W. 845. The cited statute does prohibit a vehicle from being "driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless said left side is clearly visible and is free from oncoming traffic for a sufficient distance," etc. Nor shall it be driven to the left side of the roadway "when approaching within 100 feet of or traversing any intersection or railroad grade crossing." Assuming without deciding that this statute applies to street crossings, the evidence fails to show a violation of it here. At the most its violation would be only evidence of negligence. The undisputed proof shows that when Mrs. Ivy started to pass the truck it was leaving the intersection and was about even with the west curb of Gaines. She never did pass it entirely as the front end of her car was about four feet behind the front end of the truck when the child was hit, some 30 to 50 feet west of the intersection.

Therefore, when we view the evidence in its most favorable light to appellant, together with all reasonable inferences deducible therefrom, as we are required to do in determining whether an instructed verdict was correctly given, we cannot say there was any substantial evidence of negligence to be submitted to the jury. It appears that this unfortunate incident was an unavoidable accident for which said appellee is in no way to blame. In *Morel* v. *Lee,* 182 Ark. 985, 33 S. W. 2d 1110,

the late Justice KIRBY quoted with approval from 1 Blashfield Cyclopedia of Automobile Law, p. 641, § 8, to the effect that owners and drivers of motor vehicles are not insurers against all accidents, which applies to injuries to children, and further: "If no one can reasonably foresee the sudden presence of a child in the path of an automobile, so as to prevent a collision with him, the driver or his master, proceeding at a lawful speed and being otherwise in observance of traffic regulations, will not be liable for injuries for such a collision." There is in this case no showing that appellee was driving at an unlawful speed, nor that she was violating any traffic regulation. There is no showing that she saw or, by the exercise of ordinary care, could have seen the child as it ran out of the house and into the street, as the truck was between her and the child and, presumably, blocked her view.

There being no substantial evidence of negligence, which is never presumed from the accident and injury, the court properly instructed a verdict for appellees, and the judgment rendered thereon must be affirmed.

MEHAFFY, J., not participating.

GREEN *v.* OZARK LAND COMPANY.

4-6748 163 S. W. 2d 325

Opinion delivered June 29, 1942.

J. Dale Wallace, for appellant.

HUMPHREYS, J. This suit was brought on the 13th day of August, 1941, by the members of a partnership doing a real estate business under the trade name of "Ozark Land Company," against appellant, in the circuit court of Washington county, to recover a 5 per cent. commission on the sale price of a 24-acre tract of land situated near Springdale, Arkansas, growing out of a written contract of date May 21, 1940, listing said land by appellant with appellees for exclusive sale within three months for $4,500.

It was alleged in the complaint, after setting out the contract, that appellees were the procuring cause of the sale of said land made to Wallace Johnson in the early part of February, 1941, by appellant at a reduced price of $3,800, and appellees prayed for a judgment of $190 as commission upon said sale.

Appellant filed an answer admitting that she signed the contract on the 21st day of May, 1940, giving appellees the exclusive right to sell said land within three months for $4,500 and that, in the event said appellees procured a buyer within said time for $4,500, she agreed to pay them 5 per cent. commission, but that they changed the contract in material respects without her consent, and that after the expiration of the three months she notified the appellees that the place was off the market as they had not produced a buyer within three months of the date of the contract who was ready, willing and able to purchase said land, and that after waiting a reasonable time she, without the assistance of appellees, sold the land in the early part of February, 1941.

She prayed for a dismissal of the complaint.

The cause proceeded to a trial and at the conclusion of the evidence appellant and appellees respectively

moved the court for instructed verdicts and neither asked for any other instructions, whereupon the court, without objections from either party, withdrew the cause from the jury and proceeded to determine the questions involved, and from a consideration of the evidence and the applicable law, the court found that appellant was indebted to appellees in the sum of $190 with interest at the rate of 6 per cent. per annum from the date of the judgment, from which an appeal has been duly prosecuted to this court.

Under these circumstances the verdict of the court is as binding as a verdict of a jury and if there is any substantial evidence to support the verdict, it and the consequent judgment must be affirmed.

Viewing the evidence in the most favorable light to appellees it is about as follows:

At the inception of the dealings between appellant and appellees, J. P. Dean, son-in-law of appellant, and his wife, daughter of appellant, were residing upon the 24-acre tract of land. Appellant, who is a non-resident of this state and who resided in Oklahoma, was a frequent visitor at the home of her son-in-law and daughter and was visiting them when the alleged contract was executed by appellant. Her son-in-law, J. P. Dean, during her visit contacted appellees for her and had them prepare an exclusive contract for the sale of said land on May 21, 1940, authorizing them to sell the land for $4,500 within three months, and that, in the event they did so to pay them the customary commission of 5 per cent. on the gross amount of the sale. The prepared contract contained the following provision:

"I further agree to pay said commission to Ozark Land Company if said property be sold or otherwise disposed of, by any other person, firm or corporation, including the undersigned, during the above period, or after the above period, on information given, received or obtained through this agency."

This prepared contract was delivered to J. P. Dean and he took it home for his mother-in-law to sign and after procuring her signature thereto he delivered it to appellees.

Appellees then advertised the land in three or four newspapers, giving a detailed description thereof, one of the papers was the Fayetteville Daily. A man by the name of Wallace Johnson saw the advertisement in the Fayetteville Daily and went to appellees' office in Springdale and asked that they show him the land. L. S. Phillips, J. W. Phillips and Bob Gosnell were the members of the partnership. The prospective purchaser said that he would like to see the 24-acre tract of land and Bob Gosnell took him out, showed him the land and introduced him to J. P. Dean and his wife. He said he wanted his wife to see the land also and so he came back at a later date to the office, and Bob Gosnell took him and his wife out to inspect the property. He became interested to the extent that he listed his property with appellees for sale and told them if they could sell his place for $5,500 he would buy appellant's land at the price specified in the contract. Wallace Johnson was not able to buy appellant's land unless he sold his own. Appellant was visiting at the home of her son-in-law and daughter at the time Bob Gosnell introduced Wallace Johnson and his wife to J. P. Dean and his wife, but she was not present at that particular time. Thus the matter stood until J. P. Dean came to the office of appellees and directed them to reduce the price in the contract from $4,500 to $4,250 and then came back later and told them to change the price in the contract to $4,000 and also to insert in the contract the limitation of five months instead of three months, all of which they did.

L. S. Phillips, a member of the partnership, testified that his firm had all their dealings with J. P. Dean and his wife; that after the lapse of the ninety-day period of the contract J. P. Dean told him to make no further effort to sell the land, but on December 8, J. P. Dean came in and told them to go ahead and sell same, but that before doing so, to write appellant, Mrs. Green; that pursuant to this request they wrote to appellant, Mrs. Green, asking and advising her to give them the exclusive sale thereof, but that if she did not want to do that they would handle it any way she wanted them to handle it. It seems that she did not answer this letter by mail, but the witness

produced the following note from her which was left on their desk and which she admitted having written:

"Mr. Phillips, I called to see you, but found nobody home. That price of 4,000 that J. P. gave you was only until January 1st, and now it has gone back to 4,250, but if you get a buyer don't let him get away. After Sunday there will be someone living in the house. I am still at J. P.'s Lincoln, Route 2.

"Sincerely,
"Mrs. Sarah Green."

The witness admitted that during the ninety-day period specified in the contract for the exclusive sale of the property his firm did not present to appellant and did not present to J. P. Dean a purchaser who was ready, able and willing to purchase the land at either of the prices mentioned in the contract, but that the only purchaser they had for it was Wallace Johnson who had agreed to buy it in case he, Johnson, could sell his own place.

Nothing further occurred until Wallace Johnson negotiated a sale of his own property in the early part of February, 1941. Wallace Johnson then called at the home of J. P. Dean and he was absent. A day or so after he called, J. P. Dean contacted Wallace Johnson and Wallace Johnson offered him $3,800 for the property. J. P. Dean immediately called up the Greens in Oklahoma and told them of the offer without stating who had made it. Appellant's husband, Dr. Green, was doing the talking over the telephone with J. P. Dean, but appellant herself was standing by her husband and Dr. Green told J. P. Dean not to let the purchaser get away, but to close the deal with him. Mrs. Dean then wrote her mother about the matter and the deed was forwarded to Mrs. Green to execute to Wallace Johnson. She executed and returned the deed to the Deans and upon the delivery of the deed to him Wallace Johnson paid Mrs. Dean $3,800.

Wallace Johnson testified that he bought the land through J. P. Dean after Dean told him that he had taken the sale of the land out of the hands of appellees and that

it had not been listed for sale with any other agency; that he would not have known anything about the land being for sale had it not been for the advertisement inserted in the Fayetteville Daily by appellees; that appellees interested him in the purchase of the land by taking him and his wife out to see the land; that appellees introduced him to J. P. Dean and his wife; that he offered J. P. Dean $3,800 for the land without making any further inspection of same; that J. P. Dean told him he would not close the deal at that price until he telephoned parties in Oklahoma; that either that day or the day after he told him that Mrs. Green was willing to take $3,800 for the property and that he bought it from appellant through the Deans for that sum and early in February, 1941, received a deed to the land and paid the consideration to Mrs. Dean.

We think a fair interpretation of the entire testimony is that appellant authorized the Deans to negotiate a sale of the 24-acre tract of land through appellees as her agents and that J. P. Dean had authority to make such changes as were made in the contract from time to time. He certainly had authority to reduce the price in the contract to $4,000 because appellant herself stated in the note she left on the desk of appellees that the price of $4,000 that J. P. Dean gave them was only until January 1, 1941, and that now she wanted $4,250 for it, but if they got a buyer not to let him get away. In this note there was a recognition of the fact that the land was listed with them at $4,000 up to January 1, 1941, and after that they must sell it for $4,250. This necessarily meant after January 1, they must price it at $4,250, but not to let a buyer get away. Appellant knew that appellees had advertised her land for sale and had interested Wallace Johnson in it by showing Wallace Johnson and his wife the place and by introducing him to her son-in-law and daughter. She was visiting them at the time the place was shown to Wallace Johnson. In a little over a month after January 1, she reduced the price through the Deans to $3,800 and sold this property to the prospective purchaser who had been interested in the place by appellees and with whom they had a conditional offer for the place if said pur-

chaser could sell his own place. We have concluded that under all the circumstances and facts in the record appellees were the procuring cause of this sale. The party to whom she sold the land was the same party who had been interested in the land by appellees and the same party to whom appellees had shown the property and the same party to whom appellees had introduced the Deans.

There is, therefore, substantial evidence in the record to support the verdict of the court on the theory that after the property had been listed with appellees the ultimate sale thereof was brought about or procured by one of the advertisements appellees published in the newspaper and by showing the property to Wallace Johnson and introducing him to the Deans. In the language of Wallace Johnson, he would have never bought the property or even known anything about it unless he had seen their advertisement and been interested in same by their exertions. This court said in the case of *Scott* v. *Patterson & Parker,* 53 Ark. 49, 13 S. W. 419, that: "As there is conflict in the testimony as to material facts, we cannot disturb the findings of facts by the court sitting as a jury. We cannot say they are without evidence to support them."

In the *Scott* v. *Patterson & Parker* case, *supra,* this court declared the law applicable to this class of cases by quoting as follows from the case of *Tyler* v. *Parr,* 52 Mo. 249: "The law is well settled that in a suit by a real estate agent for the amount of his commissions it is immaterial that the owner sold the property and concluded the bargain. If after the property is placed in the agent's hands, the sale is brought about or procured by his advertisements and exertions, he will be entitled to his commissions. Or if the agent introduces the purchaser or discloses his name to the owner, and through such introduction or disclosure, negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner."

No error appearing, the judgment is affirmed.

Opinion delivered June 29, 1942.

[redacted]

Joseph Brooks, for appellant.

William S. Mitchell, Jr., and *Moore, Burrow & Chowning,* for appellee.

SMITH, J. From 1923 through 1937, with the exception of 1926, the Pulaski county quorum court, at the

direction of the Little Rock city council, annually levied, in addition to the 5 mills for the city general fund, a tax of 5/8ths of a mill for the use and benefit of the firemen's pension and relief fund of that city.

The general taxes on the lots in the city of Little Rock here in litigation were not paid for the year 1932, and the lots were sold to the state for the nonpayment of the taxes. The lots were not redeemed, and after the expiration of the time for redemption the sale was duly certified to the State Land Commissioner, and under authority of Act 119 of the Acts of 1935, p. 318, a decree was rendered confirming this sale on April 28, 1938.

On January 1, 1940, the delinquent taxes on the lots, including those for which the lots were sold and those which would have subsequently accrued, totaled $204.18. On January 4, 1940, appellant applied to the State Land Commissioner to purchase the lots under the provisions of Act 282 of the Acts of 1939. An appraisal of the value of the lots was made, as provided by this act, and the lots were conveyed, on January 4, 1940, to appellant by the State Land Commissioner for $33.22, the appraised value.

Appellant took immediate possession of the lots and made improvements thereon of the value of $62.

Walthour & Flake acquired the record title of the original owner of the lots, and on June 25, 1941, filed this suit, praying the cancellation of the deed from the state to appellant, and from a decree awarding that relief is this appeal.

The decree required Walthour & Flake to pay appellant, Schuman, the amount Schuman had paid the state for his deed and the value of the improvements. A tender of these amounts was made when the suit was filed.

It was held in the case of *Adamson* v. *City of Little Rock,* 199 Ark. 435, 134 S. W. 2d 558, that no authority existed for the levy of the pension tax in addition to the 5 mills for city purposes, and in the case of *Sherrill* v. *Faulkner,* 200 Ark. 1006, 142 S. W. 2d 229, it was held that a sale for taxes, including an excessive tax, was void,

because the property was sold for taxes not due and which could not be imposed. The case last cited quotes from the case of *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251, as follows: "In *Fuller* v. *Wilkinson,* . . ., it was held, to quote a syllabus: 'Where the three-mill road tax had not been voted by the electors at the preceding general election, there was no authority for extending the tax against the lands, and a sale of the land for taxes including such road tax is, for lack of power to sell, void and is not cured by a decree of confirmation.' See, also, *Adamson* v. *City of Little Rock,* 199 Ark. 435, 134 S. W. 2d 558." That holding was reaffirmed in the case of *Smart* v. *Alexander,* 201 Ark. 211, 144 S. W. 2d 25.

Those cases apply and govern here, and authorize the original owner to attack the confirmation decree where there was lacking power to sell.

It is argued, however, that this right to attack a decree which had confirmed a tax sale where the power to sell did not exist is barred by Act 423 of the Acts of 1941, p. 1227. This is an act entitled, "An Act to Amend § 8719 of Pope's Digest of the Statutes of Arkansas, as Amended by § 2 of Act 318 of the Acts of 1939; and for Other Purposes."

Section 8719, Pope's Digest, is taken from § 9 of Act 119 of the Acts of 1935. This § 9 of Act 119 of 1935 was quoted in full in the case of *Fuller* v. *Wilkinson, supra,* where it was contended that this section should be construed as enacting a statute of limitations requiring confirmation decrees rendered under Act 119 to be attacked within one year after the date of their rendition, and not later. In overruling that contention it was there said: "Does this act allow any period of time, reasonable or otherwise, within which all affected landowners may show cause why the decree should not become final and impervious to attack? The act provides that 'the title to said property shall be considered as confirmed and complete in the state forever,' that is, at the time of and upon the date of the rendition of the confirmation decree. It appears to be the purpose and effect of the act to give finality and conclusive effect to the decree of confirma-

tion, not one year after the date of its rendition, but upon its rendition. It is true that certain owners, who can make the showing that they had no knowledge of the pendency of this suit and who have a meritorious defense to the complaint upon which the decree was rendered, are allowed one year for that purpose, but only such persons are allowed that time. All others are concluded from the date of the rendition of the decree, and as to them the decree is as final upon the date of its rendition as it ever becomes."

But Act 423 of the Acts of 1941 is a statute of limitations. It provides that "The owners of any real property embraced in said decree (rendered under the authority of Act 119) may, however, by appropriate pleading filed within one year from and after its rendition, attack the said decree in so far as it relates to their property, either in the same cause in the said chancery court or in a separate cause in the same or any other court of competent jurisdiction, upon any ground which would have constituted a meritorious defense to the complaint upon which the said decree was rendered; and any such attack, made within the said one-year period as aforesaid, shall be taken to be direct attack as of the same term when the said decree was rendered. All attacks upon the said decree made after the said one-year period shall be taken to be collateral attacks and shall be wholly ineffectual. Provided nothing in this act shall prevent any person attacking such decree at any time on the grounds that taxes have actually been paid."

Now, unlike § 9 of Act 119 of the Acts of 1935, Act 423 of the Acts of 1941 is a statute of limitations, but to what decrees does it apply? Appellant insists that it applies to all decrees rendered under the authority of Act 119, whether those decrees were rendered prior to the passage of Act 423 or subsequent to that date.

If Act 423 is so construed, the effect of that construction will be that the owner's right to redeem from a confirmation decree was barred when the act became effective. The act was approved March 31, 1941, without an emergency clause, and, therefore, became effective

ninety days after the adjournment of the session of the General Assembly at which it was passed.

Appellant insists, therefore, that a reasonable time was afforded the landowner in which to prevent the bar of the statute of limitations from falling. To sustain that contention the case of *Steele* v. *Gann,* 197 Ark. 480, 123 S. W. 2d 520, 120 A. L. R. 754, is cited. That opinion construed Act 135 of the Acts of 1935, p. 383, which was a statute of limitations on actions for malpractice against physicians and surgeons and certain others. The act provided that such action must be commenced within three years after the cause of action accrued, and that the time of the accrual of the cause of action shall be the date of the wrongful act complained of. There the cause of action sued on accrued more than three years before the passage of the act; but it was held that the act applied to the causes of action mentioned, as the act did not become effective until ninety days after the passage of the act, and that a reasonable time was, therefore, afforded within which the plaintiff could have prevented the falling of the bar of the statute of limitations against her cause of action.

Not so here, as Act 423 requires that any attack upon a confirmation decree shall be "filed within one year from and after its rendition," so that, if Act 423 is to be given a retroactive effect and made applicable to decrees rendered prior to its passage it would bar an attack upon any decree rendered a year or more prior to its passage, because, if the act applies to such decrees, the period of limitation which it prescribes began to run from the date of the rendition of the decree.

It is said at § 21 of the chapter "Limitation of Actions," 34 Amer. Jur., p. 29, that "An existing right of action cannot be taken away by legislation shortening the period of limitation to a time which had already run; it is not within the power of the legislature to cut off an existing remedy entirely, since this would amount to a denial of justice. Consequently, it is firmly established that when a new limitation is made to apply to existing rights or causes of action, a reasonable time

must be allowed before it takes effect in which such rights may be asserted or in which suit may be brought on such causes of action, and that a limitation statute is void if the period allowed is unreasonably short. On the other hand, statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the enforcement of the right before the bar takes effect. The limitation fixed for actions by statute may depend upon the happening of a subsequent event, provided that event cannot possibly happen until after the expiration of a reasonable time in which to bring actions on existing causes of action that would otherwise be barred." Cases were cited in the Steele case, *supra,* in harmony with this statement of the law.

It was contended by the plaintiff in the Steele case, *supra,* that the plaintiff had three years after the passage of the act there construed in which to bring her suit, and that the act was not retroactive and did not apply to causes of action which had originated before its passage. It was said, however, that the act was retroactive, and it was upheld as a statute of limitations, inasmuch as it afforded the plaintiff a reasonable time within which to act and prevent the bar of the statute of limitations from falling.

Here, Act 423 was not, in our opinion, intended to be retroactive. It was provided in § 9 of Act 119 of the Acts of 1935, now appearing as § 8719, Pope's Digest, that certain owners might, within one year, have the confirmation decree vacated by showing a meritorious defense against the confirmation, which language was construed as meaning that it was a meritorious defense to show that the tax sale was invalid for any reason. But, inasmuch as § 9 did not apply to all owners, but only to the special class of owners there designated, it was held in the case of *Fuller* v. *Wilkinson, supra,* that the one year allowed for this attack was not a statute of limitations, and if the tax sale were void through the lack of power to make it the confirmation decree might be attacked at any time. The tax sale confirmed in *Fuller* v. *Wilkinson, supra,* was held void because the land had been sold for a road tax which had not been voted as required by the

constitution. Here, the tax sale is void because it involved a tax for the firemen's pension which had been levied in violation of the constitutional provision limiting the total tax which might be levied for municipal purposes. In both cases the tax sale was void because there was lacking power to sell for taxes which were not due and were included in the total tax for which the land was sold.

One purpose, if not the primary purpose, of Act 423 was to change the rule announced in *Fuller* v. *Wilkinson,* so as to limit the time within which confirmation decrees might be attacked for any purpose, save only upon the ground that the taxes for which the land had been sold had been paid. Act 423 does not profess to be retroactive, and there is, of course, a strong presumption against that legislative intent.

We hold, therefore, that Act 423 was not intended to and does not apply to confirmation decrees rendered prior to its passage, but only to those subsequently rendered.

The presumption against a legislative intent to make Act 423 retroactive is strengthened by the following language appearing in that act: "The owners of any real property embraced in the said decree may, however, by appropriate pleading filed within one year from and after its rendition, attack the said decree in so far as it relates to their property, . . ." It was contemplated in the passage of Act 423 that there would continue to be confirmations of future tax forfeiture, and the act imposed a limitation against attacks upon decrees subsequently rendered which did not exist before its passage. Act 423 provides that any attack upon a confirmation decree not made within one year after its rendition "shall be taken to be collateral attacks and shall be wholly ineffectual," but it does give a year within which to make a meritorious defense against the confirmation. Here, a year had expired after the rendition of the confirmation decree before Act 423 was passed, and a consideration of this fact adds strength to the view that it was intended that Act 423 should only apply to decrees of confirmation rendered subsequent to its passage.

It is insisted that appellees, as grantees of the original owner, are barred by laches from maintaining this suit. It appears, however, that appellees purchased from the original owner before appellant's deed was placed of record, and that they filed this suit promptly after being advised that appellant had purchased from the state. The decree from which is this appeal granting the right of redemption requires appellees to repay appellant the purchase price paid the state for the land and the value of the improvements which appellant made. When this has been done—and tender thereof has been made—appellant sustains no loss except that he does not acquire the property for the small amount paid the state, and the plea of laches cannot be sustained. *Sanders* v. *Flenniken,* 180 Ark. 303, 21 S. W. 2d 847.

It is also insisted that appellees are being allowed to redeem from a confirmation decree without paying the sum required for that purpose by § 6 of Act 119 of 1935, now appearing as § 8716, Pope's Digest. This section requires the owner who attacks a confirmation decree to "tender to the clerk of the court the amount of taxes, penalty and costs for which the land was forfeited to the state, plus the amount which would have accrued as taxes thereon had the land remained on the tax books at the valuation at which it was assessed immediately prior to the forfeiture; provided, that there shall be credited on the amount due, any taxes that may have been paid on the land after it was forfeited to the state." It is conceded that this amount is $204.18, and appellees are required to pay only $33.22. But appellant is in no position to complain. He did not pay the state $204.18; he paid only $33.22, and the decree requires this last-named amount to be paid him. Appellant, instead of paying $204.18, availed himself of the provisions of Act 282 of the Acts of 1939, by causing the land to be appraised and by purchasing it at its appraised value. However erroneous and inadequate this appraisement may have been, the state elected to sell, and did sell, the land for that amount. The state now asserts no title to or interest in the land by virtue of the sale for the delinquent taxes and the confirmation of that sale. Appellant is not entitled to the

difference between the amount required to redeem under § 6 of Act 119 of 1935 and the purchase price paid to the state, because he has not paid the difference. He is only entitled to be reimbursed what he paid for the land and his improvements, and the decree appealed from requires that sum to be paid to him to effect a redemption.

It is finally insisted that appellees are barred by appellant's plea of *res adjudicata*. The basis of this contention is that the decree of confirmation is conclusive of the validity of the tax sale, inasmuch as any objection to its validity could and should have been made before the rendition of the decree confirming the sale. In support of that contention appellant cites *Meyer* v. *Eichenbaum,* 202 Ark. 438, 150 S. W. 2d 958, and other similar cases holding that the judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and their privies, and constitutes a bar to a new action involving the same cause of action before the same or any other tribunal.

The case of *Fuller* v. *Wilkinson, supra,* and the later case following that decision are against that contention. Those cases are to the effect that confirmations of tax sales under Act 119 of 1935 are ineffective where the power to sell did not exist, and such decrees may be vacated upon the showing that the power to sell was lacking. *Angels* v. *Redman,* 198 Ark. 980, 132 S. W. 2d 170; *Berry* v. *Davidson,* 199 Ark. 276, 133 S. W. 2d 442; *Dansby* v. *Weeks,* 199 Ark. 497, 135 S. W. 2d 62; *Commercial National Bank* v. *Cole Bldg. Co.,* 200 Ark. 212, 138 S. W. 2d 794; *Sherrill* v. *Faulkner, supra; Moseley* v. *Moon,* 201 Ark. 164, 144 S. W. 2d 1089; *Redfern* v. *Dalton,* 201 Ark. 359, 144 S. W. 2d 713; *Beloate* v. *Taylor,* 202 Ark. 229, 150 S. W. 2d 730; *Faulkner* v. *Binns,* 202 Ark. 457, 151 S. W. 2d 101; *Ingram* v. *Blackmon,* 202 Ark. 769, 152 S. W. 2d 315.

The decree from which is this appeal, awarding the right of redemption upon the conditions herein stated, accords with this view, and it is, therefore, affirmed.

GILMORE *v.* GILMORE.

4-6814 164 S. W. 2d 446

Opinion delivered July 6, 1942.

Richard E. Robinson and *Buzbee, Harrison & Wright,* for appellant.

Owens, Ehrman & McHaney, for appellee.

GRIFFIN SMITH, C. J. Catherine M. Gilmore has appealed from an order overruling her motion to vacate a decree granting a divorce on the complaint of her husband, John Joseph Gilmore. It is contended the husband perpetrated a fraud on the court in alleging he was a resident of Arkansas. In procuring the decree June

26, 1941, appellee testified he had been a resident of Little Rock since September, 1940.[1]

Appellee is a member of the G. L. Tarlton contracting firm. His business was to inspect, make estimates, settle controversies, and sign contracts. The firm had a contract at Camp Robinson involving approximately eleven million dollars. It was one of three companies that successfully bid to build North American Aviation Aircraft Assembly Plant at Kansas City.

Stipulation is that appellee procured accommodations at Capitol Hill Apartments in Little Rock September 18, 1940, and continuously retained them until April 10, 1941, but not thereafter. In registering, appellee gave his address as 3615 Olive street, St. Louis. In May and June he was registered at the Phillips Hotel, Kansas City, where he also gave the Olive street address.

During March, April, May, June, and July, 1941, appellee carried an account with First National Bank of Chicago. He gave the management his St. Louis address, where cancelled checks were sent. For March, April, May, and June, 1941, appellee was listed as a resident member of Missouri Athletic Club, St. Louis.

After surrendering his Capitol Hill apartments, appellee had no regular place of abode in Arkansas, but usually went to Hotel Marion, where he registered as from 3615 Olive street, St. Louis.

Subsequent to April 10, 1941, and during the following summer, appellee spent a great deal of time in Washington. June 25—one day before the decree of divorce was obtained—appellee addressed a letter to his wife. The envelope bore the return address: "Missouri Athletic Club, Fourth and Washington streets, St. Louis, Mo." It was postmarked at Kansas City. All letters to his family bore the athletic club address and all communications by mail from members of his family were sent to St. Louis.

[1] Appellant and appellee were married in 1912, but had not lived together since 1936. It is asserted that "ample provision has been made for the children born of this marriage." It was also stated in the original complaint that adequate provision would be made for the defendant.

While in Arkansas appellee did not possess visible personal property. He did not carry a Little Rock bank account, did not assess for taxation purposes, and his federal income tax return was made to the St. Louis division.

Commencing August 18, 1941, appellee made his home at 516 Sherman avenue, Neosho, Mo. His personal address was changed from the athletic club. He estimated that between April 10, 1941, and June 26 of the same year, he was in Little Rock "between thirty and forty-five days." During that period he did not register at a hotel "very many times" because "a great many of those trips were daily trips." Appellee thinks he spent as many as twenty days in Little Rock after June 26. In the summer of 1941 he visited the Panama Canal Zone.[2]

In the face of this record appellee (in February of this year) testified that his home was still in Arkansas.

Affidavit for warning order was made May 22, 1941, with proof June 26 that publication had been in a North Little Rock newspaper. John L. Sullivan was attorney *ad litem.* Sullivan immediately notified the defendant that suit was pending. He informed her regarding time for an answer. In addition, attorneys representing appellee wrote appellant May 23, 1941. She was told that her husband was in Little Rock and contemplated divorce —in fact, that he was filing suit. There was this statement: "Where the defendant is a nonresident the law requires that an attorney *ad litem* be appointed, and pursuant to this provision of the statute the court has appointed Mr. Sam Wassell, who will notify you officially of the filing of the suit."[3]

Appellant says she did not receive any information from Wassell, but that Sullivan wrote her. His letter was dated May 22, one day before appellee's attorneys informed her that Wassell would notify her "officially" that suit had been filed.

. . .

[2] The decree directed payment of $250 per month alimony.

[3] The misinformation given Mrs. Gilmore—that Wassell would be appointed—was not intentional, as the record clearly discloses.

In *Dengler* v. *Dengler,* 196 Ark. 913, 120 S. W. 2d 340, it was held that on motion to vacate a divorce decree, mere allegation there was a meritorious defense, without proof, is insufficient. It was also said that ". . . decrees of divorce are not less stable than are those in other cases."

Dengler v. *Dengler* is distinguishable from the present appeal in that Mrs. Dangler was personally served. Both parties were residents of Arkansas.

The question in *Gaines* v. *Gaines,* 187 Ark. 935, 63 S. W. 2d 333, was whether a decree of divorce should be set aside because the attorney *ad litem* had not promptly notified the nonresident defendant that suit was pending. It was held there had been "substantial" compliance with the law"; hence, the court had jurisdiction.

. . .

In the instant case there was want of jurisdiction if appellee were not a *bona fide* resident of Arkansas. His own testimony shows he was not. He came to this state temporarily because a profitable contract required attention. He remained a resident member of the athletic club in St. Louis, and Olive street was his business address. Occupancy of rooms at Capitol Hill Apartments was an incident to his business. Residence in Arkansas was not his object.

. . .

Appellant's motion to vacate the decree was filed October 3, 1941, slightly more than three months after the decree was rendered. *Prima facie,* residence was established for the requisite period of ninety days. This justified the chancellor in rendering the decree. Proof in support of appellant's motion, however, shows that appellee misconstrued the statute; and in representing that he was a resident of Arkansas within the meaning of § 4386 of Pope's Digest, fraud was perpetrated on the court.

The decree is reversed, with directions to vacate the decree of June 26, 1941.

BRITTIAN, ADMINISTRATOR, *v.* MCKIM.

4-6822 164 S. W. 2d 435

Opinion delivered July 6, 1942.

Opie Rogers, for appellant.

W. F. Reeves, for appellee.

MEHAFFY, J. On December 5, 1940, Dr. A. J. Brittian filed suit in the Van Buren chancery court against Frank McKim and Mavis McKim, his wife, alleging that the appellees were indebted to him in the sum of $428.45, for which certain promissory notes had been given. A mortgage was properly executed and delivered to appellant to secure the payment of said notes. On October 30, 1940, Dr. A. J. Brittian brought suit in the Van Buren chancery court against the appellees, Vernon McKim and Edith McKim, his wife, for the sum of $1,263.01; alleged

that certain notes were given for this amount, and appellees, Vernon McKim and Edith McKim, executed and delivered to appellant their mortgage on certain real property to secure the payment of said indebtedness.

On January 6, 1941, S. L. Collums filed an intervention alleging that prior to the date suit was filed the appellee, Frank McKim, being indebted to him in the sum of $377, conveyed the lands mentioned in plaintiff's complaint to intervener by warranty deed, and that the sums credited on the indebtedness alleged to be due the plaintiff were not indorsed on the margin of the record of the mortgage within five years after the maturity of all the notes except the last one, and claimed a prior lien; that he was a third party and that all the notes except the last one were barred by the statute of limitations; that the notes given by McKim to appellant were usurious and void, and the said notes and mortgage should be canceled and the intervener decreed the first rights in said land.

Thereafter Dr. A. J. Brittian filed answer to the intervention and denied each and every allegation of the intervention.

Answer was filed in each of these suits pleading the statute of limitations and usury. There was also an intervention filed by Collums in the second suit and an answer filed denying each and every allegation in the intervention.

On April 8, 1941, in the case of A. J. Brittian v. Frank McKim and others, and also in the case of A. J. Brittian v. Vernon McKim and others, the death of Dr. A. J. Brittian was suggested and admitted, and the causes revived in the name of W. L. Brittian, administrator of the estate of A. J. Brittian. On July 7, 1941, the two cases were consolidated for trial by agreement.

W. E. Castleberry testified in substance that he was the agent of and working for Dr. W. L. Brittian in the administration of the affairs of Dr. A. J. Brittian; that he had the papers, etc., of Dr. A. J. Brittian, in case No. 610, and A. J. Brittian v. Vernon McKim and Edith McKim;

he exhibited the nine original notes and made them exhibits to his testimony; introduced the real estate mortgage executed by Vernon and Edith McKim; in case No. 611, Dr. A. J. Brittian v. Frank McKim, *et al.*, he identified and introduced six notes, and identified and exhibited the real estate mortgage; that no credits were put on the notes, but he made a statement on paper saying that the credits on the notes were as follows: "credit on note $78.30, 10/23, 1933, $25; credit note $70.30, 10/24, 1936, $20; credit on note $65.30, 11/12, 1937, $25; credit on note $70.30, 9/30, 1938, $50; credit on note $78.30, 10/29, 1940, $30." The notes were lost at the time the suit was filed, but were afterwards found. Witness got the credits from receipts given by Dr. Brittian to Frank McKim, and Frank McKim said that these were the only payments made; Frank McKim did not direct him to put the payments on the notes; put the credits on each note to protect the interest of Dr. Brittian; the notes were made out for correct amount with interest at 10 per cent.; never asked usury of anyone.

Frank McKim, one of the appellees, testified admitting that the five notes and mortgage introduced are the ones he executed; was indebted to the plaintiff at the time in the sum of $250; that Brittian wrote him a note to come down and they would fix the papers any way witness wanted them; that he wanted to make the notes for $50 and let each note draw its own interest, but Dr. Brittian would not agree to this; Dr. Brittian said he would figure the interest in the first of the notes and these notes would not draw any interest the first year if they were paid when they became due; the interest was figured in the notes and witness did not want it that way, but Dr. Brittian said, "you can or else," so witness agreed; at that time Dr. Brittian had a vendor's lien on the same land; witness took up the old notes and gave new ones; Brittian added the vendor's lien in the deed and put the mortgage on record; that he made notes for the land, but no deed was ever made; six notes were given and he says he thinks he paid $400; the notes are renewal notes made to Dr. Brittian in 1931; witness claims he charged more than 10 per cent., but he made no complaint

and tried to pay it; witness says he told Mr. Reeves he thought Dr. Brittian was charging him too much interest; this was while Dr. Brittian was bedfast; did not make any complaint until after Brittian was sick; has owed for the land 16 years and still owes for it; Dr. Brittian had a lawyer to make out the notes at Conway and witness knew nothing about what they contained when he signed; he did not discover at that time that there was any usury in them.

Vernon McKim testified in substance that Dr. Brittian had the notes for Frank McKim prepared and Frank had nothing to do with it; witness was indebted to Brittian at the time in the sum of $450; he took the notes back and fixed them up before his uncle sent them back; wanted the notes to pay $50 a year and pay the interest on the notes as they came due; but Brittian did not want to make it that way; witness made two payments; the first time he gave a bale of cotton and later gave $40; does not remember what cotton was selling for, or what year it was; witness gave the note sued on in place of other notes; there are six notes for $100 each, one for $102; seems to witness they were made for a sum more than 10 per cent.; has not paid taxes for a good while; guesses he paid the tax up to 1937; Dr. Brittian paid up the tax on them.

S. M. Collums testified in substance about filing his intervention, and that he took a deed of trust on this land November 7, 1940; Frank McKim gave him a warranty deed and he had the deed recorded; when he took the deed he examined the mortgage in the clerk's office; in case No. 610 he took a mortgage from Vernon McKim for $180 and it is recorded; no suit was pending at the time he took the mortgage.

Farish Fraser testified about the mortgage being on record from Vernon McKim and wife to A. J. Brittian, and that there had been no credits on the margin of the mortgage record prior to October 28, 1940, and there are none now; at page 545 witness finds a real estate mortgage from Frank McKim and wife to Brittian and there had been no credits on the margin of the record.

The mortgages from Vernon McKim and wife to Collums and Frank McKim and wife to Collums had been recorded.

The court found in favor of the defendants in each case and ordered that the mortgages be canceled, and that the plaintiff pay all costs. The case is here on appeal.

The appellees say that this case presents two defenses on the part of the appellees; the statute of limitations and usury. There is practically no evidence as to usury, except that of the defendants, and they testify as to transactions and conversations with the deceased, which testimony is incompetent.

The constitution provides: "In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party." Section 2 of the schedule of the Constitution of the State of Arkansas.

This court said in the case of *Lasker-Morris Bank & Trust Co.* v. *Gans,* 132 Ark. 402, 200 S. W. 1029: "But we try chancery cases *de novo,* and it is our duty as well as that of the chancellor to disregard incompetent testimony."

When we have disregarded this incompetent testimony, we are of opinion that the finding of the chancellor was against the preponderance of the evidence; that there is practically no evidence tending to support the plea of usury.

In many cases where incompetent testimony is introduced without objections, such testimony might support a finding of the court. In the case of hearsay testimony, which is inadmissible, the court holds that where introduced without objection, it is sufficient to support a finding of the court or a verdict of the jury. But the case here is very different. There is no constitutional provi-

sion prohibiting the introduction of hearsay testimony, and in this case the constitution expressly provides that neither party shall be allowed to testify against the other as to any transactions with or statements of the testator. But as we have already said, we try chancery cases *de novo,* and it is our duty, as well as the duty of the chancellor, to disregard this incompetent testimony. And without this testimony, which was wholly incompetent, there is no evidence to support the plea of usury.

We think, from a calculation of the amounts and interest on the notes, that they show that there was no usury charge.

In § 13 of art. 19 of the constitution it is provided that all contracts for a greater rate of interest than ten per cent. per annum shall be void.

In the case of *Bauer* v. *Wade,* 170 Ark. 1020, 282 S. W. 359, it was said: "In construing this section of the constitution and the statutes passed pursuant to its directions, it had been held that a mutual agreement to give and receive unlawful interest is not necessary to constitute usury, but that there must have been an intention on the part of the lender to take or receive more than the legal rate of interest. *Garvin* v. *Linton,* 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; *Jones* v. *Phillippe,* 135 Ark. 578, 206 S. W. 40."

In the case of *Briggs* v. *Steele,* 91 Ark. 458, 121 S. W. 754, it is 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 and 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.

"The wrongful act of usury will never be imputed to the parties, and it will not be inferred when the op-

posite conclusion can be reasonably and fairly reached." See, also, *Scruggs* v. *Scottish Mortgage Co.*, 54 Ark. 566, 16 S. W. 563; *Garvin* v. *Linton*, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; *Leonhard* v. *Flood*, 68 Ark. 162, 56 S. W. 781; *First National Bank* v. *Waddell*, 74 Ark. 241, 85 S. W. 417, 4 Ann. Cas. 818; *Citizens' Bank* v. *Murphy*, 83 Ark. 31, 106 S. W. 697; *Eldred* v. *Hart*, 87 Ark. 534, 113 S. W. 213; *Briant* v. *Carl-Lee Bros.*, 158 Ark. 62, 249 S. W. 577.

In each of these cases there was one debt for the land, but there were several notes given. The rule is stated in 48 C. J. 663, as follows: "Where two or more debts are kept separate and distinct from each other, the law will apply partial payments to the satisfaction first of the interest, then of the principal of the debt first falling due, and, following that, first the interest, then the principal of each succeeding debt in order. But where there is in reality but one debt represented by different notes maturing at different times, the payment should first be applied to the interest due on the whole debt."

This court, in the case of *Rich* v. *Hankins*, 203 Ark. 1082, 160 S. W. 2d 44, after citing the rule in 48 C. J., and other cases, said: "In the light of the above authorities, we think that the payments, *supra*, were an acknowledgment of the entire indebtedness as a single debt and that the payments made should first have been credited to the interest on the entire indebtedness and not credited to any single note, and that the last payment, *supra*, March 21, 1936, of $15 kept the debt alive and the five-year statute of limitation is not a bar to appellant's cause of action."

It seems clear, therefore, that in neither case was the debt barred by the statute of limitations. Of course, Collums, the intervener, had no better or greater rights than the defendants, and if the debt was not barred as to them, he could not recover. The record shows that in 1926 these two appellees purchased a farm and home from Dr. A. J. Brittian. Frank McKim promised to pay $660 for his, and Vernon McKim promised to pay $602.93. In 1931, the notes were renewed and both parties admit that they still owe for the land, admit they are

in possession of the land, and they ask permission to keep the land, cancel the debt and mortgage on the plea of usury. One of the defendants testified that when they made the notes of which they now complain as being usurious, they took them to their uncle and executed them before him and then returned them to Dr. Brittian. This was in 1931, and not a word was said by either of them, so far as the record shows, about usury or any other defense until after suit to foreclose was brought and after Dr. Brittian was sick, and one of the defendants said "bedfast."

We are of opinion that in each case there was one debt, and that there was no usury in either, and that the debt was not barred by the statute of limitations.

The decree of the chancellor is reversed in each case, and the causes remanded with directions to enter decrees for the amounts claimed in each case by the appellant, and the lands ordered sold to satisfy the decrees.

[redacted]

JONES *v.* JONES.

4-6889 163 S. W. 2d 528

Opinion delivered July 6, 1942.

[redacted]

Osro Cobb, for appellant.

HUMPHREYS, J. On February 19, 1940, this court on appeal of the case of *Jones* v. *Jones,* 199 Ark. 1000, 139 S. W. 2d 238, awarded a divorce to John R. Jones, Jr., against his wife, Jewell Jones, under the provisions of paragraph 7 of § 4381 of Pope's Digest (three-year separation statute) and rendered a continuing decree of $150 per month against him in favor of his wife.

Subsequently John R. Jones filed a petition or a motion in said cause in the chancery court of Pulaski county to reduce the monthly allowance of $150 alimony and the trial court reduced the monthly allowance to $100 per month, from which decree Jewell Jones duly prosecuted an appeal to this court and, upon a trial *de novo,* this court reversed the decree reducing the amount to $100 and rendered a continuing decree for $150 per month alimony. This opinion was handed down by this court on December 16, 1940, under the style of *Jones* v. *Jones,* 201 Ark. 546, 145 S. W. 2d 748. Upon remand a decree was rendered in accordance with the mandate of this court.

On May 25, 1941, John R. Jones applied to the chancery court of Pulaski county in said cause for permission to pay the $150 per month alimony to Jewell Jones into the registry of the chancery court of Pulaski county and an order was made granting John R. Jones the relief prayed for.

Thereafter, John R. Jones removed to Florida and continued to pay a certain part of the alimony from time to time into the registry of the chancery court of Pulaski county, but fell behind in his payments until he owed a balance thereon of date June 11, 1942, of $1,175, whereupon this motion or petition was filed by appellant in said cause for $1,175 less $275 for which she had obtained a decree on August 21, 1941. In other words, she prayed that a decree be entered in her favor for the sum of $900. The chancery court heard the motion and made the finding that John R. Jones was in arrearage in alimony payments in the sum of $1,175 and found that all of the arrearage had accumulated while John R. Jones was a resident of the state of Florida and that no additional personal service had been had upon him in this

cause in the accumulation of such arrearage and for that reason refused to give a decree to appellant for the arrearage, from which decree Jewell Jones has appealed to this court.

John R. Jones instituted this suit for divorce and Jewell Jones, his wife, filed a cross-complaint for permanent alimony. John R. Jones, in the course of the litigation, finally obtained a divorce under the provisions of paragraph 7 of § 4381 of Pope's Digest on the ground that he and his wife had lived separate and apart for a period of three years and under the same statute Jewell Jones was awarded permanent alimony in the sum of $150 per month which was a continuing general decree against him unless there should be some subsequent modification of the order for alimony on account of a change in the condition of the parties. So far as the alimony was concerned the decree for same was not a final determination of the rights of the parties and has always been open to review should there be a change in the circumstances of the parties under the rule in the case of *Holmes* v. *Holmes,* 186 Ark. 251, 53 S. W. 2d 226, nor is a decree for future payments of permanent alimony a final decree upon which an execution might be issued or which might become a lien upon real estate. In order to collect on such a continuing general decree, it would be necessary to ascertain from time to time the amount of arrearages due in the payment of alimony and render a decree for the specific amount due. For these purposes the parties to the suit continue to be parties and, being parties already, it would not be necessary to get personal service upon them to carry out and enforce a continuing decree when an attempt is made to reduce the decree to a definite and certain amount, dependent upon whether there should be delinquencies in the payment of the monthly alimony allowed.

We think, therefore, the trial court was clearly in error in refusing to render a decree certain for the arrearage in payment of alimony on the ground that no additional personal service had been obtained against John R. Jones.

On account of the error indicated the decree refusing to enter a decree in favor of appellant for arrearages against appellee is reversed and a decree is ordered entered here for arrearage in the sum of $900 which is the accumulated arrearage subsequent to August 21, 1941, and to June 11, 1942.

LEVY, EX PARTE.

LEVY *v.* ALBRIGHT.

4-6894 163 S. W. 2d 529

Opinion delivered July 6, 1942.

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

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

SMITH, J. The question here presented for decision is whether a judge of this court has the jurisdiction and power to issue a search and seizure warrant. Section 3327, Pope's Digest, attempts to confer this power, so that the ultimate question for decision is whether this legislation, as related to judges of the Supreme Court, is valid and constitutional. This section, § 3327, reads as follows: "Search warrants. It is hereby made and declared to be the duty and required of the judges of the Supreme Court, the judges of the circuit courts and of the justices of the peace, on information given or on their own knowledge, or where they have reasonable ground to suspect, that they issue their warrant to some peace officer, directing in such warrant a search for such gaming tables or devices hereinbefore mentioned or referred to, and directing that, on finding any such, they shall be publicly burned by the officer executing the warrant."

It is said that the act has twice been held to be constitutional, first in the case of *Garland Novelty Co.* v. *State,* 71 Ark. 138, 71 S. W. 257, and later in the case of

Furth v. *State,* 72 Ark. 161, 78 S. W. 759. These cases did hold that the legislation is not void, but neither held that it is entirely valid.

In each of those cases a circuit judge had issued a seizure warrant, directing the sheriff of the county to whom it was issued to seize certain gambling instrumentalities. The jurisdiction of the circuit judge was not and could not be successfully questioned. A hearing was accorded in each of those cases to the owner of the seized property as to the nature and use of the instrumentalities seized, and the action of the circuit judge in holding that the paraphernalia were gambling devices was affirmed in each case on the appeal to this court.

The question was not involved in either of those cases whether a judge of the Supreme Court had the jurisdiction and power to issue such a warrant, and that question was, therefore, neither considered nor decided. It was decided in both of those cases that the act was constitutional in so far as it conferred upon circuit judges the power to issue these warrants.

An act may be unconstitutional in part and yet be valid as to the remainder. Many cases so hold, and the following quotation from Cooley's Constitutional Limitations appearing in the case of *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77, has been many times approved by this court: "'. . . Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the un-

constitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' Cooley's Constitutional Limitations, 6th ed., p. 210. This rule has been followed in innumerable cases in the various courts, and by this court in the following cases: *L. R. & Ft. Smith Rd. Co.* v. *Worthen,* 46 Ark. 312; *State* v. *Marsh,* 37 Ark. 356; *State* v. *Deschamp,* 53 Ark. 490, 14 S. W. 653; *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707; *Wells Fargo & Co., Express* v. *Crawford County,* 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371.

We think it obvious that the General Assembly would have enacted this law even though judges of the Supreme Court had not been included, as the General Assembly was imposing a duty upon courts engaged in enforcing the criminal laws of the state, and it is apparent that duty would have been imposed upon courts having jurisdiction to enforce the criminal laws, although that duty was also imposed upon a court which could not exercise that jurisdiction. *Conway County Bridge District* v. *Williams,* 189 Ark. 929, 75 S. W. 2d 814; *State* v. *Hurlock,* 185 Ark. 807, 49 S. W. 2d 611.

Article 7 of the Constitution of 1874 deals with the judicial department of the state, and § 4 of that article

reads as follows: "The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, *habeas corpus,* prohibition, mandamus and *quo warranto,* and other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the state, and shall severally have power to issue any of the aforesaid writs."

It was said in the case of Batesville & Brinkley Railroad Co., *Ex parte,* 39 Ark. 82, that the phrase "appellate jurisdiction," as used in this section of the Constitution means the review by a superior court of the final judgment, order, or decree of an inferior court.

This section of the Constitution confers upon the Supreme Court a general superintending control over all inferior courts of law and equity, and in aid of this appellate and supervisory jurisdiction power is given to issue the writs there named; but the power to issue these writs is in aid of the appellate and supervisory jurisdiction of the court.

The last sentence of this section provides that the judges of the Supreme Court shall be conservators of the peace throughout the state, and shall severally have power to issue any of the aforesaid writs.

Now, one judge, as well as all the judges, may issue the writs above named, but whether issued by a judge acting severally or by all the judges acting collectively, they may only be issued in aid of the court's appellate and supervisory jurisdiction. These writs have meanings well known to the profession, and their respective functions have been defined in innumerable cases.

Certain it is that they have no relation to search and seizure warrants, and if any power has been conferred upon a judge of the Supreme Court to issue a search and

seizure warrant, that power must be found in some other provision of the Constitution.

Now, this section quoted above does make the judges of the Supreme Court conservators of the peace throughout the state. But who and what is a conservator of the peace? Many definitions of the term, "conservator of the peace," are to be found under that title in Words and Phrases, and the one most frequently given is that term, "conservator of the peace," is synonymous with the term, "peace officer." The origin of this office and the functions of that official are there defined as follows: " 'Conservator of the peace' was the name of a common-law officer, which, prior to St. 1 Ed. iii, c. 16, authorizing the appointment of justices of the peace, were elected by the people. They were common-law officers, and their duties as such were to prevent and arrest for breaches of the peace in their presence, but not to arraign and try the offender. *Smith* v. *Abbott,* 17 N. J. L. (2 Har.) 358, In re *Barker,* 56 Vt. 14." Vol. 8, Words and Phrases (Permanent Edition), p. 645.

Judges of the Supreme Court are not the only conservators of the peace or peace officers. Sheriffs, constables and policemen are also conservators of the peace or peace officers. These latter have powers which are local, while those of a judge of the Supreme Court in this respect are state-wide.

There appears but little, if any, basis for the contention that a peace officer may issue search and seizure warrants. There is no authority in the law for a peace officer to issue such a warrant, the issuance of which involves a judicial function. Section 15 of art. 2 of the Constitution definitely settles that question. It reads as follows: "The right of the people of this state to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

It was held in *Bryan* v. *State,* 99 Ark. 163, 137 S. W. 561, Ann. Cas. 1913A, 908, that a search warrant was a

judicial writ, and that resistance to it constituted a contempt of the court which issued it.

Only judicial officers may issue search and seizure warrants, and these officials may do so only upon the conditions and under the circumstances stated in the provision of the Constitution above quoted. Certainly, a mere peace officer has no such power.

At § 155 of Cornelius on Search and Seizure, 2d ed., p. 357, it is said: "A clerk of a court has no jurisdiction to issue a search warrant, neither has a prohibition agent, and since the issuance of a search warrant is a judicial act, it naturally follows that no other ministerial officer has jurisdiction to issue such a warrant, . . ."

Now, as has been said, § 3327, Pope's Digest, does attempt to confer the power to issue these warrants upon the judges of the Supreme Court. And if that power is exercised by a judge of the Supreme Court, he acts in his official judicial capacity, because he is discharging a duty imposed by the act upon the judges of the Supreme Court, and in doing so he exercises no appellate or supervisory jurisdiction, and issues no writ in aid of that jurisdiction. The issuance of such a writ is an act of original jurisdiction, a jurisdiction which has not been conferred by the Constitution upon this court, but which has been expressly denied by that instrument, as will be more fully shown.

The issuance of this writ and the seizure of the property described in it is not the end of the proceeding. It is rather the means by which the proceeding is begun. The writ is issued upon an *ex parte* affidavit, and is not made conclusive of the character of the property to be seized. The act does not undertake to make it so. If it did, it would be unconstitutional for that reason as violative of § 21, art. 2, of the constitution, which article is frequently referred to as the "Bill of Rights."

Justice Riddick defines the proper practice under this act in the Garland Novelty Company, case, *supra*. He there said: "The object of the warrant was not to empower the officer to search, but to empower him to

seize the slot machine (the gambling device there in question), and to summon the owners thereof to appear and show cause why it should not be condemned and destroyed."

The learned justice in the same opinion said: "The statute does not authorize the seizure and destruction of tables or other useful furniture simply because they may be found in a gambling house, or because they may be used in playing cards or other games upon which money is bet, but it permits the destruction of those tables and devices only that are made and kept solely for the purpose of carrying on a business which the law forbids."

The owner of the device seized has the right, therefore, to be heard upon the question whether the property seized is a gambling device. The property here involved was seized at the owner's place of business in the city of North Little Rock, and he insists that this property, called a ticker telegraph machine, is not a gambling device. There is, therefore, here, and might be in any case, a question of fact as to whether the property seized was a gambling device. The determination of that question of fact involves the exercise of an act of original jurisdiction which judges of the Supreme Court do not possess. Had the warrant in question here been issued by any one of the circuit judges presiding in Pulaski county, or by any one of the many justices of the peace holding office in that county, these officers, or any of them issuing the writ, could determine this question of fact by exercising the original jurisdiction given them by the constitution.

In the very early history of this state, and in the first volume of the decisions of this court, at page 279, in the case styled *The State* v. *Chester Ashley, et al.,* the court had occasion to consider distribution of the judicial power among the courts of the state. The litigants were among the most prominent citizens of the state, and the litigation involved the control of the principal branch of the Real Estate Bank of this state, a question of wide public interest and then regarded as of paramount importance, and the opinion reflects a decision upon greatest consideration.

Our first constitution, that of 1836, was then in force, and art. VI thereof related to the "Judicial Department." Sections 2 and 4 of art. VII of our present constitution were taken from § 2 of art. VI of the Constitution of 1836, § 2 of which defined the jurisdiction of the Supreme Court in language substantially identical with § 4 of our present constitution, except that in enumerating the writs which the Supreme Court may issue in aid of its appellate and supervisory jurisdiction the present constitution names prohibition as a writ which may be issued which was not named in the Constitution of 1836, but this was, of course, a remedial writ which the 1836 constitution authorized. So, therefore, the jurisdiction of the Supreme Court under our present constitution is identical with that of the Constitution of 1836. It follows, therefore, that what was said of the jurisdiction of our courts in the Ashley case, *supra,* is as applicable to our present constitution as it would have been had our present constitution then been in effect. Both constitutions conferred the power upon the Supreme Court to issue "other remedial writs," and in defining that power the Supreme Court in the Ashley case, *supra,* said:

"We will now examine what jurisdiction or power this court can derive from the term, 'other remedial writs,' as used in the constitution. The terms here used are general, and their application is left indefinite. Did the convention intend thereby to authorize this court to issue every writ of a remedial nature known to the law, and to hear and determine the same? If they did, their declaration that this court 'shall have appellate jurisdiction only, except in cases otherwise directed by the constitution,' as well as their special grants of powers, to issue certain enumerated writs, each of which is of a remedial nature, is wholly unmeaning, if not positively absurd; and besides that, it would produce a direct conflict of authority between the several judicial tribunals, and involve them in the utmost confusion. It would destroy every vestige of harmony in the whole system, and virtually repeal every other grant of judicial power made by the constitution. It would draw to this forum original jurisdiction co-extensive with the state, of every

civil controversy; for it must be observed, that in respect to the sum or amount involved, there is no restriction whatever imposed by the constitution, in any case in which this court can exercise original jurisdiction; therefore, if it can, under any authority derived from this general grant, take original jurisdiction in any case, it may of all cases falling within the same general class. These consequences are clearly not within the object and intention of the convention, but in opposition to both. And it is a rule founded upon the dictates of common sense, admitted by all jurists, that in construing a constitution or fundamental law of government, no construction of a given power is to be allowed, which plainly defeats or impairs the avowed objects."

The able discussion, of which we have copied only a part, concludes with this statement of the law: "It therefore results from the view taken of this subject by the court, that the Supreme Court cannot, under any power conferred upon it by the constitution, exercise original jurisdiction in any case where the proceeding is, or must necessarily be of a criminal nature; its original jurisdiction being expressly limited and restrained by the constitution, to such matters of a civil nature as may be properly brought before the court, by some one of the writs expressly enumerated in the constitution; and the proceeding by information, in the nature of a *quo warranto,* being properly a criminal proceeding, this court cannot entertain original jurisdiction of it. And for this reason, the motion in this case must be denied and the rule refused."

In this connection, it may be called to mind that § 11 of art. VII of our constitution provides that "The circuit court shall have jurisdiction in all civil and criminal cases the exclusive jurisdiction of which may not be vested in some other court provided for by this constitution."

The distribution of jurisdiction among the courts of the state, and especially the jurisdiction of the Supreme Court, was again considered in the case of *Isaac N. Jones, ex parte,* 2 Ark. 93, where the Ashley case was quoted

from more extensively than we have done here. The court again considered the meaning of the constitution in conferring jurisdiction to issue "other remedial writs," and the limitations upon that power. After quoting article 4 (6), § 2, it was there said: "The obligation to exercise a jurisdiction that is conferred, and to refrain from exercising it where it is denied, is of equal obligatory force. By an analysis of the powers conferred upon the Supreme Court, as prescribed by the constitution, it will be readily perceived that all its constitutional jurisdiction, as derivative from the grant of its creation, and nearly all of its powers, are strictly of an appellate character. The constitution first designed to make it what in truth it is—a court of error and of appeals, whose practice might be regulated and prescribed by legislative enactments; but whose constitutional existence, organization, and jurisdiction, could in no essential point or manner be changed or altered by the legislature. This proposition seems to our minds to be clearly deducible, not only from the particular clause of the constitution we are now considering, but from the general frame and nature of the government itself, as organized and established by the convention. Then, it clearly follows, from these plain and obvious principles, that the Supreme Court possesses no constitutional power and authority to issue any other writs than those expressly enumerated and embraced in the constitution, or such as are necessarily implied and contained in that enumeration."

Among other cases consonant with the Ashley and Jones cases, *supra,* are the following: *Byrd* v. *Brown,* 5 Ark. 709; *Allis Ex Parte,* 12 Ark. 101; *Marr Ex Parte,* 12 Ark. 84; *Carr* v. *State,* 93 Ark. 585, 122 S. W. 631; *Fort Smith Light & Traction Co.* v. *Bourland,* 160 Ark. 1, 254 S. W. 481.

It is easily conceivable that in any case where the writ authorized by § 3327, Pope's Digest, had been served the question might arise whether the articles seized were gaming devices. Indeed, that question did arise in both the Garland Novelty Company and the Furth cases, and the finding of fact was made by the circuit judge issuing the writs that the articles seized were gaming devices.

The same question is raised here, and its decision involves the exercise of original jurisdiction, which any one of the circuit judges of Pulaski county, or any one of the justices of the peace who may issue such a writ, could determine. They have that original jurisdiction, but, in our opinion, this court does not have it.

It is, therefore, ordered that the writ of seizure heretofore issued be quashed.

GRIFFIN SMITH, C. J., and GREENHAW, J., dissent.

McHANEY, J., not participating.

GRIFFIN SMITH, C. J. (Dissenting). Section 3327 of Pope's Digest authorizes issuance of search warrants. If formal information is given a judge of the supreme court, a circuit judge, or a justice of the peace that a gambling house is being conducted, it is the "*duty,*" and it is "*required*" of such judge or justice that he direct a warrant to some peace officer commanding a search and seizure, and ordering that the unlawful devices be publicly burned by the officer executing the warrant.

Constitutionality of the statute was upheld in *Furth* v. *State,* 72 Ark. 161, 78 S. W. 759. In that case, upon affidavit before the judge of the Sixth judicial circuit stating that certain gambling devices were kept at 109 South Main street, Little Rock, the sheriff seized two tables.

It was contended (a) that the tables were not gambling paraphernalia, and (b) that incompetent evidence had been admitted at a hearing conducted in response to citation commanding the defendant to appear and show cause why the fruits of seizure should not be destroyed.

The second paragraph of the opinion is: "The appellant contends that the Act providing for this procedure is void, because §§ 1618 and 1619 of the statute are unconstitutional, because they are uncertain and ambiguous. We do not consider this objection sound." Section 1618 of Sandels & Hill's Digest was then copied in full, with the comment: "Though the meaning of this

section might have been made plainer by particularity in the use of language, it is easily understood by anyone who does not want to misunderstand." It was then said: "The objection that the Act in question does not provide for a jury is a serious one. But this is a proceeding *in rem* of a civil nature. It is a summary proceeding in the exercise of the police power of the state, under a statute passed to suppress the nuisance of gambling. Gambling was a nuisance at common law. It is only in cases where a jury could be demanded as a matter of right at common law that the refusal of a jury under our constitution is ground for reversal.

"The contention is made here *that the legislature has no right or power to enact this statute.* We understand that it is competent for the legislature to provide by statute for the suppression of nuisances by a summary proceeding, and to authorize the destruction of gambling devices the use of which constitutes a nuisance. The principle is settled in case of the *Garland Novelty Co.* v. *State,* 71 Ark. 138, 71 S. W. 257, which case counsel for appellant asked this court to reconsider and modify, so as to confine its ruling to the cases where not only the devices seized are nuisances *per se,* but where the facts are confessedly that such property is used for gambling purposes only, and cannot be used for any other. This we cannot do. This case stands on its own facts, and announces correct principles of law."

After copying the section of the statute in question, including, of course, that portion conferring upon judges of the supreme court the right to issue search warrants, *requiring* them to do so, and imposing it as a *duty,* attention was called to the contention that the legislature was without power *to enact this statute,* the court very emphatically held it was competent for the legislature to provide for the suppression of gambling, and by every intendment short of saying "this statute is constitutional," held it to be valid.

It is true that in the Furth case the warrant had been issued by a circuit judge. But, quoting again from the opinion, there is this declaration: "To maintain the constitutionality *of the statute under consideration,* the doc-

trine of what is known as the Fish Net Case, *Lawton* v. *Steele,* 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385, is justly invoked."

In the appeal involving the Garland Novelty Company Mr. Justice RIDDICK was very careful to say it was necessary for warrants to be supported by oath or affirmation showing probable cause for belief that the thing to be searched for was on the premises or in the building. While the statute by its terms conferred upon judges authority to issue warrants on belief, it was shown that the Act was passed before 1874, when the present constitution was adopted.

The exact question involved in petitioner's complaint has not heretofore been raised, but the Act as a whole (except as circumscribed by Mr. Justice RIDDICK) has been held valid.

Why, then, must society be controlled by judicial gossamer, the effect of which is to satisfy, pacify, and fortify commercial gambling?, although, of course, this radial consequence is not intended.

Informed citizens are not strangers to the interests of the lawless minority in Hot Springs, nor are they insensible to the practice of gamblers elsewhere who course the subways of crime.

Sharp practices, confidence games, robbery, theft—these and other kindred pursuits are propagated with unrelenting zeal by that galaxy of the "shifty" who subsist by what is mistakenly referred to as their wits, but which in fact is wantonness aggravated by acute decay. It would be futile—an endless task—to enumerate the efforts good people have continuously exerted to enforce laws enacted to suppress the practices engaged in by overlords of corruption.

Editors have inveighed against conduct of the recalcitrant who prostitute alike the mind of young and old. Ministers, by sermons, have begged for public support in their struggle against that character of degredation which attends either legal or illegal gambling. Lay-workers in churches, whose sincerity rises higher than lip-service and an occasional contribution from surplus

funds, have sought by example and entreaty to place human conduct upon a plane removed from dens where professional sportsmen ply their trade. There has always been willingness by the few to challenge procurers of protection who find immunity in public apathy. The lawless believe that technicalities and judicial "breaks" will wrap them in the folds of a constitution they have neither the capacity to understand nor the inclination to examine.

By a process of deduction which textwriters of law would perhaps term reasoning, the majority reaches the conclusion that an Act making it the duty of a supreme court judge to issue search warrants is unconstitutional because, says the opinion, art. 7, § 4 restricts the tribunal to appellate jurisdiction except in cases otherwise provided.

No one contends that the *supreme court* has issued any writ. It could not do so if the Act in question had so provided; because, in that event, a review involving rights of those from whom equipment was taken would be before the authority that sanctioned the warrant. It is different when a single judge has responded to mandatory provisions of § 3327 of Pope's Digest. This court should say that replevin would lie for the purpose of determining whether the things taken were, in fact, gambling paraphernalia.

It is somewhat anomalous for the court to say it may, as an original proposition, assume jurisdiction to determine a constitutional question involving the right of a judge to issue search warrants, but it may not designate procedure for review.

As the judge who issued the warrant now questioned, and others not in issue; as one who under express authority of a statute imposing such duty responded to affidavits regularly presented (in consequence of which nearly a score of gambling houses were raided in Hot Springs in 1937 and fifty thousand dollars' worth of equipment at Belvedere, Southern Club, and other notorious halls was appropriated, and destroyed after sufficient time had been allowed to permit operators to question the procedure) I concede that a *strict* construc-

tion such as the court has placed on the constitution would produce the results Henry Levy has been able to procure. But I contend that art. 7, § 4 should receive the *liberal* interpretation of which it is susceptible, thereby reserving to the authority designated by the general assembly the right to interfere when there is justification.

CLAPP *v.* SUN LIFE ASSURANCE COMPANY OF CANADA.

4-6817 163 S. W. 2d 537

Opinion delivered July 6, 1942.

Alonzo D. Camp, for appellant.

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

HOLT, J. In August, 1939, Malvin John Clapp was an employee of the Missouri Pacific Railroad Company, and at this time the railroad company was carrying with appellee, Sun Life Assurance Company of Canada, a

group insurance policy No. 1682-G covering its employees. Mr. Clapp applied for and was issued a certificate of insurance No. 18154 by appellee under this group policy on August 3, 1939. Harry Clapp, son of M. J. Clapp, was named beneficiary in the insurance certificate. At the time of acquiring the insurance, Mr. Clapp signed and delivered to the railroad company a deduction order, authorizing the railroad company to make monthly deductions from his pay check. This deduction was made on the last day of each month and was payable in advance on the first day of each month, the insurance being carried from month to month.

Mr. Clapp died November 30, 1940. Demand was made by appellant beneficiary for the amount of insurance under the insurance certificate. Appellee denied liability on the policy and refused to pay same on the ground that the insurance certificate in question lapsed on September 30, 1939, for nonpayment of premiums.

January 3, 1941, appellant filed suit on the policy in the Pulaski circuit court, alleging full compliance with all of its terms. Appellee answered with a general denial. By agreement, the cause was submitted to the court sitting as a jury, and there was a finding in favor of appellee insurance company. From a judgment on this finding comes this appeal.

The group insurance policy No. 1682-G contains, among others, the following provisions: "Cessation of Assurance:—Subject to the terms of the clause providing limited waiver of premium on disability, the assurance shall cease at the earliest following dates:—(a) thirty-one days after the employee leaves the service of the employer or (b) at the due date of the premium to which the employee has failed to make a required contribution or (c) at the date such employee otherwise ceases to be eligible under the group policy. Assurance of all employees shall cease immediately upon the lapse or discontinuance of the group policy."

From the effective date of the policy, August 3, 1939, until Malvin John Clapp died, November 30, 1940, he earned each month between those dates sufficient money to pay his monthly premiums which were due and payable in advance on the first day of each month.

September 28, 1939, Mr. Clapp by virtue of a reduction order ceased work for the railroad company, but was reinstated October 16, 1939, and again worked for the company. Subsequent to September 28, 1939, Mr. Clapp paid none of the monthly insurance premiums required under the insurance certificate issued to him by appellee. It is not denied that during the months that he worked for the railroad company, subsequent to September 28, 1939, the railroad company paid him the full amount of his monthly earnings without first having deducted the monthly insurance premiums.

It is the contention of appellee that appellant, as beneficiary, is not entitled to recover for the reason that the insured suffered the policy to lapse on September 30, 1939, by refusing to pay the premium due in advance, October 1, 1939, and all subsequent premiums, and that the insured, Clapp, refused to reinstate the policy after he had been duly notified of his delinquency.

Appellant, on the other hand, contends that no notice was ever given to Mr. Clapp, the insured, that his monthly insurance premiums were not being paid and that the railroad company had in its hands his deduction order, and sufficient funds at all times with which to pay his monthly premiums, and says in his brief "the real issue in this case turns upon a question of notice."

It must be borne in mind, at the outset, that the group insurance contract in this case is one between the railroad company and appellee insurance company. *Neely* v. *Sun Life Assurance Company of Canada,* 203 Ark. 902, 159 S. W. 2d 722, this court said: "The appellee and the railroad company were the only parties to the group policy, and the law seems to be well settled that the parties who make a contract may rescind the same by mutual agreement."

On the question of notice to the insured, Mr. A. S. Metcalf, chief clerk of the Missouri Pacific shops, testified: "Q. Do your records indicate when he (meaning Mr. Clapp) came back? A. Yes, sir, in the restoration of the force we had occasion to call Mr. Clapp back in line with seniority and he went back to work October 16, 1939.

Q. Do your records reflect, or do you have any information as to why the premium reductions on Mr. Clapp's policy was discontinued? Do you have any record? A. I wouldn't have any records and couldn't say. Q. Was it called to your attention some time in 1939 or first part of 1940 that Mr. Clapp was not carrying his insurance? A. In January, 1940—in order that you may understand this—all employees covered under the group plan get a low rate and it is set up so that such and such a per cent., I think, 74 per cent. of the shop employees have to be covered to keep this in effect. And, naturally, in the office there, we are interested in keeping as many men insured as possible. We made periodical checks of copies of the pay roll and this man was found not to be covered and we called it to his attention and asked if he wanted the benefit of this protection, that was in January, 1940, and we didn't hear anything further from Mr. Clapp. Q. Did you inform the foreman that he was not carrying the insurance? A. I wrote the foreman that Mr. Clapp was not insured. Q. That was in January, 1940? A. Yes, sir. Q. Did you put out a second letter? A. In August, 1940, the same information. Q. After that second letter, did you personally have a conversation with Mr. Clapp? A. Yes, he came up to the office. . . .

"Q. Did you personally request Mr. Clapp to reinstate the insurance? A. Yes, sir. Q. What did he tell you? A. He told me, 'I don't know if I need insurance. I haven't got a wife and don't know whether I want it. I will let you know later.' . . . Q. Did he ever come back and let you know or make a request that the policy be reinstated? A. I heard nothing more from him. Q. Were you the man he would necessarily see? A. Yes, if he came to the office, I would be the man he would interview or talk to."

This witness further testified that if Mr. Clapp had permitted him to do so the insurance would have been reinstated and further: "If a man laid off on force reduction he would pay his premium in cash. If he wanted to keep it in effect he would come up and pay in cash. We would send it in for him or they could send it in direct." The testimony further reflects that Mr. Clapp did not

avail himself of this privilege on September 30, 1939. When he did return to work on October 16, 1939, he was at a new division point in Little Rock, Arkansas, and he then could have gone to the chief clerk and had his insurance reinstated, but he failed to do so.

From this testimony we think it clear that Mr. Clapp was properly notified that his insurance had lapsed and after receiving this notice declined to reinstate it.

Appellant argues that the conversation between Mr. Clapp and Mr. Metcalf, the agent of the railroad company, was incompetent. However, we think it was competent as a declaration against interest made to one not a party to or interested in the litigation.

Appellant also contends (quoting from his brief): "It is incumbent upon the insurance company itself to take some action before it may insist upon a forfeiture. The insurance company itself must notify the insured of the situation; it must, it seems, make demand upon the erstwhile insured and offer to the delinquent some reasonable method or plan by which his lapsed policy may be reinstated."

It is conceded here that whatever effort was made to give notice to the insured, Mr. Clapp, was given to him by the railroad company, and not directly by appellee. We think it can make no difference whether this notice was given to Mr. Clapp by the railroad company or the appellee. The fact remains that he was notified by his employer, to whom Clapp had given the deduction order, that he was delinquent and that his premiums were not being paid.

As above stated, the contract here is a group policy. The rule announced in *Metropolitan Life Insurance Co.* v. *Thompson,* 203 Ark. 1103, 160 S. W. 2d 852, applies here. There we said: "We, therefore, are of the opinion that it had the right to rely and act upon the report of Lion Oil as to whether any employee had ceased to be employed, and to cancel his certificate on the ground of non-employment, in the absence of collusion or fraud between it and Lion Oil. Nor was there any duty resting upon appellant to notify Thompson his certificate had

been canceled. Neither the group policy nor the certificate require it to do so."

We find no provision in the group policy or the certificate in the instant case requiring notice from appellee insurance company to the insured, Mr. Clapp.

In the instant case the railroad company was vitally interested in seeing that their employees maintained their insurance since, under the group policy, it was required to have 74 per cent. of its employees insured. The evidence shows that the railroad company endeavored to induce Mr. Clapp to reinstate his insurance and keep it in force, but this he refused to do and thus caused the policy in question to lapse.

It is also undenied in this case that subsequent to September 30, 1939, and beginning with October 16, 1939, until his death, all of Mr. Clapp's wages were paid to him regularly without any monthly pay roll deductions and certainly this was additional notice to him that his premiums were not being paid. In the recent case of *Millerick, Executrix,* v. *Benefit Association of Railway Employees,* 184 ms. op. April 27, 1942, p. 765, 160 S. W. 2d 852, we said: ". . . Mr. Millerick had the additional information that his premiums were not being paid from the fact that the monthly premium payments of $3.60 were not being deducted from his pay check on or after April, 1939, since he was drawing all the money due him. Certainly, therefore, he must have known that the railroad company was not paying his monthly premiums when all his wages were being paid to him."

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

DINWIDDIE *v.* METROPOLITAN LIFE INSURANCE COMPANY.

4-6819 163 S. W. 2d 525

Opinion delivered July 6, 1942.

[redacted]

Kirsh & Cathey, for appellant.

Westbrooke & Westbrooke, for appellee.

McHaney, J. On June 4, 1941, Leo Hairell shot and mortally wounded his wife, Lucille Hairell, and then shot and killed himself, she surviving him about two hours. He was an employee of Ely & Walker Dry Goods Company, Paragould, Arkansas, and as such his life was insured in the sum of $500 under a group life insurance policy issued by appellee to his employer and a certificate of such insurance issued to him in which his wife, Lucille, was named the beneficiary. Said certificate contained the following language: "In the event of the death of any beneficiary, prior to that of the employee, the interest of such beneficiary shall vest in the employee by whom he was designated. If there be no designated beneficiary at the time when any insurance hereunder shall be payable to the beneficiary, then such insurance shall be payable as follows:

"To the wife or husband, if living, of such employee; if not living, to the children of such employee who survive such employee, equally; if none survives, to either

the father or the mother of such employee, or to both equally; if none of the above survives such employee, to the estate of such employee."

The group policy contained this provision: "Upon receipt by the company of the notice and proof—in writing—of the death of any employee, while insured hereunder, and upon the surrender of the certificate and all certificate riders—if any—issued hereunder to such employee, the company shall pay, subject to the terms hereof, to the beneficiary of record, the amount of insurance, if any, in force on account of such employee at the date of his death, according to the schedule of benefits."

As above stated, Lucille Hairell, the named beneficiary, survived her husband about two hours. After her death an administrator was appointed for her estate, who surrendered said certificate and made proof of death of insured to appellee and it paid the amount of said insurance to said administrator, with knowledge at the time that appellant, the mother of Leo Hairell, was claiming same. There were no children surviving and Hairell's father had predeceased him. Appellant, the mother, requested of appellee forms on which to make proof of death which appellee refused, and she then brought this action to recover the $500 insurance, penalty and attorney's fee. To a complaint alleging said facts, a demurrer was interposed and sustained. Declining to plead further, she suffered a judgment of dismissal.

Counsel for appellant say: "The only issue in this case is whether appellant, mother of Leo Hairell, is entitled to the $500 insurance on his life as against the claim of the estate of his deceased wife, who survived the insured by less than two hours and who under the terms of the policy could not have enforced payment of the insurance as against appellee at any time during her life." In other words, because she was mortally wounded and did not live long enough to make proof of death and surrender the policy, her rights as beneficiary were lost.

If we understand the novel contention of appellant, it is based upon the following portion of the above quoted clause in the certificate: "If there be no desig-

nated beneficiary *at the time when any insurance hereunder shall be payable to the beneficiary,* then such insurance shall be payable as follows:" It being contended that there was no beneficiary at the time when the insurance became payable, as provided in the above quoted clause from the group policy, which provides that the company shall pay "upon receipt . . . of the notice and proof —in writing—of the death . . . and upon the surrender of the certificate," etc. But that clause concludes by providing it shall pay "to the beneficiary of record the amount," etc. Lucille Hairell was the beneficiary of record even though she was dead at the time the notice and proof were given and made. But, aside from that, the general rule is that, where the insured reserves the right to change the beneficiary in a policy of life insurance, the beneficiary has no vested interest therein during the life of the insured. *Sovereign Camp, W. O. W.,* v. *Israel,* 117 Ark. 121, 173 S. W. 855; *Watkins* v. *Home Life & Acc. Ins. Co.,* 137 Ark. 207, 208 S. W. 587, 5 A. L. R. 791. In the latter case, W. R. Fischer insured his life and named his son, J. E. Fischer as beneficiary. They were shot from ambush and both instantly killed. The policy provided that the insured might change the beneficiary at any time in the manner provided therein. It also provided: "If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured." In construing this provision the late Judge HART, for the court, said: "This provided for a substituted beneficiary in case of the death of the primary one. The beneficiary, therefore, had a qualified interest in the policy, and his death in the lifetime of the insured is therefore a condition which must exist before the right of any subsequent beneficiary can be asserted. J. E. Fischer was the beneficiary named in the policy, and under its terms his representative had a *prima facie* title to the fund. In this case, by the terms of the policy itself, the substituted beneficiary could only take in case the insured survived the beneficiary. . . . Until it is shown that the beneficiary died in the lifetime of the insured we think, according to the terms of the policy of insurance, the fund is payable to the representative of the beneficiary

because it is only in the event of the death of the named beneficiary in the lifetime of the insured that the heirs of insured can take."

Here the relevant clause is in substance the same. It provided: "In the event of the death of any beneficiary, prior to that of the employee, the interest of such beneficiary shall vest in the employee by whom he was designated." Now, it is undisputed that Lucille Hairell survived her husband and there was no change in or new designation of a beneficiary. She did not die in the lifetime of her husband, but continued to live, although mortally wounded, and immediately on his death her interest as beneficiary in the proceeds of the policy became vested. As said by Judge HART in the Watkins case, *supra,* "by the terms of the policy itself the substituted beneficiary could only take in case the insured survived the beneficiary," which he did not do.

Appellant cites and relies upon certain cases to support her theory that the policy was not payable until proof of loss is made and received by the company, such as *Metropolitan Life Ins. Co.* v. *Jones,* 192 Ark. 1106, 96 S. W. 2d 957, involving disability benefits, in which it was held, to quote a headnote, that: "Under a group policy providing that 'Upon receipt at the home office . . . of due proof that any employee . . . has become totally and permanently disabled, the company will pay equal monthly installments . . . The first monthly installment will be paid upon receipt of the proof of total and permanent disability,' proof of disability is not a condition precedent to the fixing of liability. but is only a prerequisite to the institution of an action to recover for the liability; and insured may, under such a policy, recover from date of disability, and not merely from date of receipt of proof by the company."

There, as here, liability attached on the happening of the eventuality insured against, but the liability was not enforcible until proof was made. As stated above, when Leo Hairell died, his wife's theretofore contingent interest as beneficiary in the policy became vested and liability attached in her favor, whether she survived him one minute, one hour, one day or one year and passed to her

administrator on her death, and the matter of making proof and surrendering the certificate were conditions subsequent, conditions inserted for the benefit of the appellee and which it might have waived, and which it did waive, as to appellant, by refusing to furnish forms for proof and by denying liability to her.

The trial court correctly sustained the demurrer and its judgment is accordingly affirmed.

IRBY *v.* BARRETT.

4-6886 163 S. W. 2d 512

Opinion delivered July 6, 1942.

Arthur Sneed, for appellant.

Buzbee, Harrison & Wright, for appellee.

SMITH, J. Appellant filed in the court below a petition for a writ of mandamus requiring Joe C. Barrett and Harvey G. Combs, chairman and secretary of the Democratic State Committee, respectively, to certify him as a candidate for the office of state senator from the 28th Senatorial District, of which district Clay county is a part. He alleged that he had been a resident of Clay county for many years; that he is 64 years of age and a qualified elector of that county, and had been all his life a Democrat, and that he is a member of the Democratic Party in Clay county, and that he had complied with all the laws of the state and all the rules of the Democratic Party to become a candidate for the nomination of his party as its candidate for the senate in the district of which Clay county is a part; but notwithstanding these facts the defendants had refused to certify his name as required by the rules of the Democratic Party.

An answer was filed, which did not deny any of these allegations, and averred that defendants had refused to certify petitioner's name because petitioner is legally ineligible to hold the office of state senator by virtue of art. 5, § 9, of the Constitution of 1874, which prohibits any person convicted of the embezzlement of public money or other infamous crime from serving as a member of the General Assembly or from holding any office of trust or profit in this state.

A demurrer was filed to this answer, which was overruled, and petitioner's cause of action was dismissed when he stood on his demurrer, and from that decree is this appeal.

Appellees justify their action by citing the cases of *State, ex rel. Attorney General,* v. *Irby,* 190 Ark. 786, 81 S. W. 2d 419; *Winton* v. *Irby,* 189 Ark. 906, 75 S. W. 2d 656, and *Irby* v. *Day,* 182 Ark. 595, 32 S. W. 2d 157.

The case first above cited was a *quo warranto* proceeding to oust petitioner from the office of county judge of Clay county to which he had been elected, and

it was there held that petitioner was ineligible to hold that office because of his conviction in the federal district court of the crime of embezzling postoffice funds, notwithstanding his unconditional and full pardon for that offense by the President of the United States.

It is urged that it would be a vain and useless proceeding to permit petitioner to be a candidate for an office which he could not fill, if he were elected to it.

We cannot anticipate what action the senate might take in the event petitioner were nominated and then elected senator from the district in which he resides. Section 11 of art. 5 of the Constitution provides that "Each house (of the General Assembly) shall appoint its own officers, and shall be sole judge of the qualifications, returns and elections of its own members."

The last of these Irby cases (190 Ark. 786, 81 S. W. 2d 419) was decided by a divided vote of 4 to 3. It is possible, and within the power of the senate, to adopt the view of the dissenting judges, rather than the opinion of the majority, in that case, in which event petitioner would be eligible to serve as a member of the senate.

It was the opinion of the majority in that case that one convicted, in a federal court, of embezzlement of money belonging to the United States, is ineligible to hold any office of trust or profit within this state notwithstanding the Presidential pardon, since the pardon restored merely his civil rights, as distinguished from his political privileges.

It was the opinion of the majority in that case that the disqualification of petitioner to hold office was no part of the punishment for the crime for which petitioner had been convicted and that, therefore, the pardon could not remove his disqualification for holding office.

It was also the opinion of the majority that it was immaterial that petitioner had not been convicted for a violation of a law of this state, and that a conviction in any jurisdiction barred petitioner from holding office as effectively as a conviction for a violation of the laws of this state would have done.

It was the opinion of the minority that all these holdings were contrary to the great weight of authority. It was said in the minority opinion that "It has been held, upon great consideration, that a conviction and sentence for felony in one of the states and the disabilities arising from the same would not come within the inhibition of statutory and constitutional provisions of another state and the disqualifications therein denounced. Greenleaf on Evidence, 15th ed., § 376."

It was the opinion also of the minority that the pardon removed, not only the guilt of the one pardoned, but likewise the legal infamy and all other consequences arising out of the conviction, and that it was futile to say that ineligibility to hold office was not a part of the punishment for crimes denounced by § 9 of art. 5 of the Constitution. The concession appears to have been made in the majority opinion that if ineligibility to hold office was a part of the punishment, this ineligibility was removed by the pardon.

The senate has the power to accept either the majority or the minority view, and its action is beyond the power of review by this court, as the senate is the sole judge of the qualification of its members.

But aside from these considerations, we are of the opinion that the chairman and secretary of the state committee acted without authority in refusing to certify petitioner as a candidate. Certainly no law of this state confers that power, and we are cited to no rule of the party conferring it. Certain it is that the chairman and secretary of the state committee are clothed with no judicial power. Their duties are purely ministerial, and in the matter under consideration are defined by § 58 of the Rules of the Party, which reads as follows: "Sec. 58. All candidates for United States senator, representative in Congress and all state and district offices shall file the prescribed pledge with the secretary of the state committee and all candidates for county and township offices shall file the prescribed pledge with the secretary of the county committee, not later than 12 o'clock noon on the 90th day before the preferential

primary election, and all candidates for municipal offices (including candidates for county and city committeemen) shall file their pledges with the secretary of the county committee and the city committee not later than 12 o'clock noon on the 30th day before the preferential primary election.

"The name of any candidate, who shall fail to sign and file said pledge within the time fixed shall not appear on the official ballot in said primary election.

"The chairman and secretary of the state committee shall certify to the various county committees not later than 30 days before the day of the election the names of all candidates who have complied with the rules herein prescribed, and the name of no other candidate for such office shall be printed on the ballots by the county committee."

It was held in the case of *Williamson* v. *Montgomery*, 185 Ark. 1129, 51 S. W. 2d 987, that no one could become a candidate for a party nomination for an office without complying with the rules of the party; but it was also held in that case that where the committee or officer conducting a primary election acted fraudulently or in such an arbitrary manner as to prevent a person who, in good faith, sought to comply with the rules, the courts would require the party officers to comply with the party rules. There is no intimation here that the chairman and secretary of the committee have acted fraudulently, but we think they have acted without authority conferred either by the laws of this state or the rules of the party.

Rule 58, above quoted, requires the chairman and secretary to certify the names of all candidates "who have complied with the rules herein prescribed." The fact stands undisputed that the petitioner has complied with these rules and, having done so, no duty rests upon, nor is there any power vested in, the chairman and secretary of the committee except to perform the ministerial duty of certifying the names of petitioner and all others who have complied with the party rules.

If it be said—and it is said—that the Supreme Court has decided that petitioner is ineligible to hold a public

office, it may be answered that this proceeding is not a contest for an office nor a proceeding to oust one from office. The only question here is whether petitioner has complied with the laws of the state and the party rules sufficiently to become a candidate for office; and the fact is undisputed that he has done so.

If the chairman and secretary of the committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the chairman and secretary of the committee? It may be that such power can be conferred upon them by laws of this state or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the state and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of the candidate omitted, he have a holding by the court that the name should not have been omitted.

We are cited to only two cases in point, and in view of the fact that this opinion must be rendered within a week after the submission of the cause, if the petitioner is to have redress which will require that he be certified as a candidate, the time has not been afforded for the investigation which otherwise would have been made.

But these two cases are exactly in point and are consonant with our view that the chairman and secretary of the state committee have only a ministerial duty to perform, and have no right to exclude the name of a candidate because, in their opinion, he is ineligible and could not hold the office, whether that ineligibility arose out of a conviction for a felony or any other cause which would render him ineligible.

The two cases to which we have referred are *Young* v. *Beckham,* 115 Ky. 246, 72 S. W. 1092, decided by the Court of Appeals of Kentucky, and the case of *Roussel* v. *Dormier,* 130 La. 367, 57 So. 1007, 39 L. R. A., N. S., 826.

In the first of these cases the facts are so similar and the reasoning so convincing that we quote somewhat extensively from it. The first sentence in the opinion in that case reads as follows: "PAYNTER, J. The purpose of this proceeding is to compel the Democratic Committee to place the name of the appellee, J. C. W. Beckham, on the ballot as a candidate for the office of governor before the Democratic primary election called for May 9, 1903. The question of his eligibility has been raised, and the committee refuses to place his name upon the ballot. The question to be determined from the pleading is whether the governing authority of the party has called a primary election, and, if so, (a) whether the statute authorizes the holding of primary elections to nominate candidates for state offices; (b) whether the committee can refuse to place his name upon the ballot because they think he is ineligible to re-election; (c) whether, by proceeding in mandamus, the committee may be compelled to place his name upon the ballot used at the primary as a candidate for governor."

The opinion does not state upon what ground the committee found Beckham to be ineligible. The facts upon which the committee found Beckham to be ineligible were not in dispute, as the opinion does not state them. Probably the Democratic State Committee had concluded that a man had aspired to the nomination of their party for the highest office in the state who could not serve if he were nominated and elected. The ground of a candi-

date's ineligibility would be immaterial. It would be unimportant whether he had been convicted of a felony or was ineligible for some other reason. If he were ineligible, he was ineligible regardless of the cause of the ineligibility.

The Kentucky court did not consider the correctness of the committee's finding that Beckham was ineligible to be a candidate. That question was pretermitted and not even referred to, the opinion being based solely upon the question of the power of the committee to exclude the name of a candidate. In holding that the committee did not have this power it was there said: "We are of the opinion that the committee had no right to raise the question of the appellee's eligibility to re-election to the office of governor. The governing authority of the party has no right to determine who is eligible under the laws of the land to hold offices. It can call primary elections and make proper rules for their government, but has no right to say who is eligible to be a candidate before the primary. The persons who are entitled to vote at the primary are the ones to determine who shall be selected as their candidate for a particular office. If the committee can say who is not eligible to be nominated as party's candidate for office, they can, on the very last day before the ballots are printed, refuse to allow a person's name to go on the ballot upon the pretext that he is ineligible, and thus prevent his name from appearing upon the official ballot. They could thus destroy one's prospect to be nominated, for the rules of procedure in courts are necessarily such that no adequate relief could be afforded the party complaining, if at all, until after the primary election had been held. If the committee or governing authority has the authority to decide the question as to who is eligible to hold an office or be a candidate before a primary election, then they would have a discretion and judgment to exercise that could not be exercised by a mandamus. The most that could be done by such a writ would be to compel them to act upon the question."

In the second case above cited the Supreme Court of Louisiana, with equal emphasis, denied the right of a party committee to pass upon the eligibility of a candidate for the nomination of that party as its candidate for office. A headnote in that case reads as follows: "1. A Democratic parish committee has no power to pass upon the eligibility of candidates for public office, as they are not charged with judicial functions nor clothed with judicial power." Parish committees in Louisiana correspond with county committees in this state.

We conclude, therefore, that the chairman and secretary of the state committee exceeded their power in refusing to perform the ministerial duty of certifying petitioner as one who had complied with the laws of the state and the rules of the party, as he admittedly has done.

The decree of the court below will, therefore, be reversed, and the cause will be remanded with directions to award the writ of mandamus.

GRIFFIN SMITH, C. J., dissenting. In *Irby* v. *Day,* 182 Ark. 595, 32 S. W. 2d 157, ". . . we expressly held that Irby was disqualified to receive the democratic nomination to public office in this state because of his previous conviction of embezzlement of public funds. Therefore, any question as to his conviction resting in a foreign jurisdiction is laid at rest, and we shall not again consider it. The sole question here presented for consideration is, Does a pardon by the chief executive restore to Irby all civil rights and political privileges enjoyed by him prior to his conviction?"[1] The opinion was delivered Nov. 3, 1930. The pardon came nearly three months later.

The author of the opinion in *Irby* v. *Day* (the preceding quotation having been taken from *State Ex. Rel. Attorney General* v. *Irby,* 190 Ark. 786, 81 S. W. 2d 419) said: "Appellant's second and last contention for a reversal of the judgment is that the plea did not con-

[1] Irby was sentenced February 17, 1922, on a charge of embezzling post office funds. He entered a plea of guilty. February 19, 1931, President Hoover issued a pardon, "the purpose being to restore Irby's civil rights."

stitute a defense to the cause of action. The plea was sufficient to show that the appellant was ineligible to hold the office of representative from Clay county, and for that reason had no right to contest appellee's certificate of nomination. Section 9 of art. 5 of the constitution of 1874 provides that no person convicted of embezzlement of public money shall be eligible to hold an office of representative in the general assembly."

From what I have been able to ascertain by reading the majority opinion of today, and from discussions in conference, it is not intended that *State Ex Rel. Attorney General* v. *Irby* be overruled. On the contrary, my understanding is that if the result brings about an impairment of the opinion written by Chief Justice JOHNSON, a majority of the justices did not so intend. In other words, there were not four votes to overrule the former holding. We have, then, reaffirmation of the rule that one convicted of embezzling public money may not hold office, and this status is not altered by pardon.

By circuitous construction the opinion in *State* v. *Irby* is bypassed. It is now held that the state committee could not exercise a judicial function by deciding that Irby was not eligible; that the committee's functions were ministerial; that its members must close their vision and their minds to what this court has said on previous occasions—all this because, as it is argued, Irby might be nominated and elected, and under art. 5, § 11, of the constitution, he could be seated.

Unless it should be held that the presidential pardon restored appellant's political rights, as well as his civil rights, I do not agree that if elected he can be seated by the senate. Section 11 of art. 5 of the constitution authorizes each house of the general assembly to appoint its officers; and it shall be the sole judge of the qualifications, returns and election of its own members when there has been an election. But this right must be read in connection with art. 5, § 9, and with § 8 of art. 5 when it is applicable. Section 8 provides: "No person who now is or shall be hereafter a collector or holder of public money, nor any assistant or deputy of such holder or collector of public money, shall be eligible to a seat in

either house of the general assembly, nor to any office of trust or profit, until he shall have accounted for and paid over all sums for which he may have been liable."

Section 9 is: "No person hereafter convicted of embezzlement of public money . . . shall be eligible to the general assembly or capable of holding any office of trust or profit in this state."

Effect of the majority opinion is to hold that the chairman and secretary of the state committee are guilty of tyrannical conduct, or at least grave indiscretion, in following the law as laid down in 1935.

It is my view that they were justified in believing the court meant what it said. They would have been insensible to a public trust had they ignored *State ex rel. Attorney General* v. *Irby*. No discretion was exercised; no judicial function was usurped. This court had already made the law. There was more understanding in what they did than would have been the case had they simulated estrangement to the law as it had been written.

CITY OF LITTLE ROCK *v.* SMITH.

4-6902 163 S. W. 2d 705

Opinion delivered July 13, 1942.

Cooper Jacoway, for appellant.

McHaney, J. Appellee, Billie Smith, who says she is a resident of Malvern, Arkansas, was arrested on the night of June 13, 1942, in her room at a hotel in the city of Little Rock, and charged with a violation of §§ 1 and 2 of ordinance No. 6249, prohibiting immorality and prostitution and § 3 fixing the punishment therefor. Through her attorney, she pleaded guilty to the charge and paid a fine of $10. Section 4 of said ordinance, as amended by § 3 of ordinance No. 6434, provides that if any person is convicted of a violation of said offense, "such fact shall be reported by the clerk of the municipal court to the city health officer; and on such conviction, the municipal judge or the city health officer is authorized to cause such person to be detained and examined by the city health officer or by a physician designated by the city health officer by use of the necessary tests and examinations, including the Wassermann blood test, to ascertain the presence of any venereal disease in a communicable

stage, provided that any evidence so acquired shall not be used against such person in any criminal prosecution." Section 5 of said ordinance provides: "Whenever any person, after the examination provided in section four of this ordinance, is found to be infected with a venereal disease in a communicable stage, the city health officer may, pending the imposition of or at the expiration of any jail sentence imposed on such person, when in the exercise of his discretion he believes that the public health requires it, commit such person found to be infected with a venereal disease in a communicable stage who fails to take treatment adequate for the protection of the public health, to a hospital or other place designated by the city health officer as a place of quarantine in the state of Arkansas for such treatment, even over the objection of such person so diseased or infected, provided the commitment can be done without endangering the life of the patient."

After her conviction appellee was detained and examined by the city health officer, and was found to be infected with a venereal disease, gonorrhea, in a communicable stage, and a Wassermann blood test for syphilis showed positive. She was thereupon ordered quarantined in the public health center, maintained by the United States Government in the city of Hot Springs, Arkansas, by the city health officer.

On June 16, 1942, appellee filed her petition for a writ of *habeas corpus* directed to the appellant, Gus Caple, sheriff of Pulaski county, in which she stated that she was unlawfully confined in the Pulaski county jail under said ordinance No. 6249 which was alleged to be void, and that she had been informed that she would be transferred to "a concentration camp" against her will.

The sheriff filed an answer to the petition for *habeas corpus,* setting up the matters aforesaid and many others as his authority for detaining appellee and attaching certified copies of ordinance No. 6249 and its amendatory ordinance No. 6434; also ordinance No. 6248 and its amendatory ordinance No. 6282, and asserting the validity of said ordinances as being a reasonable exercise of the

police power of the city for the protection of the public peace, health and safety, and that no right of appellee is being violated in or by them. He further alleged that he held appellee under and subject to the orders of Dr. L. L. Fatherree, city health officer, who should be made a party respondent to the petition. Dr. Fatherree was made a party and adopted, as his response, that of sheriff Caple.

Trial resulted in a holding, by the learned trial judge, that ordinances Nos. 6248 and 6249, as amended, are unconstitutional and void. The writ was granted and appellee was discharged upon her petition, but was ordered held subject to the action of the prosecuting attorney's office on a charge of prostitution, and was remanded to jail pending further orders of the court. The city, the sheriff and the city health officer have appealed, and the city attorney has filed an able brief in their behalf. Appellee has not favored us with a brief in her behalf.

The question presented is whether the ordinances of the city of Little Rock, above mentioned and parts of which are quoted, are valid as being within the police power of the city. If they are valid, then the action taken is not in excess of the authority conferred. There can be no doubt of the city's power to declare prostitution or immorality a criminal offense and to punish for a violation. Indeed appellee was so convicted and paid a fine therefor. This is not a criminal proceeding, but is one in the interest not only of appellee, but of the public. It is a proceeding to compel her to be quarantined, segregated from the public, to the end that she may be cured of the venereal diseases with which she is infected, and that she may not communicate them to others. When a cure is effected, the authority to detain her is at an end.

In *Williams* v. *State,* 85 Ark. 464, 108 S. W. 838, 26 L. R. A., N. S. 482, 122 Am. St. Rep. 47, it was said: "It is the duty of courts, in testing the validity of a given regulation, to resolve all doubts in favor of the legislative action, and to sustain it unless it appear to be clearly outside the scope of reasonable and legitimate regulation." In 16 C. J. S., § 183, it is said: "Health being a *sine qua non,* of all personal enjoyment, it is not

only the right but the duty of the state possessing the police power to pass such laws as may be necessary for the preservation of the public health." In *Beaty* v. *Humphrey,* 195 Ark. 1008, 115 S. W. 2d 559, we said: "The police power of the state is one founded in public necessity and this necessity must exist in order to justify its exercise. It is always justified when it can be said to be in the interest of the public health, public safety, public comfort, and when it is, private rights must yield to their security, under reasonable laws." Can there be any doubt that the legislature might enact valid legislation similar to the ordinances here in question? We think not. If it could, then it can and has delegated this power to municipalities. Section 9543 of Pope's Digest makes it their duty to publish certain ordinances and by-laws and power is conferred to "make and publish such by-laws and ordinances—to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such (municipal) corporation and the inhabitants thereof." Section 9589 provides: "They shall have power to prevent injury or annoyance, within the limits of the corporation, from anything dangerous, offensive or unhealthy . . ." So, the state's power to legislate in the protection of the public health has been granted and delegated to municipalities, and its exercise by the city in the ordinances here presented must be held to be within the grant, unless it can be said that the power conferred on the city health officer is unreasonable. Applying the rule above stated in the Williams case, we cannot say that the power conferred is "clearly outside the scope of reasonable and legitimate regulation."

The venereal diseases with which appellee is afflicted have become so widespread and so devastating in their effects upon communities where prevalent as to become a public menace. Many cities are now fighting more or less successfully to overcome this menace and to prevent degeneration into a race of cripples, paranoiacs and insane. Camp Joseph T. Robinson, with its 25,000 young men soldiers; Maumelle Ordnance Works and Arkansas Ordnance Plant, each with thousands of workers, men and

women, are near the city of Little Rock, and these men and women, as well as our own citizens in the city, are entitled to protection against these dreadful and loathsome diseases. Here the necessity exists which justifies the exercise of the power, and the private rights of appellee, if any, must yield in the interest of the public security.

Section 9679, Pope's Digest, provides: "The city council shall have the power to establish a board of health, with jurisdiction for one mile beyond the city limits; and for quarantine purposes, in cases of epidemic, five miles; to invest it with such powers and impose upon it such duties as shall be necessary to secure the city and the inhabitants thereof from the evils of contagious and malignant and infectious disease; to provide for its proper organization and the election or appointment of necessary officers, and to make such by-laws, rules and regulations for its government and support as shall be required for enforcing the prompt and efficient performance of its duties and the lawful exercise of its powers."

The trial court thought this statute denied the right of the city health officer to quarantine appellee outside the city or county beyond the limits stated, in case of epidemics, five miles. We think the statute means that the jurisdiction of the board of health shall extend for one mile beyond the city limits, or five miles for quarantine purposes, in cases of epidemics. It has no reference to the place a person may be confined for quarantine purposes, but only to the extent of the jurisdiction beyond the city limits for the better protection of the inhabitants of the city. Section 6438 of Pope's Digest expressly authorizes and requires the city health officer to perform the duties "prescribed for him under the directions, rules, regulations and requirements of the State Board of Health." One of these regulations of the State Board of Health is No. 3, as follows: "Isolation of infectious cases until rendered non-infectious. Any health authority may, when in the exercise of his discretion he believes that the public health requires it, commit any commercial prostitute or other person apprehended and examined and found afflicted with said diseases or either of them who refuses or fails to take treatment adequate for the

protection of the public health, to a hospital or other place in the state of Arkansas for such treatment even over the objection of the person so diseased and treated, provided the commitment can be done without endangering the life of the patient."

These rules have been upheld by this court in *Allen* v. *Ingalls,* 182 Ark. 991, 33 S. W. 2d 1099, and *State* v. *Martin & Lipe,* 134 Ark. 420, 204 S. W. 622. In the latter case we held this court would take judicial notice of the rules, orders and regulations of the State Board, and that it was authorized to make and promulgate rules and regulations for the prevention of infectious, contagious and communicable diseases, which was not a delegation of legislative power. Now, the above rule is authority to the city health officer to commit appellee ouside the city of Little Rock and to confine her at the government health center in Hot Springs. See, also, §§ 1, 2, 3 and 4 of the Rules and Regulations of the State Board of Health under the heading "Genito—Infectious Diseases (Syphilis, Gonorrhea and Chancroid)."

A number of cases of courts of other states sustaining similar legislation or ordinances are cited, one of which *Ex Parte McGehee, et al.,* 105 Kans. 574, 185 Pac. 17, 8 A. L. R. 831, is quite similar to the case before us. There, as here, the State Board of Health, under statutory authority, had adopted rules and regulations for the isolation and quarantine of persons exposed or afflicted with infectious disease, and these regulations authorized the city health officer to investigate such suspected cases and to isolate persons found to be so infected. A place of quarantine for men was provided at Lansing, Kansas. The city of Topeka passed an ordinance conforming to the state regulation, and under it the city health officer was authorized to quarantine persons infected with venereal diseases outside the city of Topea. McGehee was found to be infected with gonorrhea and was ordered quarantined at Lansing by the city health officer, and he sought release by *habeas corpus.* The language of the Supreme Court of Kansas, in denying the writ, is so applicable here that we quote the following with approval: "The rules of the

State Board of Health and the city ordinance are assailed as unreasonable. In this instance only those provisions of the rules of the State Board of Health and of the city ordinance are involved which relate to isolation of persons who have been examined and have been found to be diseased. Reasonableness of provisions relating to discovery and to examination of suspects need not be determined. It may be observed, however, that while provisions of the latter class cut deeply into private personal right, the subject is one respecting which a mincing policy is not to be tolerated. It affects the public health so intimately and so insidiously that consideration of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril. Only those invasions of personal privacy are unlawful which are unreasonable, and reasonableness is always relative to gravity of the occasion. Opportunity for abuse of power is no greater than in other fields of governmental activity, and misconduct in the execution of official authority is not to be presumed.

"It is urged that the regulations in question are unreasonable, in that they authorize isolation in remote places beyond the limits of the city in which the petitioners reside. The court knows of no law, or rule of public policy or private right, which requires a person who, for the protection of the public must be isolated and treated for loathsome communicable disease, to be interned in the locality in which he may reside. It would have been competent for the State Board of Health to designate a single hospital for the detention of all persons in the state found to be so diseased, and it is entirely reasonable for cities having inadequate facilities, or having no facilities of their own, to take advantage of those provided by state authority. In this instance the city health officer's power to isolate is restrained by ordinance which requires the city commission to approve detention hospitals other than those provided by the city.

"In the application for the writ it is stated that the petitioner is not diseased. The question is one of fact, determinable by practically infallible scientific methods. The city health officer was authorized to ascertain the

fact. He has certified to the existence of disease, and, in the absence of a charge of bad faith, or conduct equivalent to bad faith, on his part, his finding is conclusive.

"In the application for the writ it is stated that, if the petitioners be diseased, they are able to provide themselves with proper treatment in an isolated place in the city of Topeka. The answer is: *The public health authorities are not obliged to take chances.*"

We, therefore, conclude that the court erred in holding said ordinances unconstitutional and void and in discharging appellee. The judgment is reversed and the cause remanded with directions to dismiss the petition for the writ of *habeas corpus* and to remand appellee into the custody of the sheriff for isolation and quarantine as ordered by the city health officer, and an immediate mandate shall issue.

WOFFORD *v.* JAMES.

4-6755 163 S. W. 2d 710

Opinion delivered July 13, 1942.

M. F. Elms, for appellant.

John W. Moncrief, for appellee.

SMITH, J. Rena Moore owned three lots in the city of Stuttgart at the time of her death May 3, 1937. She was survived by two children, a son named Alfred Wofford, and a daughter named Ida Mae Wofford. She had married Moore subsequent to the birth of these children. Ida Mae died intestate, and without issue, whereupon her brother, Alfred, being her only heir, became the sole owner of all the property owned by their mother. The father of Alfred and Ida Mae had been married prior to his marriage to Rena, their mother, and by that marriage had a daughter named Zelia Herbert, but as the lots here in question comprised an ancestral estate, Zelia claimed no interest in the lots as an heir-at-law.

Alfred died testate November 9, 1938, after having executed his last will and testament on the preceding day. This will reads as follows:

"State of Arkansas, county of Arkansas—

"Will

"Know all men by these presents, that I, Alfred Wofford, of the county of Arkansas and state of Arkansas, being of sound and disposing mind and memory, and being above the age of twenty-one, do make and publish this my last will and testament, hereby revoking all wills by me at any time heretofore made.

"First: I direct that my just debts be paid, and that the legacies hereinafter given shall, after the payment of my debts be paid out of my estate.

"Second: I give to Hattie Johnson lots 23 and 24, block 8, Washington Heights Addition to the city of Stuttgart, with all improvements and appurtenances thereon. (Fee simple estate.)

"Third: I give to my beloved aunt, Maggie James, all of lot in Flood's Addition to the city of Stuttgart. (House located at 313 North Lowe.)

"Fourth: I give to my sister, Zelia Herbert, all of lot located 404 Cleveland street, Stuttgart, Arkansas.

"Fifth: I give all the residue of my estate which consists of household goods in each house to those receiving the real estate as above.

"Sixth: I constitute and appoint Dr. J. B. Bryant sole executor of this my will.

"In witness whereof, I have hereunto set my hand this 8th day of November, 1938, in the presence of E. C. Hughes, Sophronia Jones, who attest the same at my request.

(Signed) "Alfred Wofford.

"The above instrument now subscribed by the testator, in our presence; and we, at his request and in his presence, sign our names hereto as attesting witnesses, and at the time of our signing, said testator declared said instrument to be his last will and testament.

(Signed) "E. C. Hughes,
(Signed) "Sophronia Jones,
"Witnesses."

For brevity and convenient reference, we will refer to the property devised in paragraph second as lot 1; to that referred to in paragraph third as lot 2, and to that referred to in paragraph fourth as lot 3.

Dr. Bryant, named as executor, qualified as such, and is still acting in that capacity. He filed a report of his administration, and the litigation appears to have had its inception in the exceptions filed by Hattie Wofford to the confirmation of his settlement. A decree was

entered sustaining her exceptions, in which it was adjudged that she was the wife of Alfred Wofford; that she took title in fee simple to lot 1 under the will, and was entitled to the possession of lot 2 as her homestead, and that she was entitled to the $450 allowed widows under §§ 80 and 86, Pope's Digest. This decree was rendered July 8, 1940. A motion was filed to correct this decree, which was sustained, it being found and held that the court had decreed only that Hattie had married Alfred and was his widow.

Maggie James, to whom lot 2 was devised, was Rena's sister, and, therefore, the aunt of Alfred. Zelia Herbert, to whom lot 3 was devised, was Alfred's half-sister by his father's first marriage, and no one questions her ownership of the lot under the terms of the will.

Maggie appealed from the decree finding that Alfred and Hattie had been lawfully married, but the appeal was not perfected and was dismissed for non-compliance with rule 9 of this court.

Thereafter the matter was further heard on the exceptions of Hattie to the executor's final settlement. In this decree it was held that the court had determined previously that Hattie was the widow of Alfred and it was adjudged in the decree from which is this appeal that as such she was entitled to the statutory allowances of $450.

Hattie has never disavowed the will, but has at all times claimed, and does now claim, that her interest in the lots should be determined by the will, which, she says, devised lot 1 to her, and, in addition, she claims lot 2 under her right of homestead as Alfred's widow. Her contention is that the will does not express the intention of depriving her of her homestead right in this estate, and that she is not put to an election which would require abandonment of the claim of homestead if she also claims under the will.

It is insisted that the testimony does not show that Hattie and Alfred were ever married; but the first decree above referred to is conclusive of that fact. Hattie's name was Johnson when she married Alfred, and it will

be noted that he referred to her by that name—and not as his wife—in his will.

The will was prepared by a well-known and very reputable lawyer, who wrote it as he sat by Alfred's bedside. A number of witnesses were present during the preparation and execution of the will. All of these, including the subscribing witnesses, testified that the scrivener asked Alfred which of the women present was his wife, and Alfred answered that he was an unmarried man. Alfred then asked if he might give Hattie a portion of his estate, and was told that he could devise it to whom he pleased. Hattie did not assert that she was Alfred's wife, although she was present and saw and heard everything that occurred while the will was being prepared. Tax receipts were produced to identify the lots, and that given Hattie was described according to the plat of the survey thereof as described in the tax receipts, the others by their street numbers.

There apparently was no controversy about the disposition of Alfred's estate for a year or more, and the executor proceeded to discharge his duties under the will and under the law. An inventory was filed of the personal property, which is not questioned. Certain debts were probated and paid. The court authorized the purchase of a monument to cost not exceeding $150, and the final settlement of the executor showed a balance of $38.17 on hand after paying all claims against the estate and expenses of administration.

There are three houses on the property which we designate as lot 1, and very conflicting testimony was offered as to whether Alfred's homestead was in one of those houses, although he was residing in the house on lot 2 at the time of his death.

We do not recite this testimony, as our view of the case renders that fact unimportant, even though it is assumed that lot 2 was Alfred's homestead, this for reasons later to be stated.

The three lots were all the real estate which Alfred owned, and his will disposed of all of them, and the disposition made is entirely inconsistent with the thought

that he intended Hattie to have a homestead in addition to other lands devised her. Indeed, as we have said, there was much testimony to the effect that the lot devised Hattie was, in fact, Alfred's homestead.

Now, of course, the widow's right of homestead is not created by the will nor dependent upon it. She has that right because the law gives it to her, and the husband may not, by his will, divest her of this right, unless, indeed, by his will he puts upon her the necessity of electing to take under the will; but this right of election is hers and cannot be controlled by her husband.

This proposition was announced and applied by Justice RIDDICK in the case of *Stokes* v. *Pillow,* 64 Ark. 1, 40 S. W. 580, where it was said: "It becomes, therefore, material to determine whether the provision in the will was intended to be in lieu of the homestead given by law; for, if the provision in the will was made for the widow in lieu of her homestead, she would be put to her election, but, if the provision was not made in lieu of the homestead estate, she had the right to hold both the homestead and the benefits conferred by the will, . . ."

In volume 4, Page on Wills (Lifetime Edition), at § 1357 of the chapter on Election, p. 25, it is said: "If the testator's intention is clearly expressed or otherwise shown that the spouse shall not have both the provision made by the will and the homestead rights, an election is required. Where he has so disposed of his property by will that some provision of the will will be defeated if the widow is given both the property devised to her by will and the homestead, the widow must elect between her rights under the homestead law and her rights under the will."

There appears an extensive annotation on the subject in the note to the case of Re *Flournoy,* 4 A. L. R. 391. See, also, *United States Fidelity & Guaranty Co.* v. *Edmondson,* 187 Ark. 257, 59 S. W. 2d 488; *McDonald* v. *Shaw,* 92 Ark. 15, 121 S. W. 935, 28 L. R. A., N. S. 657; *McEachin* v. *Peoples National Bank,* 191 Ark. 544, 87 S. W. 2d 12.

In the decree from which is this appeal it was adjudged that "The claim of homestead of Hattie Johnson in and to lot 1 of block 38 of Flood's Addition to the city of Stuttgart (which we have referred to as lot 2) . . . is hereby disallowed and rejected." And from that part of the decree Hattie has appealed.

It follows, from what we have said, that this holding must be affirmed, as Hattie has elected, and now elects, to claim under the will, which makes a provision for her inconsistent with her claim of homestead.

The court sustained Hattie's claim for the $450 statutory allowances, and from that portion of the decree Maggie James has appealed.

The decree makes the following provision for the payment of these allowances: It was found that Hattie had been in possession of lot 2 since July 18, 1940, but that, as she was not entitled to its possession under her homestead claim, she should account for the rental value thereof, and a master was appointed to state the account of these rents, and that this value "shall be deducted from the allowance of $450 herein made to Hattie Wofford. When so ascertained the master shall report same to this court and chancellor for approval and same shall be credited on the said $450." And from this portion of the decree Maggie James has appealed.

We think this allowance was properly made. It was said in the case of *Costen* v. *Fricke,* 169 Ark. 572, 276 S. W. 579, that "The widow does not take the homestead as dower; neither does she take these statutory allowances as dower. They are in addition to dower, and the widow is not put to an election in regard thereto unless the language of the will makes it clear that the property devised to her is to be in lieu of those allowances as well as that of dower."

We find nothing in the will inconsistent with the claim of these statutory allowances; but they must be paid, under the decree of the court below, out of any money remaining in the hands of the executor, and by charging Hattie with rents collected on the property which she claimed as her homestead, for if she is given

the rents on this property which she claims as her homestead the result is that she is given rents to which Maggie is entitled.

We conclude, therefore, on the cross-appeal, that Hattie should be paid only such sum as the executor now has on hand, this for the reason that she did not ask the allotment to her of these statutory allowances while the executor had in his hands money to pay them. She permitted the executor to expend the money which had come to his hands in the payment of debts and expenses of administration. She appears to have made no objection to the expenditure of $150 for a monument for her husband.

In each of the recent cases of *Barnes* v. *Cooper, ante,* p. 118, 161 S. W. 2d 8, and *Walls* v. *Phillips, ante,* p. 365, 162 S. W. 2d 59, the widow's claim of these statutory allowances was rejected, for the reason that she had not claimed them seasonably, and in the last of these cases we quoted from the earlier one as follows: "In the very recent case of *Barnes* v. *Cooper, Admr., ante,* p. 118, 161 S. W. 2d 8, we held the allowances provided by these sections were personal to the widow, and said 'The right thereto is permissive, and, by § 87, "The widow shall apply for such property before it is distributed or sold, and not after," and this section applies to the allowances under § 86, as well as to those under § 80.' The court, therefore, properly denied her claim for such allowances."

The decree will, therefore, be modified to the extent of holding that Hattie's claim for the statutory allowances may only be paid out of the funds which the executor has not distributed, and, as thus modified, the decree is affirmed.

McLaughlin, Trustee, *v.* Lovett.

4-6834 163 S. W. 2d 826

Opinion delivered July 13, 1942.

[redacted]

A. T. Davies and *Jay M. Rowland,* for appellant.

James R. Campbell, for appellee.

Holt, J. Appellee, Lyda Lovett, filed complaint against appellants in the Garland circuit court in which she alleged that as the widow of John Lovett, a retired fireman of the fire department of the city of Hot Springs, Arkansas, she was entitled to a pension. Appellants, by demurrer and answer, denied that Mrs. Lovett was entitled to the pension claimed.

By agreement the cause was heard by the court, sitting as a jury, and from a judgment in favor of appellee comes this appeal. The cause was submitted on an agreed statement of facts.

John Lovett, appellee's husband, after many years of faithful and efficient service as fireman, on March 15, 1933, was retired on a pension of $54 per month, which represented one-half of the salary received by him at the time of his retirement. This pension award was made to Mr. Lovett under the provisions of act 491 of the Acts of 1921. Mr. Lovett continued to draw this pension each month until his death before eight o'clock

on the morning of April 1, 1941. John Lovett and appellee had no children. Mrs. Lovett, his widow, was his sole survivor.

On this same date, April 1, 1941, an election was held by the city of Hot Springs, Arkansas, at which the following question, on an initiated ordinance, was submitted to the electorate of the city: "An ordinance to authorize and direct the city council of the city of Hot Springs to levy annually a tax of not more than one mill on the assessed value of the real and personal property within the city for the purpose of paying pensions to retired firemen, and pensions to widows and minor children of deceased firemen and widows and minor children of deceased retired firemen."

Section 2 of the ordinance provides: "This ordinance shall take effect and be in force from and after its approval by the people of the city of Hot Springs."

The agreed statement of facts contains this provision: "That the vote on said question was as follows: For initiated ordinance No. 2, 3,044. Against initiated ordinance No. 2, 20.

"That said initiated ordinance thereupon became law; that no tax was levied thereunder . . . ; the city council did not certify any tax to the county clerk to be collected by the tax collector for the year 1942, or any other year. The city had sufficient funds available in the funds received from the State Insurance Commissioner for 1942, and that is the reason no tax was certified for collection."

Act 491 of 1921, *supra,* under the terms of which Mr. Lovett was drawing a pension at the time of his death, makes no provision for a pension on behalf of the widow of a deceased fireman unless the fireman loses his life while in the performance of his duty. It is conceded here that appellee would not be entitled to a pension under the provisions of this act, but she insists, and the lower court so found, that she is entitled to her husband's pension under the ordinance, *supra,* and subsequent legislation hereinafter referred to.

Under act 491, the fund out of which pensions to firemen are paid, is created by a two per cent. levy on all fire, tornado and marine insurance premiums collected in cities and towns of Arkansas maintaining a fire department of the value of $1,000 or more. The act provides that one-half of this two per cent. tax collected on insurance premiums within each city or town affected, shall be paid back to each city or town from which collected, as a fund to be paid out to eligible firemen by a board of trustees created by the act.

The Legislature of 1939, by act 30, amended act 491 of 1921. Among other things, it provided that each city or town affected might, by a vote, provide for a tax not to exceed 1½ mills, with which to supplement and add to the fund created under the 1921 act, *supra,* "for pensioned members of the fire department, and of the widows and orphans," etc. The act further provided for acceptance of donations to the fund and deductions of one per cent. from the salaries of affected firemen.

That part only of act 30, which sought to enable cities and towns to levy a tax above the five mill limit, for all purposes as provided by the Constitution of Arkansas at that time, was declared by this court unconstitutional in *Adamson* v. *City of Little Rock, et al.,* 199 Ark. 435, 134 S. W. 2d 558. In all other respects the validity of act 30 was not affected by that decision.

In 1940, amendment No. 31 to the Constitution of the state of Arkansas was enacted and put into effect. Under its provisions, cities and towns of the first and second class were permitted to vote a tax not to exceed two mills on the dollar, "from which there shall be created a fund to pay retirement salaries and pensions to policemen and firemen theretofore or therafter earned, and pensions to the widows and minor children of such, as may be provided by law. The annual levy for the Policemen's Retirement Salary and Pension Funds shall not exceed one mill on the dollar, and the annual levy for the Firemen's Retirement Salary and Pension Funds shall not exceed one mill on the dollar. The manner of such levy of the tax, and the eligibility for the retirement

salaries and pensions, the several amounts thereof, and when payable, shall be such as may be provided by law."

Subsequent to the passage of amendment No. 31, the Legislature of 1941 passed act 14, under the terms of which there is provision for pensions to widows of deceased retired firemen. Section 1 provides for elections in cities of the first or second class to vote a tax not to exceed one mill for pensions to widows of deceased retired firemen and that the governing body of such city or town shall certify to the county clerk the rate of taxation levied to the end that the amount so certified be placed upon the tax books of the county by the county clerk and collected by him. The taxes thus collected "Shall be turned over to the board of trustees of the Firemen's Pension and Relief Fund of such city, created under act 491 of the Acts of the Arkansas General Assembly for the year 1921."

Section 3 provides that the board of trustees of the Firemen's Pension and Relief Fund shall "certify to the city an estimate of the amount of money necessary to pay . . . pensions to the widows . . . of deceased retired firemen, for the following year, and the city shall make its levy against the real and personal property of such city sufficient to raise and provide the sum of money estimated and certified by the board of trustees of the Firemen's Pension and Relief Fund. Provided, the annual levy shall not exceed one mill on the dollar of the assessed value of the real and personal property within such city."

Section 4 provides "The funds provided for herein shall be supplemental to and in addition to any funds provided for by any laws in effect at the time of the passage of this act, and shall become a part of the Firemen's Pension and Relief Fund of such city, created under act 491 of the Acts of the Arkansas Legislature in 1921, and shall be administered by the board of trustees created by said act, to the same class of beneficiaries and in the same manner as the funds provided for therein, it being the specific intention not to repeal act No. 491 of the Acts of the Arkansas Legislature of 1921, or

any amendments thereto, but to provide additional money for the Firemen's Pension and Relief Fund."

On April 1, 1941, as has been indicated, the city of Hot Springs by an overwhelming vote, adopted initiated ordinance No. 2, which provided for a tax not to exceed one mill to pay pensions to widows of deceased retired firemen and also that "The council shall make the rate of taxation, not to exceed one mill on the dollar of the assessed value of the real and personal property within the city of Hot Springs, sufficient to raise and provide such amount of money as the board of trustees of the Firemen's Pension and Relief Fund certifies to the council will be required to pay pensions to retired firemen, and pensions to widows and minor children of deceased firemen and widows and minor children of deceased retired firemen, for the following year. If the amount certified to the council by said board of trustees is more than a levy of one mill will produce, the council shall make the full levy of one mill.

"Section 2. This ordinance shall take effect and be in force from and after its approval by the city of Hot Springs."

It is conceded here that the ordinance in question was approved by the people of Hot Springs and became effective on April 1, 1941, but at a time on this date, subsequent to the exact hour or moment when appellee's husband, John Lovett, died, it being conceded that Mr. Lovett died on the morning of April 1, 1941, but prior to eight o'clock.

The primary question presented is: Was the ordinance in effect when John Lovett died? It is our view that it was. This court has many times held that the law does not consider parts of a day. In *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361, this court said: "Moreover, it may be said that the law does not consider parts of a day, etc."

And in *Lee Wilson & Company* v. *William R. Compton Bond & Mortgage Company,* 103 Ark. 452, 146 S. W. 110, this court said: "Upon its approval, in conformity with the Constitution, the act is regarded as

being in full force and effect during the whole day upon which it is approved. *Mallory* v. *Hiles,* 61 Ky. (4 Met.) 53; *Kennedy* v. *Palmer,* 72 Mass. 316."

In the Kentucky case, *supra,* cited with approval by this court, it is said: "In our opinion, according to the weight of reason, and the decided weight of authority, the act in question must be regarded as having been in force during the whole of the day upon which it was approved, in conformity to the general rule, that where a computation is to be made from an act done, the day on which the act is done is to be included. (*Arnold, et al.* v. *The United States,* 9 Cranch 104, 3 L. Ed. 671."

The Supreme Court of the United States in *Lapeyre* v. *United States,* 84 U. S. 606, 21 L. Ed. 606, said: "There is no statute fixing the time when Acts of Congress shall take effect, but it is settled that where no other time is prescribed, they take effect from their date. *Matthews* v. *Zane,* 7 Wheat. 164, 5 L. Ed. 425. Where the language employed is 'From and after the passing of this act,' the same result follows. The act becomes effectual upon the day of its date. In such cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible. Welman's case, 20 Vt. 653, Fed. Case No. 17407. The subject is there examined with learning and ability."

And in the Welman case, 20 Vt. 653, *supra,* the court uses this language: "This was a direct recognition, that, in a question as to the time when a law takes effect, there are no parts or divisions of a day. The day is to be included, because, there being no fraction of a day, the act relates to the first moment of the day on which it is done, and as if it were then done. This is the very reason given in the books for the rule the courts rely upon. Instead of intimating, that there could be any fraction of day in such a question, or that it would be proper to reverse the general rule of law and consider the act in force only from the last instant of the day, the court held, that the day on which the act was approved was to be included in its operation."

We are clearly of the view, therefore, that this ordinance was in full force and effect on and after the first moment of the day it was approved, April 1, 1941, and at the time Mr. Lovett died, and that the trial court correctly found that appellee was entitled to the pension of $54 per month as his widow. The fact that the governing body of the city of Hot Springs made no levy of any part of the one mill permitted by the ordinance cannot affect appellee's right to the pension in question, for the reason that under the terms of acts 30 and 14, *supra,* which are amendatory of the 1921 act, *supra,* it was clearly the intent of the lawmakers to give to the governing bodies of cities and towns affected, the discretionary power to supplement the fund created and distributed under the 1921 act, by levying and collecting any part of the one mill tax if necessary to pay the pensions allowed to widows of deceased retired firemen and any others entitled to pensions under the ordinance.

It must be remembered that the legislation, *supra,* contemplates that the Firemen's Pension and Relief Fund, created out of the one-half of the two per cent. tax on all fire, tornado and marine insurance premiums collected within the cities and towns affected, may be materially supplemented or increased by donations and otherwise, and therefore that there may be occasions, as in the instant case, when it becomes unnecessary to levy and collect any part of the additional one mill tax in order to pay all eligible pensioners.

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

The Chief Justice concurs.

WILSON *v.* URQUHART.

4-6831 163 S. W. 2d 709

Opinion delivered July 13, 1942.

[redacted]

Cecil C. Talley, for appellant.

GRIFFIN SMITH, C. J. Mrs. Teresa Wilson's daughter, Vivien, married John A. Urquhart in New York June 22, 1922, and the couple resided there. In 1931 Vivien went to Garland county, Arkansas, to obtain a divorce. Her testimony is that she returned to New York before the decree was granted, her stay in Hot Springs having been for a period less than ninety days. In New York she resumed her marriage status with Urquhart, and a son (Peter Andrew) was born October 23, 1935.

January 3, 1940, Mrs. Wilson, as grandmother and next friend of Peter Andrew, brought an action in Garland chancery to annul the decree of divorce granted July 5, 1932, on Vivien's complaint. Mrs. Wilson alleged that at the time the decree was rendered Vivien was mentally incompetent.[1] The complaint was dismissed September 3, 1940, for want of equity. No appeal was taken.

October 22, 1941, Mrs. Wilson moved to vacate the order dismissing her 1940 complaint. The motion was overruled the same day; hence this appeal.

[1] Although the complaint of January 3, 1940, alleged that Vivien, at the time her suit was filed in 1932, was "mentally incompetent to understand and comprehend the seriousness [of her act in suing for divorce], and still is mentally incompetent," her deposition was taken in the instant case. The effect is to impliedly contradict the allegation of mental incompetency. Mrs. Urquhart established the so-called "residence" at Hot Springs Dec. 18, 1931, remained 82 days (her testimony), then returned to New York.

April 20, 1942—two days before the expiration of six months following the chancellor's action in overruling the motion to vacate the order dismissing the petition to vacate the decree of divorce—an appeal was lodged in this court. Warning order was issued on affidavit duly presented, with proof of publication May 22, 1942, for the requisite period. The attorney *ad litem* has moved to be discharged.

The appeal must be dismissed because the order of October 22, 1941, was not appealable. *United Drug Company* v. *Bedell,* 164 Ark. 527, 262 S. W. 316; *Bradley* v. *Ashby,* 188 Ark. 707, 67 S. W. 2d 739.

The 1940 decree shows that Mrs. Wilson was represented by her attorneys when the court dismissed the petition of January 3. There is the recital: "The plaintiff at the time excepted and prays that her exceptions be noted of record, which is accordingly done."

We do not discuss the question whether Mrs. Wilson, as Peter Andrew's next friend, had a right to ask the court to set aside the decree of divorce. See *Kirby* v. *Kent,* 172 Miss. 457, 160 So. 569, 99 A. L. R., p. 1303; *Baugh* v. *Baugh,* 26 American Reports, p. 495, 37 Mich. 59. But see, also, *Robert Rawlins, Administrator, et al.,* v. *Amanda Rawlins, et al.,* 18 Fla. 345. An interesting discussion of the verity given by New York to divorces granted in foreign jurisdictions where personal service was not obtained is to be found in Vreeland's "Validity of Foreign Divorces."

The appeal is dismissed and the attorney *ad litem* is discharged. No fee can be allowed the attorney because this court did not acquire jurisdiction, there having been no right of appeal.

CARL *v.* ELIZABETH HOSPITAL.

4-6830 164 S. W. 2d 432

Opinion delivered July 13, 1942.

C. D. Atkinson, Chas. W. Atkinson and *John Mayes,* for appellant.

Clifton Wade and *J. Frank Holmes,* for appellee.

HUMPHREYS, J. This is an appeal by appellant as sole heir at law, and administratrix of the estate of John Lewis Robbins, deceased, from a judgment of the probate court of Washington county that lands particularly described in the agreed statement of facts hereinafter set out in full are subject to sale to pay debts of the deceased before resorting to the only other lands owned by deceased in said county and which are particularly described in said agreed statement of facts.

This judgment was rendered on the 31st day of March, 1942, upon a stipulation of facts by the parties, which stipulation was embodied in the judgment as findings of the court, and which stipulation is as follows:

"Stipulations

"It is agreed and stipulated in open court by and between Elizabeth Hospital, petitioner, and Jimmie Maxie Carl, administratrix of the estate of John Lewis Robbins, deceased, and Jimmie Maxie Carl, heir at law of said deceased, intervener herein, that said John Lewis Robbins, late a resident of Washington county, Arkansas, died intestate in said county on the 6th day of April, 1940,

leaving no widow and no children surviving and leaving as his sole heir at law by declaration of deceased, Jimmie Maxie Carl, intervener.

"Said deceased was the head of a family, at the time of his death, he owned and resided upon and occupied as his homestead the following described tract of land in said county, to-wit:

" 'The southeast quarter of the northeast quarter and a tract forty-five rods in width off of the east side of the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section No. 16; also the north half of the northeast quarter of the southeast quarter of said section No. 16, all in township No. 14 north, range No. 31 west of the 5th p. m. containing less than 160 acres and of a value less than $2,500, which tract of real estate will be referred to hereafter as tract No. 1.'

"Said deceased, at the time of his death, owned also the following described tract of land in Washington county, Arkansas, to-wit: 'Part of the east half of the northwest quarter of section No. 23, township No. 15 north, range No. 32 west of the 5th p. m. bounded as follows: beginning seventeen rods west and fifty rods and thirteen feet south of the northeast corner of said east half of northwest quarter aforesaid and running thence south 105.2 rods; thence north 60.5 degrees east, 17 rods to the east line of said subdivision; thence south 16 rods to the southeast corner of subdivision; thence west 54.72 rods; thence north 37.92 rods; thence west 25.28 rods; thence north 71.3 rods; thence east 63 rods to the point of beginning. Also part of the northeast quarter of the southwest quarter of section No. 23, bounded as follows: beginning at the northeast corner of said subdivision and running thence west 7.66 chains; thence south 1.76 chains; thence east 7.66 chains; thence north 1.76 chains to the place of beginning, subject to a roadway twenty feet in width off the east end of the last described tract, which tract of real estate will be referred to hereafter as tract No. 2.'

"Said deceased also left $106.70 in money and personal property which has been sold by said administratrix under an order of this court for $253.

"Claims against the estate of said deceased have been filed and allowed by the court in the sum of $598.12 and it is necessary to sell lands of said estate for the payment of debts of deceased.

"Jimmie Maxie Carl was duly appointed as administratrix of the estate of said deceased on the 29th day of April, 1940, by this court, and is now the duly qualified and acting administratrix of said estate.

"The petitioner, Elizabeth Hospital of Prairie Grove, Ark., was one of the creditors of said deceased, and made written demand by registered mail upon the said administratrix for the sale of tract No. 1 of said real estate for the purpose of paying debts of said deceased; on failure of said administratrix to do so, notice of application to sell said lands to pay debts was published in the form and manner prescribed by law by said creditor and pursuant to the said notice said creditor filed its petition; that thereafter said administratrix filed answer to the petition of said creditor and her application to sell tract No. 2 for the purpose of paying debts, and the said Jimmie Maxie Carl, heir at law, filed an answer and intervention claiming that tract No. 1 was her homestead and that it should not be sold to pay debts until the said tract No. 2 had been sold.

"Said Jimmie Maxie Carl, heir at law of said deceased, at the time of the death of said deceased, was above 21 years of age; was a married woman and living with her husband, and they had been living with said deceased on tract No. 1 of said real estate for more than one month prior to the death of deceased; Jimmie Maxie Carl and her husband owned no real estate and had no other homestead at said time and she claimed and still claims said real estate as her homestead and she and her husband are still living thereon.

"On the 5th day of April, 1940, the said Jimmie Maxie Carl filed a voluntary petition in the district court of the United States, Western District of Arkansas, Fort

Smith Division, and on said date she was adjudged a bankrupt; that in her schedules, she listed no assets and only one creditor, the Farmers & Merchants Bank of Prairie Grove; that thereafter on the 19th day of April, 1940, she filed an amendment to her schedules listing all of above described real estate and claiming tract No. 1 thereof as her homestead and said court set off the same to her as her homestead.

"Said Farmers & Merchants Bank made proof of its claim in said bankruptcy proceeding based upon a judgment and decree of the chancery court of Washington county, rendered on April 1, 1932, for $3,373.71 and for foreclosure of mortgage upon debtor's property which was sold for $1,200 under said decree, and which sale was approved by said court on May 19, 1932; said judgment never had been revived.

"On August 20, 1940, the trustee in bankruptcy, in consideration of $800, sold to Farmers & Merchants Bank of Prairie Grove, and by deed dated October 29, 1940, conveyed to it, all of the right, title and interest of said bankrupt in and to the tract of land No. 2 hereinbefore described, under an order of the referee in bankruptcy, which deed is recorded in Washington county Deed Record 319 at p. 110.

"Tract No. 1 of said real estate lies wholly outside of any city, town or village and was appraised at $1,750 and tract No. 2 was appraised at $1,000, and this stipulation contains all of the facts upon which said matter shall be tried and decided."

Immediately following this stipulation the judgment recites and declares as follows: "And said stipulation of facts being all of the evidence considered by the court in the trial of said case, and the court having fully considered the same and being well advised in the premises, finds the law to be: 'That the lands described in the petition of Elizabeth Hospital, being tract No. 1 above described and which are claimed as the homestead of Jimmie Maxie Carl, intervener, are subject to sale to pay debts of the deceased and should be sold by the administratrix before resorting to tract No. 2 which is the only

other lands of said deceased which have been heretofore sold by virtue of an order of the bankruptcy court to pay the individual debt of the heir, Jimmie Maxie Carl, and the prayer of Elizabeth Hospital should be granted and the prayer of the petition of the administratrix and the prayer of the intervener should be denied.

" 'Therefore it is ordered and adjudged by the court that the said administratrix sell a sufficient amount of the lands of said deceased, to-wit: the southeast quarter of the northeast quarter and a tract forty-five rods in width off of the east side of the southwest quarter of the northeast quarter and northwest quarter of southeast quarter; also the north half of northeast quarter of southeast quarter of section No. 16, all in township No. 14 north, range No. 31 west of the 5th p. m. in Washington county, Arkansas, to pay the debts probated against said estate and from the proceeds of such sale, pay said debts and the costs and expenses of administration.' "

The judgment then provides for the manner in which the lands shall be sold.

According to the agreed statement of facts, deceased occupied tract No. 1 as his homestead at the time of his death. He left no widow or minor children. He was survived by Jimmie Maxie Carl, a married woman over 21 years of age, who, with her husband, had been living with him about a month before he died. Jimmie Maxie Carl inherited his estate by virtue of a declaration of heirship previously made by him. She acquired no homestead right in any of the lands owned by her foster father at the time of his death, but inherited the title thereto in fee by inheritance subject to the payment of his debts as there was insufficient personal property to pay them. The day before her foster father died, appellant, Jimmie Maxie Carl, filed a voluntary petition in bankruptcy in the district court of the United States, Western District of Arkansas, Fort Smith Division, and on said date she was adjudged bankrupt. In her schedules she listed no assets and only one creditor, the Farmers & Merchants Bank of Prairie Grove. On the 19th day of April, 1940, she filed an amendment to her schedules listing tract No. 1 and tract No. 2 as assets and in the bankruptcy pro-

ceedings claimed tract No. 1 as her homestead and the court set off same to her as a homestead, but she, without question, permitted her sole creditor, the Farmers & Merchants Bank of Prairie Grove, to make proof of its claim and to sell same through the trustee to apply on her individual debt. Tract No. 2 was subsequently sold in the bankruptcy proceedings to apply on her individual debt and the trustee made a deed to tract No. 2 to her sole individual creditor, the Farmers & Merchants Bank of Prairie Grove.

The creditors of deceased were not parties to the bankruptcy proceedings and were not bound in any way by the action of the bankruptcy court in setting off tract No. 1 to appellant as a homestead.

The result of appellant's voluntary proceedings in bankruptcy amounted to an alienation of tract No. 2 by her in settlement of her individual debt.

The rule of law applicable to the facts found by the probate court in the instant case is that an heir who inherits the lands of a deceased subject to the payment of the debts of the deceased, if the personal property of the deceased is insufficient to pay said debts, the heir may transfer or dispose of the lands subject to the payment of the debts, but that the lands remaining in the possession of the heir and not alienated by him should be first exhausted in the payment of decedent's debts.

The principle of law thus announced was applied in the case of *Howell* v. *Duke,* 40 Ark. 102. The only material difference between the instant case and the case cited is that in the instant case tract No. 2 was alienated by appellant, who inherited both the tracts subject to the debts of the deceased, whereas, in the case cited, the devisee mortgaged a part of the land, which mortgage was subsequently foreclosed to pay the debt of the heir secured by the mortgage. We think, therefore, the instant case is ruled in principle by the case of *Howell* v. *Duke, supra.*

No error appearing, the judgment is affirmed.

HARDIN, COMMISSIONER OF REVENUES, *v.* GAUTNEY, CHANCELLOR.

4-6908 164 S. W. 2d 427

Opinion delivered July 13, 1942.

O. T. Ward, for petitioner.

Claude F. Cooper and *T. J. Crowder,* for respondent.

GRIFFIN SMITH, C. J. February 20, 1942, Joe Hardin, as commissioner of revenues, filed with the circuit clerk for Mississippi county a certificate of indebtedness, ". . . in re, delinquent sales tax $384, July through December, 1941." It was asserted that O. M. Morgan owed $307.20 on gross receipts from music machines operated by coins inserted in slots. Sec. 3 (e), Act 386 of 1941, p. 1059. A penalty of 25% was added by the commissioner, amounting to $76.80. Sec. 9 (b) of Act 386.

March 28, 1942, and by amendment June 24, the taxpayer petitioned Mississippi chancery court to enjoin Hale Jackson, as sheriff, and the commissioner of rev-

enues, from proceeding under an execution issued by the circuit clerk. It was also alleged that the certificate, as docketed, constituted a cloud upon petitioner's title to real and personal property. Section 11, Act 386.

The facts are that the commissioner's agents reported the tax obligation. Morgan had failed to file a return. He was notified by registered mail January 28, 1942, that the department would determine the tax and at the expiration of twenty days issue a certificate of indebtedness. Section 10, Act 386. Morgan responded February 5 and asked to be heard. By letter February 6 the department directed the taxpayer to appear February 16. The letter contained the statement: "For your information, the commissioner will not go into the question of liability for the taxes, but simply the amount of the tax due."

Morgan did not attend the hearing. When default was ascertained, the commissioner made a finding as to the sum due, and the certificate was executed.

May 22, 1942, the department of revenues moved to quash service of summons and to dismiss, alleging the Mississippi chancery court was without jurisdiction, inasmuch as more than thirty days had intervened after the certificate had been filed, and before suit was brought. An answer was filed June 24.

Section 10 of Act 386 gives to a taxpayer who is aggrieved by action of the commissioner thirty days within which to appeal to the chancery court of Pulaski county, "where the matter shall be tried *de novo*." The statute, however, requires that the amount ascertained by the commissioner to be due shall be paid, with interest and penalty. Any sums found to have been wrongfully collected shall be repaid from a fund " to be created by the commissioner out of moneys collected [under Act 386], to be known as the 'special gross receipts refund account,' to be maintained for such purposes, which account shall not exceed the sum of $10,000." It is then enacted that "No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under this Act." There does not appear to have been an

appropriation to facilitate use of the $10,000. But see Act 219 approved March 25, 1941.

Assuming (but we do not decide) that the general assembly had power to prohibit recourse by injunction to stay "proceedings for assessment or collection of any taxes levied under the Act," the interdiction could only have reference to taxes lawfully assessed and to lawful methods used in collection of taxes *levied under the Act.*

We think the legislature had a right to designate a period within which one alleged to owe the state on sales tax, or two percent on gross receipts, would be required to make his defense. If the controversy goes only to the proposition that the transaction is not taxable, or, if taxable, the person assessed is not the party charged by law with payment, such issue is determinable by the chancery court of the county where it is sought to compel collection—that is, where the certificate, *prima facie,* creates a lien. If the issue relates only to the *amount* of a valid tax to be paid, then it is appropriate for the general assembly to require payment as a condition precedent to the right to litigate as to any alleged overcharge; and since the fund, when so paid, is transmitted to Little Rock, it is competent for the lawmaking body to fix the venue in Pulaski county.

Where payment has been made, and the suit is one to recover, then the certificate of indebtedness has performed its function, and there is no lien.

In the instant case action was not taken within thirty days; hence, the question cannot now be raised. It is true § 10 of Act 386, by its terms, requires suit to be filed in Pulaski chancery court within thirty days. Insofar as the time element is concerned, the limitation of thirty days applies with equal force to a litigant who seeks relief in his home county where the right to assess *any* tax under Act 386 is challenged, and to the litigant who only questions the *amount* of a tax that has been legally assessed, some part of which is due.

Respondent relies upon *McCain* v. *Hammock, Chancellor, ante,* p. 163, 161 S. W. 2d 192.

In the McCain-Hammock case limitation was not involved. It was sought by prohibition to restrain the chancery court of Bradley county from entertaining jurisdiction in respect of suits filed by plaintiffs who denied they were chargeable in any sense with sums the state sought to assess under provisions of Act 391 of 1941. Collection machinery called for issuance of a certificate of indebtedness, to be filed in the county of the residence of the taxpayer. Before the certificate was filed, McCain, as commissioner of labor to whom director of the employment security division was answerable, alleged the Bradley court was without jurisdiction to determine validity of taxes evidenced by the certificate the commissioner proposed to file. The statute allowed an aggrieved employer a right to review action of the director within ten days after an assessment had been filed, suit to be brought "in the chancery court having jurisdiction."

It was held that the quoted language evidenced an intention by the general assembly to permit suits in any chancery court of the state, "depending upon the facts in each case."

Respondent cites *McCarroll, Commissioner of Revenues,* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977. In that case the suit was brought in Pulaski county. The commissioner of revenues had notified the appellant he "intended to take action to collect $825." It was held that a provision of Act 118 of 1929 prohibiting issuance of injunctions in favor of those from whom it was sought to collect income taxes was invalid and that the chancery court of Pulaski county had jurisdiction to hear the cause. It would probably have been more appropriate to say the venue was in Pulaski county.

In the instant case the record does not present the question of an illegal exaction within the meaning of Art. 16, § 13, of the constitution.

Because Morgan did not question validity of the tax by suit in Mississippi county within thirty days (nor did he satisfy the demand and sue in Pulaski county within thirty days from the exaction of any excess amount collected) the writ is granted.

CITY OF LITTLE ROCK *v.* BENTLEY.

4-6772 165 S. W. 2d 890

Opinion delivered October 5, 1942.

(Rehearing granted; opinion delivered June 29, 1942, withdrawn.)

Cooper Jacoway and *R. C. Butler,* for appellant.

Verne McMillen, for appellee.

SMITH, J. Appellee owns two lots at the southwest corner of Markham and Johnson streets in the city of Little Rock. In March, 1937, after she had acquired one of the lots and shortly before she acquired the other, the city passed ordinance No. 5420 (a zoning ordinance).

At the time she acquired these properties there was a residence on each of the lots. A map attached to the zoning ordinance placed the property in the "B" one-family district, the effect of which classification was to forbid the use of the property for business or commercial purposes.

Appellee applied for a permit to construct a store building on the property, which was denied as a violation of the ordinance. A petition for a reclassification was filed, and referred to the city planning commission, which first approved, but later denied, the petition. On an appeal to the city council the petition was again denied, whereupon appellee filed this suit praying the relief which the council had denied.

After hearing much testimony the court made the following findings:

"The court, being well and sufficiently advised, doth find that the city of Little Rock failed to comply with the requirements of § 4 of act 108 of the Acts of 1929. Therefore, ordinance No. 5420 of the city of Little Rock, known as 'The Zoning Ordinance,' is void.

"The court further finds that the business district known as 'Stifft's Station,' adjacent to the property of the plaintiff, was rightfully established; that it is a growing business district, and that by reason of the growth of said district, plaintiff's property has become undesirable for residence purposes; that there is a demand for an expansion of said business district; that the use of plaintiff's property when a store building is erected thereon will not be hurtful in its use to adjacent property except as such proximity necessarily makes the locality less desirable for residence purposes; that, therefore, plaintiff has the right to use said property for business purposes and that any attempt on the part of the defendants to restrict the growth of the business district or to prevent the plaintiff from using her property for business purposes is unlawful and arbitrary and discriminatory.

"It is, therefore, considered, ordered, adjudged and decreed that the defendants, city of Little Rock and R. A.

Boyce, city engineer of the city of Little Rock, Arkansas, be and they are hereby permanently enjoined from interfering with the construction, operation and use of a store building on lots 1 and 2, block 3, C. S. Stifft's addition to the city of Little Rock, Arkansas, and its officers, agents and employees, are permanently enjoined from prosecuting plaintiff or any of her employees or tenants from erecting or occupying the said store building."

The effect of these findings would be to invalidate the entire ordinance under the holding in the case of *Benton* v. *Phillips,* 191 Ark. 961, 88 S. W. 2d 828, it being there held that compliance with act 108 of the Acts of 1929 was essential to the validity of such an ordinance. But we do not concur in that part of the court's finding. We do think, however, that other findings of fact made by the court are abundantly supported by the testimony, and are certainly not contrary to the preponderance of the evidence.

Our leading case on the subject, and one which we have since consistently followed, is that of *Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883. That case upheld the power of cities to pass zoning ordinances imposing reasonable regulations of buildings, but it was there said: "As the size of the business district grows, it ceases to be a residence district to that extent within the purview of the zoning ordinance, and any attempt on the part of the city council to restrict the growth of an established business district is arbitrary. When a business district has been rightly established, the rights of owners of property adjacent thereto cannot be restricted, so as to prevent them from using it as business property."

Moreover, we are of the opinion that the testimony does not show that the property here in question was zoned as residential property on the map attached to the ordinance when it was passed. The city clerk, Mr. H. C. Graham, testified that the map had been prepared and various districts shown by crayon colors; that after the city engineer returned him the map, it has stayed in his office and the public had access to it; that the crayon markings were not permanent and could be erased; that

the city engineer had a map of the original district, but it was not physically attached to the ordinance, but accompanied it when it was introduced in the council; that he had never certified a copy of the map to the circuit clerk for the reason that he had only the original.

The testimony on the part of appellee is to the effect that she desired to purchase lot No. 2 for the purpose of erecting a store building thereon, but before purchasing the lot she, in company with the agent of the owner having the property for sale, examined the map, and saw that the lot was zoned as business—and not as residential—property. To make this fact entirely certain the agent had the city engineer write a letter reading as follows:

"Department of Public Works
"J. E. McCook, Jr., City Engineer
"May 26, 1937.

"Mr. E. A. McCaskill,
"McCaskill, Inc.,
"Exchange Bank Bldg.,
"City.
"Dear Sir:

"As per your request, be advised that lots 1 and 2, block 3, C. S. Stifft's addition, in accordance with the new zoning ordinance, being ordinance 5420, is zoned for light commercial use, which permits use of this property for retail stores, office buildings, filling stations, etc.

"I trust that this is the information which you desire.

"Yours very truly,
"J. E. McCook, Jr.,
"City Engineer."

If the lot No. 2 was zoned as business property on the map when the ordinance was passed, its character as such would not be changed by alterations of the map made subsequent to the passage of the ordinance. We prefer, however, to predicate our opinion upon the finding of the court below that "plaintiff's property has become undesirable for residence purposes; and that there is a demand for an expansion of said business district. . . ."

If this finding is sustained by the testimony—and we think it is—then a permit should be granted, although the property may have been zoned as residential—and not as business—property when the ordinance was passed.

The power of the courts to review the action of the city council in the classification of property was expressly declared in the Pfeifer case, *supra,* and the existence of that power was reaffirmed in the cases of *City of Little Rock* v. *Sun Building Co.,* 199 Ark. 333, 134 S. W. 2d 583, and *McKinney* v. *City of Little Rock,* 201 Ark. 618, 146 S. W. 2d 167.

The holding that the classification of a particular lot is arbitrary does not affect the validity of the ordinance as to other property the classification of which was not arbitrary. Equally so is this true where property zoned as residential property has ceased to be such.

It was held in the case last cited that the finding of the court upon an application for reclassification of property would not be disturbed where that finding was not contrary to the preponderance of the evidence. Here, the finding of the court is not contrary to the preponderance of the evidence, but is in accordance with it, and the decree will, therefore, be affirmed.

JOHNSON *v.* BYRD.

4-6781 164 S. W. 2d 895

Opinion delivered October 5, 1942.

Hardin & Barton and *Mark E. Woolsey,* for appellant.

GRIFFIN SMITH, C. J. March 13, 1941, J. W. Johnson filed suit in replevin, alleging ownership of a red heifer claimed by C. T. Byrd. A six-man jury in the justice court of Jeff White found in the plaintiff's favor. Judgment was for the heifer and $15. Johnson had alleged the heifer to be worth $15, and had asked $30 as damages.

On appeal a circuit court jury found for the defendant (Byrd) "$50 or the calf in question."

Three errors (copied in the margin) [1] are urged.

First.—Appellee testified he got the heifer from a brother about March 15, 1939, and took it home. The calf was born in April, 1938. Appellee turned it out to graze on the open range. For a time it returned to appellee's home with other cattle, then disappeared. Byrd and his wife, while driving on the highway in February, 1941, saw the animal pasturing with some of appellant's stock. The two testified that they recognized it, and made definite identification in general terms. Byrd's statement was that ". . . my heifer is a three-year-old, past, and not a two-year-old, past." Undisputed facts are that when the trial was had before Justice of the Peace White the heifer had not lost any of its so-called "milk teeth"; also, that when trial was had in circuit court the animal still retained ". . . two large center front teeth and the rest were milk teeth."

Farmers' Bulletin No. 1721, U. S. Department of Agriculture, is attached to appellant's brief. Using the bulletin as an authority, it is argued that the heifer could not belong to Byrd because of the admitted condition of its teeth; therefore, it is insisted, the evidence is contrary to recognized laws of nature.

[1] (a) "The verdict of the jury was contrary to and not supported by any substantial evidence."

(b) "The trial court erred in instructing the jury over the objection and exception of the plaintiff that the burden rested upon the plaintiff to prove by a preponderance of the evidence that the animal in question was the property of the plaintiff."

(c) "The trial court erred in not granting a new trial on the grounds of newly discovered evidence."

While we find it difficult to understand how appellee and those who testified for him were able to definitely identify the animal, we are not willing to say the evidence was not substantial; hence assignment No. 1 must be dismissed.

Second.—Insistence is that because the heifer bore Johnson's mark, the burden rested upon Byrd to prove ownership, and the court's ruling to the contrary was erroneous. The mark was only evidential.

Third.—Was it essential that there be evidence of value? The only showing of worth is contained in the affidavit filed by Johnson, alleging that in March, 1941, the heifer was worth $15, and that damages were $30. Johnson has asked for another trial on the ground of newly discovered evidence, and says that if given the opportunity he will produce the heifer for a jury's inspection. The absence of evidence as to value was not raised in appellant's motion for a new trial, unless it be said that the general allegation that the verdict was contrary to the law and the evidence was sufficient. If the value be fixed at the lowest amount shown—that contained in the affidavit and bond—fifteen dollars would be the maximum recovery in the event the animal cannot be delivered, and the error complained of would be cured. *Keller* v. *Sawyer,* 104 Ark. 375, 149 S. W. 334.

Our holding that the value should be fixed at the lowest figure substantially dealt with does not give the party in possession the right to pay the alternative money judgment and retain the property. The owner has an absolute right to have his property restored if that can be done. *Bilby* v. *Foosh,* 90 Ark. 297, 119 S. W. 286; *Swantz* v. *Pillow,* 50 Ark. 300, 7 S. W. 167; *Miller* v. *Gordon,* 172 Ark. 1, 285 S. W. 359.

Affirmed.

MILLS *v.* SILBERNAGEL & COMPANY.

4-6688 164 S. W. 2d 893

Opinion delivered October 5, 1942.

[redacted]

O. C. Burnside and *J. R. Wilson,* for appellant.

Maurice L. Reimberger and *E. D. Dupree, Jr.,* for appellee.

GREENHAW, J. Appellant sued Silbernagel & Company, a partnership, and a number of their truck drivers for damages for a personal injury he received from an alleged collision near Jenny in Chicot county on U. S. highway 65 shortly after dark on Monday, June 26, 1939.

The complaint alleged that appellant was driving his truck south on said highway at a reasonable rate of speed, with due care and caution for his own safety, when he met a truck of Silbernagel & Company going north on said highway, and driven by their agent and employee in the prosecution of their business. It further alleged that the Silbernagel truck was being operated in a negligent and reckless manner at an excessive rate of speed, taking most of the paved surface of the

highway, and forced appellant to drive on the shoulder of the highway in an effort to avoid a collision, striking the left side of his truck and resulting in a serious injury to his left arm which necessitated its amputation about two inches above the elbow.

Silbernagel & Company answered, denying all material allegations of the complaint, and specifically stating that no truck belonging to them and operated for their benefit or on any of their business was in the vicinity of the place where appellant claims he was injured; that all of their trucks were through with their business for the day and none of the defendants were performing any business for them. They later filed an amendment to their answer, stating that appellant at the time of the alleged collision was in such an intoxicated condition that he did not know or could not know whose truck struck him and was not in such condition that he could exercise ordinary care for his own safety, and pleaded appellant's contributory negligence.

At the conclusion of the testimony on behalf of appellant, a nonsuit was taken as to all defendants except Silbernagel & Company and Sylvester Brown, their driver, who appellant contends was driving the truck involved in the collision, and the trial proceeded against them only. Several witnesses testified and the issues were submitted to a jury resulting in a verdict in favor of appellees, upon which judgment was entered and from which is this appeal.

In his motion for a new trial appellant assigns numerous errors, a part of which he waived in his brief on appeal. We have carefully considered all the assignments of error upon which appellant relies for a reversal of this case, and are unable to agree that any of them constitute reversible error.

There was substantial evidence introduced on behalf of both appellant and appellees. We think the instructions given to the jury fairly presented their respective theories of the case, and that no reversible error was committed either in the admission or rejection of testimony or in the giving or refusing of instructions. It is

a well established rule that this court will not pass on the weight of testimony, that being within the exclusive province of the jury, whose verdict should be upheld when it is based upon substantial evidence. *Lewis* v. *Shackleford,* 203 Ark. 500, 157 S. W. 2d 509.

The evidence showed that no one was with appellant at the time of the collision. He testified that the lights of the truck which struck him were not dimmed as it approached him, and that in order to avoid the collision he drove over on the shoulder of the highway as far as he could without going into a deep ditch, and that the truck which struck him was over on his side of the highway, although it had ample room to pass him on its side of the highway; that the rear view mirror and the door handle were knocked off of his truck, the door dented and about half of the left rear fender knocked off; that after the collision the truck proceeded up the highway a short distance and stopped, the driver opening the door, looking back and then immediately closing the door of the truck and proceeding on his way without offering any assistance or making known his identity. He could see that the driver of the truck was a negro. He testified that he saw the name of Silbernagel on the truck, and knew the kind of trucks Silbernagel & Company operated, as he had seen them frequently. After the accident he drove his truck into the town of Jenny, a short distance from the scene of the collision. He further testified that he was sober at the time of the collision.

The evidence showed that Silbernagel & Company was engaged in the wholesale grocery business and also in the beer business and operated trucks with trailers in connection with their grocery business, but that the trucks which handled beer did not have trailers attached. Sylvester Brown, when driving the truck, used one with a trailer, delivering groceries. It is not contended that a beer truck was involved in this collision, but that the truck was one with a trailer, used in the delivery of groceries, and driven by Sylvester Brown.

Evidence was given on behalf of appellant by other witnesses to the effect that a truck and trailer of Sil-

bernagel & Company used for delivering groceries was seen by them that evening near the scene of the alleged collision on U. S. highway 65, proceeding north in the direction of the place where the collision occurred, and some of them identified the driver thereof as Sylvester Brown. One witness, Willie Stewart, testified that he saw Sylvester Brown on this occasion driving the truck of Silbernagel & Company and talked with him.

On the other hand, considerable evidence was introduced on behalf of appellees that no truck of Silbernagel & Company was operated on U. S. highway 65 at or near the scene of the alleged collision at any time on Monday, June 26, 1939, the date of the collision, except a beer truck, and that all Silbernagel & Company's trucks were in their garage by 5 p. m. on that date, and left there for the night and locked up, although it was further in evidence that all the drivers had keys to the garage.

Sylvester Brown, who appellant contends was the driver of the truck that struck him, testified that he did not work for Silbernagel & Company on Monday, June 26, 1939, and did not drive one of their trucks at any time on that date. His testimony was corroborated by other witnesses, and the payroll record showed he was not paid anything for that day, but worked the remainder of the week, and showed the number of hours he worked each day. Brown testified that not only did he not drive the truck involved in the collision with appellant, but that he was not present, knew nothing about the collision, and further that he did not have a conversation with Stewart on that date.

Evidence was also given that appellant was not intoxicated when he arrived at Jenny shortly after the collision. A young woman, a waitress in a cafe at Lake Village, testified that appellant drank two bottles of beer around noon in the cafe. She was with him most of the afternoon, and when she last saw him, about 6:30 p. m., he was leaving in his truck for home and appeared to be sober. He had drunk nothing while in her company since noon.

A number of witnesses, some of them being officers, testified that appellant was intoxicated in Lake Village and Eudora on the afternoon preceding the collision, the time of his intoxication being placed by some as late in the afternoon. Calmes Merritt, former sheriff and collector of Chicot county for 22 years, testified that he saw appellant at Lake Village between 6 and 7 p. m. on this date, and that he was "pretty drunk." Appellant testified that the collision occurred about 8 p. m.

Appellant contends that it was reversible error for the court to submit to the jury the question of contributory negligence, since appellees contended that neither Silbernagel & Company's truck nor Sylvester Brown was involved in this collision, and that in view of this contention a plea of contributory negligence was inconsistent. He further urges that no one testified that he was intoxicated at the time the collision occurred; that there was no evidence of contributory negligence which warranted the submission of this question to the jury, and that the court erred in admitting evidence of the intoxication of appellant, and in instructing the jury that if they found from the evidence that appellant at the time of the collision was driving his truck upon the highway in an intoxicated condition they could consider that as a circumstance in determining whether appellant was guilty of contributory negligence.

While it is true no one testified that appellant was intoxicated at the exact time the collision occurred, there was ample testimony to support a finding that he was intoxicated a short time before the collision. The former sheriff of Chicot county and others testified they saw him in an intoxicated condition shortly before dark on the date of the collision. According to the testimony, the period intervening between the time the last witnesses saw appellant and the time of the collision was short, and we do not think the court erred in submitting the question of intoxication to the jury for their consideration in connection with other facts in evidence, in determining whether appellant was guilty of contributory negligence.

The court did not tell the jury that if they found that appellant was intoxicated at the time of the collision he

would be guilty of contributory negligence, nor that it was evidence of contributory negligence, but instructed them that if they found from a preponderance of the evidence that appellant was driving his truck while under the influence of intoxicating liquors and such intoxication, if any, caused or contributed to appellant's injury, he could not recover.

This was a correct declaration of law. This court has held that the fact that a person was intoxicated at the time he was injured does not of itself show such contributory negligence as will defeat his recovery for such injury, but it is a circumstance which may be considered in determining whether or not his intoxication contributed to his injury. *American Bauxite Co.* v. *Dunn,* 120 Ark. 1, 178 S. W. 934, Ann. Cas. 1917C, 625.

It appears that Sylvester Brown was never served with summons, nor was an answer filed for him, although he appeared and testified. Appellant now contends that, although Brown was named as a defendant in the complaint, it was reversible error for the court to instruct the jury regarding his liability. Brown was treated by all parties throughout the trial as a party defendant. Instructions were offered concerning him without objection from either party on this ground, and appellant cannot now complain of this alleged error.

Finding no reversible error, the judgment is affirmed.

POWELL *v.* COGGINS.

4-6815 164 S. W. 2d 891

Opinion delivered October 5, 1942.

Mann & McCulloch and *Harold Sharpe,* for appellant.

Giles Dearing, for appellee.

McHaney, J. On December 27, 1939, appellant purchased from the state the north half, south half, southeast quarter, 7-8-4 and north half, southwest, southwest, 8-8-4, in Cross county, Arkansas, receiving from the State Land Commissioner a deed therefor, which was thereafter duly recorded. The state's title was based on a tax forfeiture and sale to the state in 1936 for the taxes of 1935.

On March 11, 1940, appellee purchased from the state the south two-thirds of the south half, southeast one-fourth, 7-8-4 and the south two-thirds of southwest, southwest, 8-8-4, Cross county, receiving from the State Land Commissioner a deed therefor, which was thereafter duly recorded. The state's title was based on a tax forfeiture and sale to the state in 1933 for the taxes of 1932.

Appellant also got a deed from the St. Francis Levee District to all the southwest, southwest of section 8 and 15.3 acres in section 7.

She brought this action against appellee, setting up her title as aforesaid, and alleging that he had moved his fence and enclosed about 220 feet of her land and refused to give her the possession thereof. She prayed that appellee be enjoined from entering upon her land and that he be ordered to remove said fence and place it upon her south boundary line, and that she be awarded damages. The answer was a general denial. Trial resulted in a decree dismissing the complaint for want of equity and an order directing appellee to refund appel-

lant any amount she had paid the levee district on lands owned by him, a tender of which was made in court.

Prior to 1935, the land in the south half of the southeast quarter of section 7 and that in the southwest quarter of the southwest quarter of section 8, said township and range, had been assessed on the tax books of Cross county as north one-third of south half of southeast quarter of section 7, township 8 north, range 4 east, 26 2/3 acres in the name of John Coggins. South 2/3 of the same tract, 53 1/3 acres, in the name of Mrs. Sharp. North 1/3 of southwest, southwest, section 8, 13 1/3 acres, in the name of John Coggins. South 2/3 of the same tract, 26 2/3 acres, in the name of Mrs. Sharp. In 1933 the tax on each of these tracts was not paid, became delinquent, and all four tracts were sold to the state. Later appellee redeemed from the state the two tracts assessed in his name as the north 1/3 of each tract, but Mrs. Sharp did not redeem the south 2/3s of either tract assessed in her name and later the title to her two tracts was confirmed in the state. For the first time, in 1935, there appeared on the tax books an assessment of these lands which were described in section 7 as the north half (N½) of south half (S½) of SE¼, 40 acres, in the name of Mrs. Sharp, and south half (S½) of south half (S½) of southeast quarter, 40 acres, in the name of John Coggins. In section 8, the land was described as north half of southwest quarter of southwest quarter in the name of Mrs. Sharp, and the south half of southwest quarter of southwest quarter in the name of John Coggins. Not only were the descriptions changed from the north one-third and south two-thirds of each tract to the north half and south half, but the ownership was also switched. Of course the name of the listed owner is unimportant, but the fact that the title to the south two-thirds of these tracts had been in the state for two years is important. The 1935 description on the tax books as the north half of the south half of the southeast quarter of section 7 and the north half of the southwest, southwest of section 8 necessarily included a part

of the 1933 forfeiture and sale to the state described as the south two-thirds of each tract. The title, therefore, to a portion of the 1935 description, being already in the state, the land was not subject to taxation as the north half. The north one-third of each tract was subject to taxation, because it had been redeemed by appellee, but the north one-third was not assessed as such, but was attempted to be assessed as the north half description, which was ineffective because it was not described as the north third and because it included land already in the state and not subject to taxation.

Therefore, the 1935 tax forfeiture and sale to the state, being void for want of power to make it, the deed from the state to appellant based thereon is likewise void as to all lands covered thereby, the title to which was not already in the state, and the fact that the state's title based thereon was confirmed did not cure the invalidity because, as we said in *Crockett* v. *Beardon,* 203 Ark. 48, in a similar situation, "Confirmation does not cure a sale that could not be made." The collector would have no power to sell land to the state for taxes, when the title is already in the state.

The question then narrows down to the ownership, as between the parties, to a strip of land 220 feet wide and extending east and west across both descriptions and lying on the south side of the north half of the south half of the southeast quarter of section 7 and on the south side of the north half of the southwest, southwest of section 8. Appellant's deed includes this strip, as does appellee's, and it is conceded that the title to it was in the state by reason of the 1933 forfeiture and sale. Appellant's deed, being prior in point of time to appellee's, necessarily conveyed this strip to her, as it was included in the calls in her deed, and the subsequent deed from the state to appellee was ineffectual to this extent. The fact that her deed mentioned the 1935 forfeiture and sale is unimportant as to that strip already in the state. *Walker* v. *Taylor,* 43 Ark. 543. It was effective to convey whatever title the state had by any forfeiture and sale to it.

Appellant also relies on her deed from the levee district. The court correctly held that this purchase amounted to a redemption by her and adjudged that appellee should refund her the amount she had paid out on his land, a tender of which had been made by him.

The decree will be reversed, and the cause remanded with direction to enter a decree in her favor for the strip of land above described.

WISE *v.* STATE.

4270 164 S. W. 2d 897

Opinion delivered October 5, 1942.

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. Trial resulted in a verdict of guilty, on which a judgment was entered, sentencing him to the penitentiary for a term of two years, and from which he has appealed. He has not favored us with a brief in his behalf.

Five assignments of error were set up in the motion for a new trial, but they raise only two questions: (1) the sufficiency of the evidence to sustain the verdict and judgment, and (2) the jurisdiction of the court, it being alleged that the offense, if any, was committed in the Western District of Carroll county and not in the Eastern District, in which the court was sitting. Neither assignment can be sustained.

As to the alleged insufficiency of the evidence, it was established by the testimony of the father and mother of the prosecutrix that she was under the age of 16 years, and there was no dispute of their testimony. The prosecutrix herself testified positively that she did have sexual intercourse with appellant in March of this year, detailing the time, the place and the circumstances of the occurrence. She was corroborated to some extent by the testimony of a girl companion who, with another man, drove to Eureka Springs and back from Berryville that night, and also by a physician who made a physical examination of her the next day. Appellant denied that he had such relationship with her and was corroborated by the other man. She was not an accomplice within the meaning of § 4017 of Pope's Digest, and corroboration was not necessary. *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813. So the testimony was in dispute, and, as to who was telling the truth, was for the jury to decide. It did so, found appellant guilty and its verdict must stand since it was supported by substantial testimony, in fact by a preponderance thereof.

As to the jurisdiction of the court, we think the venue was sufficiently proven. Under § 36 of Initiated Act No. 3 of 1936, Acts of 1937, p. 1384, *et seq.,* it is provided that upon trial the offense shall be presumed to have been committed within the jurisdiction of the court, "unless the evidence affirmatively shows otherwise." There is no evidence showing that the offense, if committed at all, was at another place in another jurisdiction.

Affirmed.

TALLEY *v.* CITY OF BLYTHEVILLE.

4267 164 S. W. 2d 900

Opinion delivered October 5, 1942.

Claude F. Cooper and *T. J. Crowder,* for appellant.

Percy A. Wright, for appellee.

SMITH, J. Appellant was fined for a violation of an ordinance of the city of Blytheville requiring payment of an occupation tax to operate a taxicab service within the corporate limits of that city.

The cause was heard upon an agreed statement of facts, in which a violation of the ordinance is admitted, but it is insisted for the reversal of the judgment of the court below that the ordinance is void for the reason that there was no statute of the state authorizing the passage of the ordinance at the time of its enactment.

We said in the case of *Nesler* v. *Paragould,* 187 Ark. 177, 58 S. W. 2d 677, that "The right to enact ordinances is a power conferred on municipal corporations by legislative grant, and therefore its authority to legislate is limited to the authority found in an express grant of power, or which is necessarily implied in the express grant in order to make effective the attainment of the purpose for which the express authority is given."

The question for decision is, therefore, whether the authority has been conferred upon the city to enact the ordinance.

This power is expressly conferred by act 239 of the Act of 1931, p. 748; but the city ordinance was enacted March 27, 1921, which was ten years prior to the passage of Act 239.

It was said in the case of *Nesler* v. *Paragould, supra,* that "The city council has authority under § 7532 of Crawford & Moses' Digest to regulate and license wheel vehicles kept for hire." This section of Crawford & Moses' Digest appears as § 9601, Pope's Digest, and is a regulatory—and not a revenue—statute. It confers upon the cities and towns of the state the power, among others, "to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire and all delivery stables; . . ."

This statute was construed and upheld in the cases of *Russellville* v. *White,* 41 Ark. 485; *Fort Smith* v. *Ayers,* 43 Ark. 82; *Brewster* v. *Pine Bluff,* 70 Ark. 28, 65 S. W. 934. It was held in these cases that the act was a regulatory—and not a revenue—statute, and that the power to regulate includes the power to license as a means of regulating, but that the license fee must be reasonable and not imposed for the sole or main purpose of raising revenue.

Now, the ordinance here in question is a revenue measure, imposing an occupation tax on various businesses for the purpose of raising revenue, and authority for its enactment must be found elsewhere than in § 9601, Pope's Digest.

We think that authority appears and is found in § 9728, Pope's Digest. This section was enacted as act 294 of the Acts of 1937, p. 1045, and is entitled "An Act amending act 94 of the Acts of 1919 which permits cities of the first and second class to levy an occupation tax to include all municipal corporations, and for other purposes." This act 94 of the Acts of 1919 was in force and effect when the city ordinance here in question was passed.

The constitutionality of this act was attacked in the case of *Davies* v. *Hot Springs,* 141 Ark. 521, 217 S. W. 769; but the grant of power to tax occupations was there upheld. A headnote to that case reads as follows: "7. Act of February 19, 1919, page 82, authorizing cities to tax occupations, authorizes the imposition of a tax, and not merely a license fee for purposes of regulation."

That this act authorized the ordinance here in question is conceded; but it is contended that this grant of power as related to motor vehicles was withdrawn by Act 62 of the Acts of 1929, p. 137.

We do not think, however, that it was the purpose of act 62 to impair § 7618, C. & M. Digest, then in force. That section was amended by act 294 of the Acts of 1937, and, as thus amended, now appears as § 9728, Pope's Digest; but the amendment does not change § 7618, C. & M. Digest, in any respect of importance in this case.

The case of *Nesler* v. *Paragould, supra,* (opinion delivered April 3, 1933) recognizes § 7618, C. & M. Digest, as being then in effect and as conferring power to impose a tax on the operator of an automotive vehicle for hire; but the owner in that case was held not to be subject to the tax for the reason that his vehicle, a one-half ton truck, was used solely and exclusively for making delivery of merchandise to his customers for which no extra charge was made over and above the price charged customers who bought at his counters and themselves carried away the merchandise which they had purchased. It was there said: "It appears that the city's right to tax motor vehicles *not used for hire* is limited by § 7444 (C. & M. Digest, *supra*), and the burden sought to be imposed upon the appellant for the use of his truck in addition to the $5 prescribed by § 7444 is invalid and cannot be sustained."

The provision of the ordinance imposing the tax reads as follows: "Service cars for hire to public, $30 per annum." This is not a tax of $30 upon each car owned and operated for hire, or a tax in any amount upon the car, but it is a license or occupation tax upon

any one engaged in the business of operating a car or cars for hire.

In our opinion § 7618, C. & M. Digest, in force when the ordinance was passed, conferred power to pass it, and the judgment of the court below will, therefore, be affirmed.

CRAWFORD *v.* STATE.

4268 164 S. W. 2d 898

Opinion delivered October 5, 1942.

C. T. Carpenter, for appellant.

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

HUMPHREYS, J. Appellant, Lee Crawford, and his son, Lester Crawford, were accused by prosecuting attorney in an information filed in the criminal division of the circuit court of Poinsett county, Arkansas, of assaulting Neil Holdman with a knife in said county with intent to kill him.

They were tried to a jury under instructions correctly defining the law on assault with intent to kill, assault with a deadly weapon and assault and battery.

Both were convicted for assault with intent to kill as charged.

The jury fixed the punishment of Lester Crawford at one year in the penitentiary, but recommended a suspended sentence which the court adopted.

The jury fixed the punishment of appellant at two years in the penitentiary, and from the judgment and sentence of the court to a two-year term in the penitentiary an appeal has been duly prosecuted to this court by appellant.

Appellant assigns as reversible error the insufficiency of the evidence to sustain the verdict and judgment for assault with intent to kill, arguing that the parties involved in the difficulty met unexpectedly on the road and had a family fight.

The evidence, viewed in the most favorable light to the state, reflects that Neil Holdman planted and cultivated a garden of two or three acres near his home and near where the appellant and his family lived; that appellant's children, at his instance, pulled up and destroyed the garden; that Neil Holdman swore out warrants for them; that after the service of the warrants upon them, they met Neil Holdman on the highway, and appellant said to Neil Holdman, "Who in the hell told you that I stole your stuff?" that Neil Holdman responded by saying, "I didn't need anyone to tell me, I saw it"; that appellant then said that anyone who said he stole the garden stuff told a damn lie; that Neil Holdman then said, "We will see about that," (meaning that they would see about it when the trial came up); appellant responded by saying, "We will see about it now"; that both appellant and his son, Lester, made for Neil Holdman and grappled with him; that Neil Holdman had a walking stick which he raised when they came at him and while they were struggling appellant's housekeeper said "Get the stick and beat him to death"; that during the struggle, in order to avoid an automobile which came

down the highway, they rolled down the dump into a ditch; that appellant and his son, Lester, were beating Neil Holdman over the head and on the back and during the struggle Lester Crawford kicked Neil Holdman over the eye; that at this juncture appellant told Lester Crawford to "cut him, cut him," whereupon, Lester Crawford stabbed Neil Holdman in the left arm with a knife that went to the bone and deadened the arm.

About that time Hal Stricklin, a deputy sheriff, came upon the scene and saw appellant's housekeeper kick Neil Holdman in the back while he was down in the ditch beside the road. He arrested appellant and some members of his family and testified as follows concerning the condition in which he found Neil Holdman: "His right eye or one of his eyes was closed, blood was running down his shirt back of his shoulder, he was bleeding in several places over his face and arm, and I didn't know that it was Mr. Holdman at first. I took his shirt off, and he showed me where he was cut on the shoulder. It was a straight stab. His face and head were scratched up all over. He had several bruises, and I noticed knots, several of them, on his head."

He further testified that he talked to the boy after arresting him and asked him about the knife. He asked him where the knife was that he struck Mr. Holdman with, and the boy said that he did not know anything about it. Mr. Stricklin said: "Lester, what did you do with the knife?" Lester said that he threw it away, that he threw it either in the field or in the borrow pit, he did not know just where, but there was no use hunting for it. The boy admitted that he stabbed Neil Holdman. He did not tell why he had done it.

We think the jury had a right to find from the above detailed evidence that appellant and a part of his family assaulted Neil Holdman with intent to kill him because he had sworn out a warrant for appellant and his family for destroying his garden. The jury did not agree with the construction appellant has put upon the evidence to the effect that the participants in the fight met unexpectedly on the road and had a family fight without

intent to kill Neil Holdman, and there is substantial evidence to sustain the view of the jury.

Appellant also insists for reversal of the verdict and judgment because the court allowed Neil Holdman to testify that he was in fear of losing his life during the fight and for testifying that he knew if someone did not come along the jig was up. Relative to this piece of testimony the court told the jury: "You will not consider what he thought, but you will consider it for whatever assistance it will give you in arriving at the state of mind of the parties at the time in determining whether the defendants did assault him, and if so whether they assaulted him with the intention to kill him."

Later on and before the case was sent to the jury the court instructed the jury to disregard the testimony objected to entirely as he doubted whether or not it would shed any light on the state of mind of the parties or on the question as to who was the probable aggressor.

Relative to the erroneous admission of evidence during the progress of a trial and the subsequent withdrawal thereof before the case was submitted to the jury this court, in the case of *Goynes* v. *State,* 184 Ark. 303, 42 S. W. 2d 406, quoted from 38 Cyc. 1440 as follows: "The general rule is that if inadmissible evidence has been received during the trial, the error of the admission is cured by its subsequent withdrawal before the trial closes, and by an instruction to the jury to disregard it."

In the instant case the court distinctly withdrew the piece of evidence objected to and told the jury not to consider it and explained why the jury should not consider it. If any error was committed in admitting the evidence the error was cured under the general rule announced in the case of *Goynes* v. *State, supra.*

Appellant also assigns as reversible error that the prosecuting attorney asked appellant on cross-examination whether he had killed his father-in-law. He answered "yes," but that he was justified in doing so. An examination of the record reflects that no objection was made to the question or answer at the time, so it cannot

be successfully argued now that appellant was prejudiced on account of the question and answer.

Appellant also assigns as reversible error that on cross-examination he was asked by the prosecuting attorney whether his son or his housekeeper shot at Neil Holdman's wife on the day of the trial for destroying Holdman's garden. He answered the question in the negative. Under the rule announced by this court in the case of *Benton* v. *State,* 78 Ark. 284, 94 S. W. 688, no prejudice resulted to appellant since he answered the question in the negative.

No error appearing, the judgment is affirmed.

CARPENTER *v.* STATE.

4272 164 S. W. 2d 993

Opinion delivered October 5, 1942.

J. R. Long, for appellant.

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

HOLT, J. A jury convicted appellant, Arthur Carpenter, of the crime of arson and fixed his punishment at one year in the state penitentiary. The indictment charged that appellant on January 1, 1942, set fire to and burned a building belonging to the Washington county, Mississippi, Y. M. C. A. On this appeal appellant contends that the evidence was not sufficient to support the verdict and the judgment against him, and that the trial court erred in giving appellee's instruction No. 4.

1.

In cases of this nature this court has many times announced the rule that the duty devolves upon the state to prove the *corpus delicti.* The state must also not only show that a building was burned, but that such burning was the result of the willful act of some person responsible for his acts. See *Johnson* v. *State,* 198 Ark. 871, 131 S. W. 2d 934, and *Hancock* v. *State, ante,* p. 174, 161 S. W. 2d 198.

The rule is also well established that arson may be proved by circumstantial evidence. See *Duke* v. *State,* 183 Ark. 1153, 38 S. W. 2d 764.

On appeal the evidence must be viewed in the light most favorable to the appellee. See *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50, and *Tate* v. *State, ante,* p. 470, 163 S. W. 2d 150.

The secretary of the Y. M. C. A. described its property located near Malvern, Arkansas, and testified that the summer before the Y. M. C. A. building, in question, was burned they had cared for approximately 550 boys and girls in the camp, and that in a conversation with appellant, a near neighbor to the camp, appellant objected to the camp and its location. Sam Easley, a caretaker at the camp, testified that he discovered the fire at about 12:30 a. m., and that by the time he reached it the fire was beyond control. He sent his boy to call officers and request that blood hounds be sent to the scene. Bill Abbott came with two dogs and about 20 feet from the place where the building had burned they came upon and followed a trail. He further testified that he

saw a jug "partly burned right there where the fire was set." "Q. Do you know whether or not there were any jugs under the building? A. No, because I kept it cleaned out all the time. Q. How long had it been since anybody had used this building? A. Along the last of August. It was locked and nailed up." There had been a very hard rain preceding the fire.

Paul Easley, the caretaker's son, corroborated his testimony.

Bill Abbott, a Hot Springs policeman, testified that he brought two blood hounds to the scene; that they were bred at the Arkansas prison farm at Tucker, were well trained and he had never seen them fooled. When he reached the scene the building had completely burned, but the rain had stopped. He took the dogs to the back of the building and they "picked up a trail" which they followed to appellant's house. He further testified that the dogs could not have "picked up" a trail made the day before on account of the rain. On the trail they came to soft spots where they found rubber boot tracks that had been made since the rain. He put appellant's boots in the tracks and they fitted. They found the boots in appellant's house about two hours after the fire and after the dogs had led them to it. The boots were wet and appellant's trousers were wet to his waist. "We began looking around over the house for wet clothing and couldn't find them. He had on a dry pair of socks and the pants we got were soaking wet. We couldn't find any other wet clothes in the house. He still had them on. This was about 2 a. m. on the night of the fire." He further testified that they tried the dogs to see if they would trail anyone away from the gate leading to appellant's house, and they would not.

Will Lowe, a deputy sheriff, testified that he and Mr. Abbott managed the dogs and that they followed a trail up to appellant's house. He called on appellant to come out and in four or five minutes appellant appeared. Appellant had on his trousers and a pair of socks. The trousers were wet from the waist down, and the boots which were lying in a box near the wall were still moist.

Appellant said he had been in the house all evening, ever since he had finished his work. The trousers were so wet you could squeeze water out of them. He compared the boots with a track and they fitted. The track had been made after the rain which ceased about midnight. He found two glass jugs that had kerosene in them. Appellant said he had bought four gallons of kerosene from a country merchant within the last few days and two gallons from a peddler. Appellant told them he used the kerosene for his chickens. J. G. Fisher, sheriff of Hot Spring county, testified that appellant, when brought over to the jail, offered to plead guilty with the understanding that he was not guilty.

Jack McKenzie, state fire marshal, testified that in the northwest corner of the place where the building burned, near some steps, there was the neck of a glass jug; that he talked to appellant about the fuel that he used for his lanterns and lamp in his chicken house, and appellant told him he used possibly a gallon of coal oil a week and that he had a gallon or a gallon and a half on hand at the time of the fire. Appellant then said that he had purchased six gallons previous to the fire. He also saw Will Lowe fit appellant's boots in the tracks and they fitted perfectly. They checked up on the purchases of kerosene by appellant and found he had bought six gallons seven or eight days prior to the fire and that he had on hand a gallon to two gallons at the time of the fire. He talked to appellant and appellant said that he would like to get out of it and would enter a plea of guilty if he could get out real light, but wanted it understood in court he was not guilty.

It is our view that the evidence was ample to support the jury's verdict and the judgment of the court.

Appellant's objection to instruction No. 4, given on behalf of the state, can not be sustained for the reason that the transcript discloses that no objection was made to this instruction by appellant and no exceptions saved. It is not sufficient to bring forward an objection for the first time in the motion for new trial. In *Boatright* v. *State,* 195 Ark. 611, 113 S. W. 2d 107, we said: "The

transcript does not reflect that a motion to quash the indictment was filed by appellant or that any objection was made to overruling such a motion. It is true that in the motion for a new trial appellant states the trial court erred in overruling his motion to quash the indictment. However, the record does not show that such a motion was filed or that any objection was made to overruling same." See, also, *Butler* v. *State,* 198 Ark. 514, 129 S. W. 2d 226.

Finding no error, the judgment is affirmed.

ELLSWORTH, ADMINISTRATOR, *v.* CORNES.

4-6754 165 S. W. 2d 57

Opinion delivered October 12, 1942.

O. H. Sumpter, C. T. Cotham, Stanley D. Campbell, U. A. Gentry, House, Moses & Holmes and *S. Hubert Mayes,* for appellant.

Martin, Wootton & Martin, Cooper B. Land and *Moore, Burrow & Chowning,* for appellee.

McHaney, J. Appellant, E. C. Ellsworth, was the administrator in succession of the estate of Frank Eveland who died intestate in Garland county, Arkansas, February 2, 1936, leaving no widow and no direct heirs, his wife having predeceased him. Shortly after Eveland's death, one Davis, a former county judge of Garland county, was appointed and qualified as the first administrator and made and filed an inventory of said estate. A short while thereafter he died and his widow, May Davis, was appointed, qualified and served for a short time and resigned, and appellant, Ellsworth, became her successor. Appellant, Maryland Casualty Company, became the surety on Ellsworth's bond as such administrator. Appellant, Frances M. Varney, is a stepdaughter of said intestate and is claiming the real and personal property of said estate, here involved, as a gift from her stepfather. Other appellants are C. T. Cotham and O. H. Sumpter of Hot Springs, reputable members of the bar of this court of long standing, and Stanley D. Campbell, a member of the bar of Tulsa, Oklahoma, and we presume he is a reputable member thereof.

Appellees are all the collateral heirs of Frank Eveland. They brought this action against appellants in the

chancery court to surcharge and falsify the accounts of Ellsworth as administrator in the handling of said estate, and to recover a judgment against him and the surety company for the funds misappropriated, to cancel an alleged void order of the Garland probate court, to cancel a certain deed from said Eveland to Frances M. Varney purporting to convey certain real estate to her and to cancel certain deeds made and executed by her to her attorneys, totaling a one-half interest in the same real estate covered by the deed from Eveland to her, and a deed from Sumpter to Ellsworth, administrator, covering a portion of the part conveyed to him. Judgment was also sought against all the parties, including attorneys, for moneys of the estate wrongfully had and received by them. The prayer of the amendment to the complaint is: "Therefore, plaintiffs pray that they have judgment against the said E. C. Ellsworth, administrator of the estate of Frank W. Eveland, deceased, and the Maryland Casualty Company, a corporation, in the sum of $12,909.10, together with interest thereon from July 13, 1938, at the rate of six per cent. per annum until paid; that the defendants, O. H. Sumpter, C. T. Cotham, Frances M. Varney and Stanley Campbell, be required to account for the funds and property illegally paid to and received by them from said estate, and that the deed of Frances M. Varney and the deeds to all persons claiming interest in said real property through her, be canceled and held for naught, and for costs and all other proper relief."

The complaint and the amendment made certain allegations of misconduct on the part of all the individual appellants which we do not consider material to the decisive point or points on which this opinion is based and we do not, therefore, set them out. The complaint did allege that Ellsworth, as administrator, did receive personal property of said estate of the value of $15,733.08 and that the lawful expenses of administration and the payment by him of lawful and valid debts was the sum of $2,823.98, leaving a net balance of $12,909.10, which should have been distributed by him to appellees, as the heirs at law of said intestate, according to the law of

descent and distribution of this state; that he had failed and refused to do so, and that they should have judgment against him and the surety company on his official bond therefor, with interest from July 13, 1938, at six per cent. per annum; and that his settlement theretofore made be surcharged in said amount for the use and benefit of appellees. It was also alleged that the administrator had paid to Sumpter $600 and to himself $492 without any order of the probate court authorizing him so to do, and that each of them should be required to account therefor. Also that the administrator had paid and delivered to Cotham, Varney and Campbell money, stocks and securities of the total value of $11,901.10, without lawful authority, and that each of them was indebted to appellees in said sum. As to the real estate, it was alleged that the deed purporting to convey same to Varney was never signed and acknowledged by Eveland, was never legally delivered to her, and that she acquired no title thereto; that *mesne* conveyances of said real estate were made by Varney, and that Cotham, Campbell, Sumpter and Ellsworth, individually are now the record owners of a one-half interest therein; and that said conveyances by her are void as against appellees who are entitled to have all said deeds canceled. It is also alleged that they acted promptly upon discovery of the actions of appellants which was a short time before the bringing of this suit.

Separate answers were filed consisting largely of general denials. Trial resulted in a decree for appellee. The court found it had full and complete jurisdiction of the action and all the parties; that appellees are all the heirs at law of Frank W. Eveland who died intestate at the place and date aforesaid, and, as such heirs, are entitled to all the estate of said Eveland involved in this action; that "the order or orders of the Garland probate court purporting to pass title or find title to the money or other property involved in this litigation or purporting to distribute the estate or any part thereof to Frances M. Varney, E. C. Ellsworth, Stanley D. Campbell, C. T. Cotham or O. H. Sumpter, were void, the probate court being without jurisdiction to enter

such orders and that the account of E. C. Ellsworth, as administrator—be surcharged in any amounts paid to the said E. C. Ellsworth, Frances M. Varney, Stanley D. Campbell, C. T. Cotham and O. H. Sumpter out of the estate of Frank W. Eveland under such order or orders or received by them from said estate, together with his bond." The court found all issues of law and fact in favor of appellees and against appellants, "except the issue as to whether there was actual fraud on the part of the defendants (appellants) or either of them, upon which issue the court deems a specific finding unnecessary to its decree, likewise as to alleged forgery of deed," and that appellees are entitled to the relief prayed, including the cancellation of the alleged deed from Eveland to Varney and all subsequent deeds through her appearing in the chain of title to the real estate involved, and to an accounting as prayed in the complaint. Judgment was accordingly entered against Ellsworth and the Maryland Casualty Company for $13,367.11, which with interest amounted to $15,777.91 on July 15, 1941, to bear interest from said date at six per cent. per annum. Other judgments rendered were as follows:

Against	Sumpter	$2,483.53
"	Varney	6,325.55
"	Cotham	1,983.53
"	Campbell	1,983.53

together with interest on these respective amounts at six per cent. per annum from July 13, 1938, until paid; and that the account of Ellsworth be surcharged with each of said sums. All deeds involving the title to the real estate in question were canceled by the decree, and the right of subrogation, if any, in favor of the surety was preserved. From this decree comes this appeal.

A brief summary of the facts follows: Frank Eveland suffered a cerebral hemorrhage in his home on February 2, 1936, from which he died the same day. His wife, the mother of appellant, Frances M. Varney, and her sister, Lula Pearl Parr, by a former marriage had predeceased him about four months. Mrs. Varney had lived in the home with them for about seven years and

had been supported by him as a member of the family. Shortly after Eveland's death Judge Davis was appointed administrator of his estate and went to the home to make an inventory of the property. No inventory was made of the household effects, but Mrs. Varney produced a black box containing bank pass books, certificates of deposit and other evidences of indebtedness due to Eveland, all personal assets of his estate. All household effects, except the radio were later sold by her and appropriated to her own use. The radio and Eveland's automobile were later taken by Ellsworth, he claiming on trial that he paid her for them, which she denied. She first refused to surrender the black box and its contents to Judge Davis, claiming that the estate was indebted to her for services rendered the intestate and was told she must file her claim and have it allowed. She also claimed Eveland had given her the black box and contents prior to his death, on an occasion when he was going to the hospital for a dangerous operation. Judge Davis insisted she must surrender the box, which she did when threatened with the police or a court order. The circumstances of the claimed oral gift were that Eveland was afflicted with a double hernia, and on November 4, 1935, (nearly 90 days before his death) he went to the hospital for an operation. A short time before leaving for the hospital, according to her testimony, he handed her a deed to the real estate here involved and the black box, and said: "If I never come back from the hospital, everything here belongs to you." She did not mention having the deed and did not produce it at that time, and did not place it of record until April 7, 1936.

Judge Davis, the then administrator, made inventory of the contents of the box and filed same. As stated above, Judge Davis died and his wife, May Davis, succeeded him, but in about 30 days she resigned and appellant, Ellsworth, succeeded her. Ellsworth prepared the deed and took the acknowledgment as notary. He employed appellant Sumpter as his official attorney without a previous court order authorizing him so to do. Appellant Varney had employed appellant Campbell of

Tulsa, Oklahoma, to prosecute her claim against said estate on a 50 per cent. contingent fee basis, his first written contract with her being dated February 13, 1936, at which time she did not inform him that she held a deed to the real estate. Prior to April 9, 1936, Campbell had associated appellant Cotham with him as her attorney and on that date they filed "exceptions to the inventory of assets" filed by May Davis, administratrix, on the ground that the personal property was hers by gift from Eveland. In this pleading prepared by Cotham, Mrs. Varney was referred to as the "daughter" of Eveland. They also filed exceptions to the account current of May Davis on May 20, 1936. Said exceptions were denied on the same date and no appeal was taken from this action of the court.

The deed to the real estate was taken by appellant Varney to appellant Cotham early in April, 1936, at the suggestion of Ellsworth. Cotham took the deed to persons in the bank, who should know Eveland's signature, to obtain their opinions as to the genuineness of the signature and comparisons were made of the signature on the deed with Eveland's known signature on checks at the bank. After learning of this deed Campbell and Cotham secured from appellant Varney a "supplemental agreement" in which she gave them and Sumpter a one-half interest in the real estate, as compensation for services "heretofore and hereafter to be performed" for her. Sumpter was later employed by the administrator, Ellsworth, as attorney for said estate, but without a court order, and was paid the sum of $1,983.53, by Cotham, as his part or share of the fees collected from Mrs. Varney.

On November 4, 1936, a "Petition for Partial Distribution" of the estate was filed by Mrs. Varney, in which no mention is made that she claimed to own the estate, previously asserted by her exceptions, and asked for a payment of $5,000. This petition recited that she "represents to the court that she is the sole and only legatee and beneficiary" of said estate, and "as such" is "entitled to all the estate of said deceased," etc.; and she prayed therein that Ellsworth be compelled to pay

her said money as "said sole legatee and beneficiary." Cotham, who prepared the petition, admits that the words "sole legatee and beneficiary" are "inept" to describe a stepdaughter of a decedent who left no will. A hearing was had on the petition on December 8, and on December 14 an order was made which recited the following: "It appearing that on the 8th day of December, 1936, all persons interested in the estate of Frank Eveland, deceased, appeared in court, Frances M. Varney in person and by her attorneys, Stanley D. Campbell and C. T. Cotham, Esqs., Lula Pearl Parr, by her attorney, C. Floyd Huff, Jr., E. C. Ellsworth, administrator in succession of said estate, in person and by his attorney, O. H. Sumpter, Esq., and by consent of all the parties," etc. The court, after hearing Mrs. Varney and others, entered an order awarding her all the personal property of said estate against the administrator and a $5,000 distribution to her at that time.

Lula Pearl Parr, sister of Mrs. Varney, is mentioned in this order for the first time in the probate proceedings. She had questioned the genuineness of Eveland's signature on the deed and had written Mrs. Morgan, mother (now deceased) of two of the appellees, that her sister was making false claims against said estate and, with Ellsworth, was dissipating the estate. She and her attorney threatened to interfere with the proceedings on two grounds: that she had been "equitably" adopted by Eveland and that the probate court had no jurisdiction to determine the title to the property. A compromise settlement was reached and she was paid $3,000 out of the $5,000 distributed to Mrs. Varney under said order, for which Mrs. Parr gave a full release to her sister and a quitclaim deed to her interest in the real estate. Thus no one opposed the claim of Mrs. Varney and no one questioned the court's jurisdiction to determine her rights to the property. Appellees, the heirs, had no notice of the proceeding. Thereafter the property was divided and the estate closed, the final order being made on July 13, 1938. Appellant Cotham told how the estate was divided—one-third of 50 per cent. to Campbell, and the remaining two-thirds of 50 per cent. to Sumpter and Cot-

ham equally. Of the real estate, Campbell got one-third of the one-half, and of the remaining two-thirds of one-half Sumpter got two-ninths and Cotham one-ninth. Sumpter thereafter conveyed to Ellsworth a one-ninth interest, being one-half of what was conveyed to him.

We think the court correctly held that the order or orders of the probate court purporting to adjudicate the title to said property or to distribute same, and especially the order of December 14, 1936, were void, because the probate court was wholly without jurisdiction. We think there was ample proof of legal if not actual fraud practiced on the probate court in the procurement of the order, and that the chancery court, in this action, had full jurisdiction both of the subject-matter and the parties. We are also of the opinion that, conceding the truth of appellant Varney's statements in evidence, as to the gift of the black box and the deed to her by Eveland, when he was about to leave for the hospital, were gifts upon condition, and the gifts failed when the condition failed. In other words, that the gift of the black box was a gift *causa mortis,* which was revoked by his return from the hospital, and that there can be no such thing as a gift *causa mortis* of real estate. *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. 19; *Johnson* v. *Colley,* 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884. He went to the hospital for an operation to correct a double hernia. Before leaving he handed her the box and deed, saying: "If I never come back from the hospital, everything here is yours." The undisputed fact is that he did come back from the hospital on November 18, 1935, returned to his home where he was confined a few days, but not in bed, and thereafter resumed his normal life, was up and about town, and did not die until February 2, 1936, and then from a wholly disassociated affliction from that that took him to the hospital. He discussed and treated the property as his own and the black box remained in the place he had always kept it before the alleged gift.

In Pomeroy's Equity, 4th Ed., p. 2669, the rule as to gifts *causa mortis* is stated as follows: "When a gift *causa mortis* is made during sickness, it is essential, in

order to perfect it and prevent a revocation, that the donor should *die of the very same sickness* from which he was then suffering, and there should be no intervening recovery between the illness and his final death; and it seems that the donee must affirmatively show the existence of all these facts.

We, therefore, conclude that the trial court was justified in finding and holding that no valid gift of the property was made to Mrs. Varney.

Aside from this phase of the case, we are convinced that the order of the probate court was void for want of jurisdiction to make it. Throughout its history, this court has held that probate courts are without jurisdiction to hear contests of and determine the title to property between personal representatives of deceased persons and third persons claiming title adversely to the estates of deceased persons. *Moss* v. *Sandefur,* 15 Ark. 381; *Mobley* v. *Andrews,* 55 Ark. 222, 17 S. W. 805; *Shane* v. *Dickson,* 111 Ark. 353, 163 S. W. 1140; *Fowler* v. *Frazier,* 116 Ark. 350, 172 S. W. 875; *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. 19; *Huff* v. *Hot Springs Savings, T. & G. Co.,* 185 Ark. 20, 45 S. W. 2d 508; *Sides* v. *Janes,* 188 Ark. 386, 66 S. W. 2d 617; *Ellis* v. *Shuffield,* 202 Ark. 723, 152 S. W. 2d 535. The personal property was in the hands of the administrator. Mrs. Varney was not an heir, distributee or beneficiary and was therefore a third person. She was a stranger to the blood and to the estate. Counsel for the Maryland Casualty Company contends that, because the assets constituting the subject-matter of the contest were in the hands of the administrator the probate court has jurisdiction to determine the title thereto, even though such claimant be a third party or stranger to the estate. In other words, if the property is in the possession of the administrator the probate court has jurisdiction to determine the title as between him and the stranger, but if the possession is in the stranger it does not. This contention is not sound, as shown by a reading of the cases cited above, in a number of which the possession was in the administrator. For example, in *Gordon* v. *Clark, supra,* Gordon sued in the chancery court to quiet title as against an administrator and

others and alleged that the administrator was holding as a part of the estate certain bonds and other personal property which, as alleged, the deceased in his lifetime had given to him. A plea was filed to the jurisdiction, was sustained, and the case dismissed on the ground that the probate court had jurisdiction. On appeal this court reversed, saying: "The present case involves a contest between the administrator and a claimant to certain property of the estate, and it is well settled that the probate court has no jurisdiction of a contest between an executor or administrator and others over the title of property belonging to the deceased. *King* v. *Stevens,* 146 Ark. 443, 225 S. W. 656, and cases cited, and *Union & Merc. Trust Co.* v. *Hudson,* 147 Ark. 7, 227 S. W. 1."

The general rule, supported by our own cases, is stated in Gary's Probate Law, 3d Ed., § 23, p. 20, relative to the power of the probate court to determine the title to contested property, and it is limited as to contestants "to those interested in such property as equitably or legally entitled to some distributive share therein or in the residue, and to creditors who voluntarily and upon general notice and without special citation present their claims. All controversies between executors, administrators and guardians, or those interested in the particular estate, and other persons not interested in it, must be settled in another forum." *King* v. *Stevens,* 146 Ark. 443, 225 S. W. 656, and *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808. These cases hold that where the contest is between the executor or administrator and parties who claim as heirs or beneficiaries having some interest in the estate, and who do not claim adversely or as strangers to it, the probate court has jurisdiction. Mrs. Varney did not go before the probate court as one interested in the estate as an heir or beneficiary, but as one claiming adversely to the estate as a third party or stranger, and the probate court was without jurisdiction to entertain the contest, and its order of December 14, 1936, was and is void and of no effect.

All appellants, except Mrs. Varney, entered pleas of laches in bar of the action. Laches is not mere delay,

but delay that works an injury to another. No injury or disadvantage or change in status is shown. Appellants still have the real estate. There are no innocent purchasers. They may have spent the money or other personal property wrongfully received by them, but if so that is no defense. Appellees were nonresidents, living in different parts of the United States, and acted promptly when advised, and we think the plea comes with poor grace and cannot be sustained.

The decree is accordingly affirmed.

LONDON *v.* STATE.

4269 164 S. W. 2d 988

Opinion delivered October 12, 1942.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

GRIFFIN SMITH, C. J. June 8, 1941, "Chick" Collier and "Whitey" Guthrie robbed Norwood Hedge of approximately $500 and valuable jewelry. Hedge, who occupied an upstairs apartment in Blytheville with his wife, was forced at pistol-point to surrender his property. The house was searched for additional money, Guthrie and Collier having been told that Hedge (operator of a drinking place known as "Sailors' Bar") ordinarily carried $14,000 in a money belt.

When apprehended, Guthrie and Collier confessed and subsequently entered pleas of guilty. Appellant was also charged with the crime, but denied complicity. He appeals from conviction and a judgment of three years in prison. Sufficiency of the evidence and an instruction are challenged.

Prior to the robbery Guthrie "cased" Hedge's place, having been driven by Parker Morgan from Sikeston, Missouri, to Blytheville.

Guthrie, who at odd times had worked for London as a taxicab driver, testified that on the day Hedge was robbed he (Guthrie) called London at Sikeston directing contact with Collier at Dexter, and that they procure "artillery" and join him at Caruthersville. Guthrie's statement to London was that he "had something good" and wanted it attended to. London and Collier reached Caruthersville between two and three o'clock in the afternoon. A "forty-four" and a "thirty-eight" pistol were in the cowl compartment of London's car when he reached Caruthersville. Parker Morgan and Guthrie had discussed all phases of the proposed robbery, and in London's presence Guthrie told Collier what Morgan had said. The agreement was that after deducting ten percent for Morgan the remainder would be divided three ways—between Guthrie, Collier, and London. Other testimony given by Guthrie further connected London with the crime.

It is argued that Collier denied London's participation. While Collier's purpose was to shield his associate, his testimony condemned more than it protected. He admitted London informed him Guthrie called on the tele-

phone, directing the rendezvous at Caruthersville. His explanation is that after contacting Guthrie, the latter remarked that they would "take a drive to Blytheville." Collier contends that at that time he did not know what Guthrie's purpose was. On the way to Blytheville the Hedge robbery was mentioned, and the witness (Collier), after consenting to the plan when told it would yield $10,000, urged that the stick-up be consummated at Sailors' Bar "because I had been informed Hedge was married, and I always make it a practice not to steal from women."

After the three had eaten at a Blytheville restaurant, Guthrie went to a telephone booth. Hedge was pointed out to Collier, and thereafter they "killed time" until after dark. When Hedge finally left the bar in an automobile Collier told London, who was driving, to follow. Hedge drove to his home. Collier and London went back to town and got Guthrie. The three returned to a point near the Hedge home and the taxicab was parked in a side street. London remained with the cab while Guthrie and Collier robbed Hedge. Guthrie was then taken to Caruthersville and Collier "went home." "We divided the money in the car. . . . The man (presumably Hedge) told me that he had five hundred dollars. Guthrie wanted the money belt. I figured we got $200. Hedge said Guthrie stole some money and Guthrie handed me some. . . . I got in the back seat, with Guthrie in front."

There was the further explanation that at the time Hedge was robbed, Guthrie took all the money. The first time Collier saw the "take" was when Guthrie began dividing. Guthrie's pistol was in the front seat beside him. Collier testified that in apportioning proceeds, Guthrie "would take so much and give me so much." Question: "Did London get some?" Answer: "I wouldn't say. . . . I got in the back seat [and kept] looking back to see if any cars were following us." Question: "Did Guthrie hand your money to you over the back seat?" A. "Yes." Q. "Were you confident that when [Guthrie] took a twenty you would get a twenty:

did he tell London that, too?" A. "I didn't hear that. He probably got it. I saw money transferred from London to Guthrie. London asked for money. . . ." Q. "If you could hear [the statement that Morgan, the 'finger man'] ought to get ten percent, London could hear it?" A. "Yes."

Otto Scrape, a young farmer residing near Blytheville, testified that he was working in his father's tractor shed near Highway 61 when a 1941 Chevrolet automobile with Missouri license number 165,275 parked on the roadside between 6:30 and 7:00 o'clock the evening of June 8. It was good daylight. Thinking the car contained a "petting pair," the witness decided to ask them to move on. He approached by way of a low fence, shielded by bushes, stopping about ten feet from the Chevrolet:—"When I got within hearing distance they were talking about the police. I kept hidden to hear what they were saying. . . . The man under the wheel (later identified by Scrape as London) was listening and the others were talking. . . . One of the men was Guthrie. . . . The men 'outside' were talking. The only one I saw in the car was Jack [London], and I figured they were talking to him." Question: "What was the conversation you heard?" Answer: "They were planning to take a route into Missouri so that in going through they could get around the 'cops.' The rest of the road was not patrolled. . . . That was my understanding." Question: "Was anything said about Kennett, Missouri?" Answer: "It was Kennett, or some place they said was a 25-mile stretch. He said they could take one road after they hit Hayti and the only time he would worry was while they were driving the 25-mile stretch between here. . . . I took the license number at the time and wrote it down. . . . I told my Dad what I saw and what they said, and we decided to go to the police."

Appellant contends he was merely an innocent, nonsuspicious taxicab driver. The explanations and disavowals, however, were not believed by the jury. It is insisted that Guthrie's testimony is worthless because

he had served nearly fourteen years in penitentiaries, "and has many years to go." At the time of trial he was thirty-six, and had received prison sentences for burglary and robbery aggregating seventeen years. Collier, likewise, had served time for robbery. He and Guthrie met and became friends while in prison.

Enough of the state's evidence has been set out to show that appellant was not convicted upon the uncorroborated testimony of an accomplice. London's admission that he brought Guthrie and Collier to Blytheville; that after Hedge had been identified he and Collier followed him home; that they returned to town and got Guthrie, and that the taxicab was parked at a convenient point; Scrape's identification of car and parties and his narration of conversations by the roadside—these facts and other evidence it is not necessary to refer to were sufficient to go to the jury, and they warranted conviction.

It is insisted that prejudice resulted from an instruction which told the jury the defendant would be guilty if he . . . "were either standing by, aiding, abetting, assisting, or encouraging commission of the crime," . . . [and] "even though not actually present, [if he] aided, abetted, assisted, or encouraged perpetration of the crime," he would be guilty.

Appellant's theory is that prosecution was under § 2934 of Pope's Digest:—"An accessory is he who stands by, aids, abets, or assists, or who not being present . . . hath advised and encouraged the perpetration of the crime."

It was necessary, says appellant, for the state to show that he had, prior to the robbery, advised and encouraged its commission. It is conceded that if appellant had stood by, "aiding, abetting, or assisting," he would be guilty; or, if not present, if he advised and encouraged those who robbed Hedge, guilt would attach. See, also, *Fleeman and Williams* v. *State, post* p. 772.

Initiated Act No. 3 (p. 1384, Acts of 1937) deals with accessories and principals. Section 25 is: "The distinction between principals and accessories before the

fact is hereby abolished, and all accessories before the fact shall be deemed principals and punished as such. In case of felony, when the evidence justifies, one indicted as a principal may be convicted as an accessory after the fact; if indicted as an accessory after the fact, he may be convicted as principal."

Information filed by the prosecuting attorney charged London with robbery. He was treated as a principal. This was not error. If Scrape's testimony is to be believed (and it was, and appears entirely credible), London was bound to have known he was transporting robbers who for escape relied upon use of his car. Having been informed of Guthrie's and Collier's designs, appellant's act in transporting them to a point near Hedge's home, and in standing by to aid their escape, involved him to the same extent as though he had gone upstairs with his associates and had physically participated in the robbery. He was present, "aiding, abetting, and assisting."

If Guthrie's testimony is correct, appellant procured the pistols. Collier's languid effort to convince the jury that London did not understand what any man of ordinary intelligence and perception would have inferred from circumstances, acts, and conversations, adds but little to appellant's contention that in effect he was deaf, dumb, and blind.

Affirmed.

FLEEMAN AND WILLIAMS *v.* STATE.

4271 165 S. W. 2d 62

Opinion delivered October 12, 1942.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

McHaney, J. Appellants were charged by separate informations with the crime of grand larceny for the stealing of an automobile wheel, tire and tube, the property of Charles Gibson of Lake City, Arkansas. Their cases were consolidated and tried together, which resulted in a verdict and judgment of guilty, and each was sentenced to a term of five years in the state penitentiary. One Cutter Ashabranner was also charged with the same offense. He entered a plea of guilty to the charge against him and became a witness for the state in the trial of appellants.

As to appellant, Nell Williams, it is urged that the court erred in instructing the jury that: "All persons being present, aiding, abetting, assisting or standing by, ready and consenting to aid, abet or assist in the per-

petration of a crime shall be deemed a principal and shall be indicted and punished as such." Her counsel specifically objected and excepted thereto because, he says, it means "that one who stands by is guilty as an accessory when the instruction should read, 'being present and aiding and abetting and assisting,'" and for the further reason she is charged as a principal and not an accessory before or after the fact. After deliberating some time, the jury returned a verdict of guilty against Fleeman, and asked that the "aiding and abetting" instruction as to Nell Williams be repeated. Thereupon, the court said: "All persons being present, aiding or abetting or ready and consenting to aid and abet in the commission of a crime shall be deemed a principal offender and shall be indicted and punished as such. Therefore, if you find from the case (no doubt meaning evidence or evidence in the case) beyond a reasonable doubt, that the defendant, Nell Williams, was present, aiding and abetting in the commission of a felony by the said Charles Fleeman, then and in that event she would be punished as such. If you have a reasonable doubt that she was not present, aiding and abetting the commission of a crime you should acquit her." No objection was made or exception taken to the form of this instruction, but only because it was a repetition and the court was requested to repeat each of the instructions. It will be noticed that the "standing by" part of the instruction, as originally given, was not given by the court when the foreman requested it be repeated. As the jury was finally instructed, they had to find beyond a reasonable doubt that Nell Williams "was present, aiding and abetting in the commission of a felony by said Charles Fleeman" before they could find her guilty, and, if they had a reasonable doubt about it, they must acquit her. We, therefore, conclude that the instruction as repeated, being without objection or exception as to form or substance, is correct, and that it supersedes the instructions as first given, about which said appellant complains, and disposes of this assignment of error against her.

Moreover, we see no error in the instruction as originally given. Under § 25 of Initiated Act No. 3, Acts

1937, now § 3276 of Pope's Digest, the former distinction between principals and accessories is abolished and under it all accessories before the fact shall be deemed principals. See *Burns* v. *State,* 197 Ark. 918, 125 S. W. 2d 463. While this section appears in the digest as 3276, appearing under the subject of "Perjury," it should be § 2940 (a), under the heading of "Principals and Accessories." Section 2937 provides: "All persons being present, aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted and punished as such." Such is, in effect, the instruction given by the court originally and was a correct declaration of law as fixed by said statutes. See, also, *London* v. *State, ante,* p. 767, 164 S. W. 2d 988.

The only other alleged error argued applies to both appellants, that is, the insufficiency of the evidence to sustain the verdicts and judgments. We cannot agree with appellants in this contention.

It is undisputed that both appellants were present when the larceny occurred, in fact, it was so conceded in oral argument. They, with Ashabranner, who pleaded guilty to the charge against him, had been riding over the country roads in three or four counties in northeast Arkansas for some two or three days, according to Ashabranner, apparently for the purpose of stealing tires, and a number of stolen tires were recovered by the officers in Mississippi county. Mr. Gibson identified his tire and tube from among those others so recovered. He also identified his wheel. The tire and tube were identified in several ways. It was a Cooper Soft Aire, an unusual brand of tire, had a boot in it to protect the tube from blowout and the tube had been patched with an Atlas hot patch. The garage owner who patched the tube in January for Mr. Gibson testified that he did so with an Atlas patch and put a small boot in the tire, both of the same kind as found in Mr. Gibson's tire after it was recovered. Deputy Sheriff John Reinmiller of Mississippi county testified that he made the investigation when Mr. Gibson's tire was stolen, and of other stolen tires, and that they recovered thirteen other tires and

tubes, and arrested Ashabranner for these thefts. All these tires and tubes were taken to the trial of this case and Gibson's tire was picked out of the lot by Ashabranner, in the absence of Gibson, as the latter had previously done. The wheel was found by Wes Mooneyham, a deputy sheriff in the eastern district of Craighead county, in a garage at the home of Russell Fleeman, near Tyronza, in Poinsett county, who is a brother of appellant, Charles Fleeman. Mr. Gibson identified the wheel as his by its size and color, in that it matched the other wheels on his car and the color of the car itself. Also in this garage, which was locked with a new padlock, were found a lot of personal property and articles belonging to appellant, Charles Fleeman, and some things of appellant, Nell Williams, such as a picture of her, a marriage certificate of a justice of the peace in New Mexico that he had united in marriage Nell Williams and one Paul Ward on December 20, 1938.

The admitted presence of both appellants at the commission of the larceny and the finding of articles of personal property in the place where the stolen property was found are sufficient to go to the jury as substantial evidence tending to connect appellants with the larceny. Appellants did not testify and they cannot be convicted on the evidence of the accomplice, Ashabranner, "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." Section 4017, Pope's Digest. The rule in this state is that the corroborating evidence need only tend to connect the defendant with the commission of the offense, and not that such evidence of itself be sufficient, and where there is substantial corroborating evidence tending to connect the defendant with the offense, its sufficiency is a question for the jury, together with that of the accomplice. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Mullen* v. *State,* 193 Ark. 648, 102 S. W. 2d 92; *Smith* v. *State,* 199 Ark. 900, 136 S. W. 2d 673; *McDougal* v. *State,* 202 Ark. 936, 154 S. W. 2d 810.

We think the accomplice was sufficiently corroborated to take the case to the jury and that the verdict must be permitted to stand, even though the accomplice said Nell Williams took no actual part in the stealing, but sat in their car near-by. She knew what was being done. The jury had the right to draw the conclusion that she was not only present, knowing a crime was being committed, but stood by ready and consenting to aid and abet, and the fact that some of her personal belongings were found at the place where the stolen property was found further confirms the justifiable inference. The jury might reasonably have concluded that her presence in the car near-by was to aid, abet and assist by keeping a lookout for the actual thieves.

The evidence is sufficient, and no error appearing, the judgment is affirmed.

PATTERSON *v.* BELL.

4-6818 164 S. W. 2d 902

Opinion delivered October 12, 1942.

J. M. Smallwood and *Max M. Smith,* for appellant.

Bob Bailey, Jr., and *Bob Bailey,* for appellee.

SMITH, J. Appellee Bell brought this suit for himself individually and as next friend of Betty, his infant daughter, against appellant to recover damages to compensate an injury sustained by the child resulting from the striking of the child by an automobile driven by appellant, and from judgments in his favor on both counts is this appeal.

The errors assigned for the reversal of the judgment are that it is contrary to the law and the evidence, and that the court erred in not directing a verdict in appellant's favor.

Four acts of negligence on appellant's part are alleged, (1) that she was driving at a dangerous and negligent speed; (2) that she failed to apply her brakes; (3) that she was driving without sufficient brakes; and (4) that she failed to keep a proper lookout. No error is assigned in giving or in refusing to give any instruction, and the instructions are not abstracted. The presumption is, therefore, conclusive that the cause was submitted under instructions correctly declaring the law.

Appellant denied all the allegations of negligence, and alleged that the child's own negligence was the proximate cause of her injury.

The testimony cannot be reconciled, but it must be viewed in the light most favorable to appellee in testing its legal sufficiency. When thus viewed, it is to the following effect.

Appellee Bell has a 15-year-old daughter named Elizabeth, who was sent across the highway to a neighbor's home for water. Her sister, Betty, who was 9 years old, did not accompany Elizabeth, but followed her. Elizabeth crossed the road, and saw two cars approaching from the west. When she saw Betty was following, she told Betty to wait until those cars had passed. Betty obeyed, and just as she put one foot in the highway to cross it appellant's car coming from the east struck her.

The testimony is conflicting as to the speed of appellant's car. Some of the witnesses placed the speed at 65 miles per hour. There was testimony that the child was knocked up hill for a measured distance of 125 feet, and when she struck the ground the car hit her again. The car traveled as much as 250 feet after striking the child, and one witness placed the distance at 375 feet. The view of the driver of the car was unobstructed for a much greater distance, and the driver had only to turn to the left to avoid striking the child. The brakes of the car were applied, but not in time to avoid the collision.

Appellant testified that she drove through Russellville on her way to Fayetteville about 6 p. m., driving at her customary speed of around 50 miles per hour, but slowed down when meeting another car to about 40 miles per hour, and that all at once two children darted in front of the car, when she applied her brakes. She could not drive to the left of the small child for fear of striking the larger child, but she turned as far to the left as she could without striking the larger child, and it was not possible to avoid striking the small one. She was looking down the road, but did not see the children until they came in front of the car, and she did not know where they came from. Appellant was fully corroborated by the lady who was driving with her, riding on the front seat.

These conflicts in the testimony were passed upon by the jury, and that offered by appellee fully sustains the finding that appellant was negligent in failing to keep a lookout and in driving so fast without doing so. There was no testimony that appellant's brakes were defective.

The instant case is very similar to the recent case of *Robertson* v. *Walden, ante,* p. 92, 161 S. W. 2d 391. In this case, as in that, we have no hesitancy in saying that the testimony is sufficient to sustain the finding that appellant was negligent; but in this case, as in that, we are less certain about the contributory negligence of the child. There, the injured child was 14 years old;

here only 9. Taking into account the age of the child, as the jury had the right to do, we are unable to say that it was not a question for the jury, rather than one of law for the court, whether the child was guilty of contributory negligence.

The child was carried to a hospital, and was unconscious for sixteen days. She sustained a very serious injury, and no complaint is made that the verdicts returned are excessive, and as no error appears the judgment must be affirmed, and it is so ordered.

FEDERAL DEPOSIT INSURANCE COMPANY *v.* LEGGETT, BANK COMMISSIONER.

4-6741 164 S. W. 2d 882

Opinion delivered October 12, 1942.

Francis C. Brown, John L. Cecil, Owens, Ehrman & McHaney and *Herschell Bricker,* for appellant.

Hays, Wait & Williams and *Henderson, Meek & Hall,* for appellee.

HUMPHREYS, J. This is an appeal from that part of the decree of the chancery court of Pope county holding that appellant, Federal Deposit Insurance Corpora-

tion, was subrogated under the law to the extent only of the amount paid by it to each insured depositor of the Merchants & Farmers Bank, Atkins, Arkansas, insolvent, then in the course of liquidation, and was not entitled to recover interest on the amount it paid the depositors.

The facts are undisputed and are summarized in statements made by learned counsel for appellant and appellee in their respective statements of the case. We glean from their respective statements of the case that the Merchants & Farmers Bank, Atkins, Arkansas, was, on and prior to the 23rd day of March, 1939, "state non-member" bank, an insured bank, within the meaning of § 264 (c), Title 12, U.S.C.A., and its depositors were insured by the appellant to the extent provided by law; that at the close of business on March 23, 1939, the Bank Commissioner of the State of Arkansas, pursuant to the provisions of act 113 of the Acts of the General Assembly of the State of Arkansas of 1913 and acts amendatory thereto, took charge of the property and assets of said bank; that at the time the bank was closed there were no outstanding liabilities against it other than liabilities to the depositors and to the stockholders; that the total deposits aggregated $188,561.96; that after all offsets and inventory adjustments were made there remained $169,120.32 of insured deposits and $19,441.60 of uninsured deposits; that appellant paid $169,120.32 to the insured depositors and received an assignment and subrogation agreement from each depositor transferring, setting over and assigning to the appellant all claims against said bank and its stockholders, arising out of such insured deposits; that the appellant filed claims with W. H. Bost, special bank commissioner in charge of the liquidation of said bank, in the total sum of $169,120.32 with such interest thereon as is allowed by law; that the principal amount advanced by appellant, to-wit: $169,120.32, was allowed and paid to appellant by the special deputy bank commissioner out of the assets of the bank; that the unsecured depositors and all expenses incident to the liquidation of the bank were paid in full leaving sufficient assets with which to pay appellant

interest on the amounts it had advanced to pay the insured depositors unless said excess should be used to pay the preferred and capital stock owners before paying the interest to appellant on the amounts it had advanced.

On or about the 25th day of January, 1941, appellant made demand upon the receiver, or liquidating agent, for the payment of $3,685.67 which it claimed as interest upon the amounts paid out by it, calculated at six per cent. per annum from the date of the closing of said Merchants & Farmers Bank, on the 23rd day of March, 1939, until it received its full repayment; that appellant, when it took the assignment from each depositor to all claims against the bank and stockholders arising out of the insured deposits, paid no interest to the depositors.

Based upon the facts detailed above, in addition to denying appellant the interest claimed, the court declared the law to be, in the decree rendered by him, that depositors in a bank which suspends payment to its depositors, and is taken over for liquidation by the Bank Commissioner of the State of Arkansas, are entitled to interest on such deposits from the date of such suspension to the date or dates upon which sums equal to the principal amount of such deposits have been paid, if there are assets available to pay such interest after payment of all other claims against such bank, including the principal amount of such deposits, and that under such circumstances such depositors would be entitled to interest at the legal rate of six per cent. per annum. This finding and declaration of law is supported by the great weight of authority.

The depositors being entitled to interest on their claims from the date a bank closes until they are paid out of the assets of the bank, if there are available assets to do so, to the exclusion of preferred or capital stock owners, the only question which could arise is whether the assignment of the respective claims was sufficiently definite and broad enough to assign their interest rights to appellant. We think it was.

The language of the assignment is as follows: "For the purpose of subrogating the Federal Deposit Insur-

ance Corporation to all of claimant's rights against said closed insured bank arising out of the insured deposit in the amount shown above, to the extent of the amount paid the receipt thereof is hereby acknowledged, claimant hereby assigns, transfers and sets over unto said corporation all claims against said closed insured bank and its stockholders arising out of said insured deposit, together with all evidences of such indebtedness held by claimant."

We think, however, that irrespective of the assignment under the provisions of § 12B of the Federal Reserve Act as amended (U.S.C.A., Title 12, § 264) appellant was subrogated to the rights of the depositors upon payment to them of their respective claims. This court has not had occasion to construe the provisions of § 12B of the Federal Reserve Act as amended, but the purpose and intent of the act as applied to the facts similar to the facts in the instant case was construed by the Supreme Court of Iowa in *Bates* v. *Farmers Savings Bank of Ankeny,* 3 N. W. 2d 517. Practically every material question assigned by appellee in the instant case as to why appellant should not be paid interest on the amount it paid to the insured depositors was assigned in the Iowa case referred to above with the result that the Iowa Supreme Court, after discussing the assignments at great length, said: "By reason of our pronouncements and holdings heretofore made it is our conclusion that: (1) All depositors, and the FDIC as assignee of depositors' claims, are entitled to interest at five per cent. on such claims from the date of the bank's insolvency as evidenced by the date of the closing of the bank; (2) the payment of interest to depositor claimants, including the FDIC, shall have priority in payment before any distribution is made to the preferred stockholders."

As stated above the facts in the Iowa case were identical with the facts in the instant case. The Iowa case referred to is a very recent case, the opinion having been rendered on May 5, 1942.

There is another recent case decided by the United States Circuit Court of Appeals, Eighth Circuit, on

July 30, 1942, involving practically the same questions involved in the instant case with the following result: "The judgment of the district court will accordingly be reversed, and the cause will be remanded with directions to enter a declaratory judgment that the Federal Deposit Insurance Corporation Act, 49 Stat. 684, 12 U.S.C.A., § 264, does not prohibit the corporation from receiving interest upon its claim against the Citizens State Bank of Niangua, in liquidation, and that the corporation is entitled to have paid to it by the Commissioner of Finance, as part of its subrogation rights, such interest as is properly incident to the payment of claims of depositors in a bank liquidation, under Missouri law, where there is a surplus available for this purpose. . . ."

The case referred to above has not been published, but the copy of the opinion before us shows it is a consolidated case and is styled as follows: "United States Circuit Court of Appeals, Eighth Circuit, May term, A. D., 1942. No. 12,229, *Federal Deposit Insurance Corporation* v. *The Citizens State Bank of Niangua,* 130 F. 2d 102.

We think the two decisions cited above clearly construe the purpose and intent of § 12B of the Federal Reserve Act as amended and we adopt the construction placed upon said act by the Iowa Supreme Court and the United States Circuit Court of Appeals, Eighth Circuit, as being applicable to the facts in the instant case.

For the reasons set forth in those opinions, the decree of the chancery court is reversed, and this cause is remanded with directions to allow appellant its claim for interest in the sum of $3,685.67 on the amount of the insured deposits it paid at the rate of six per cent. per annum from the date of the suspension of the bank.

STURDY *v.* HALL, SECRETARY OF STATE.

4-6964 164 S. W. 2d 884

Opinion delivered October 12, 1942.

Charles W. Mehaffy and *Ed I. McKinley, Jr.*, for petitioner.

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

HOLT, J. On and prior to July 3, 1942, there was filed with the Secretary of State a petition made up of a large number of parts which contained the names of 27,194 signers. This petition was in support of proposed Initiated Act No. 1 which its sponsors refer to as the "Local Option Act."

The Secretary of State found, and declared, that the ballot title to the proposed act was sufficient and that the requisite number of signers appeared on the petition to entitle said act No. 1 to be placed on the ballot to be voted upon at the general election to be held November 3, 1942. Immediately after the ruling of the Secretary of State on the petition, plaintiff here made a check of the signatures appearing on the various parts of the petition, and on September 5, 1942, filed complaint in this court in which he questioned the sufficiency of the ballot title to the proposed act, and further alleged that the petition does not contain the names of the requisite number of legally qualified electors.

It is contended by plaintiff and not denied by defendants that the petition must contain the genuine signatures of at least 16,192 qualified electors before the act in question may be voted upon, and that if as many as 11,003 illegal signatures appear on the petition then it would be insufficient. Plaintiff has furnished us with a tabulation in which there are grouped and classified the challenged signatures appearing on the petition. Plaintiff claims that 79 signatures do not correspond with the certificate; that 264 are duplicates; 72 ineligible, scratched out or not certified; 224 have been "tampered with"; that 3,680 had no poll tax; that signatures of 792 were not properly witnessed by the circulator; that 10,752 appear on parts of the petition on which two or more names appear in similar handwriting and that a total of 15,838 illegal names appear upon the petition.

We proceed first to consider the sufficiency of the ballot title which reads as follows: "An Act to Amend the Liquor Laws of the State of Arkansas so as to Provide for Better Local Option Laws for Prohibiting the Manufacture or Sale or the Bartering, Loaning or Giving

Away of Intoxicating Liquors; for Defining Intoxicating Liquors; for Fixing Penalties for the Violation of the Law in Territory Made Dry Under the Provisions of this Act; and for Other Purposes."

This court has many times had occasion to discuss the sufficiency of ballot titles and has consistently followed the general rule announced in *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, wherein it is said: "The ballot title should be complete enough to convey an intelligible idea of the scope and import of the proposed law and that it ought to be free from any misleading tendency, whether of amplification, or omission, or of fallacy, and that it must contain no partisan coloring." No hard and fast rule as a guide has been announced by this court. We have held that an abstract or synopsis of the act is not essential in the ballot title, and that the provisions of amendment No. 7 referring to ballot titles should always be liberally construed.

In the comparatively recent case of *Newton* v. *Hall,* 196 Ark. 929, 120 S. W. 2d 364, this question was gone into rather extensively, and after considering many of our own cases, as well as cases from other jurisdictions, we there said: "In the opinion (referring to the case of *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248), in which all the judges concurred, we held that the provisions of amendment No. 7, with reference to ballot titles, should be liberally construed, and that the ballot title was sufficient. In so holding we said: 'It may be observed that if the ballot title were intended to be so elaborate as to set forth all the details of the act, the publication, or advertisement, might, for that very obvious reason, be omitted. Perhaps no set rule or formula can be announced as to what a ballot title shall contain, but it may be safely stated that, if it shall identify the proposed act and shall fairly allege the general purposes thereof, it is sufficient.' That case quoted the language of Chief Justice McSherry of the court of appeals of Maryland in the case of *Mayor of City of Baltimore* v. *Stewart,* 92 Md. 535, 48 Atl. 165, as follows: 'It has never been understood that the title of a statute should dis-

close the details embodied in the act. It is intended simply to indicate the subject to which the statute relates. . . . When the general subject is indicated, no detail matters need be mentioned in the title.' ''

In the ballot title before us it is clear and certain that it is proposed to amend the local option laws on the subject of prohibiting the manufacture, sale or the bartering, loaning or giving away of intoxicating liquors and to provide penalties for the violation of the law in territory made dry under the provisions of the act. This we think is sufficient. The details of the act need not be recited as its general purpose is clearly stated.

2.

We come now to a consideration of the sufficiency of the number of qualified signers on the petition. It is conceded that *prima facie* the petition contains 11,003 more signatures than is required to initiate the act. This excess is such as to make it unnecessary to consider such questions as that persons who had not paid their poll tax and therefore not qualified electors had signed the petition. All signatures questioned by plaintiff for this and other reasons bearing upon the qualifications of the signers of the petition may be stricken and a sufficient number of signers remain to initiate the act. As we view it, there is only one theory upon which plaintiff may be awarded the relief prayed and the submission of the act to the electorate enjoined and that is this—a handwriting expert, whose testimony is undisputed, stated that he had examined all of the parts of the petition and gave the names, petition numbers and signature line numbers of certain signers which were in the handwriting of persons who had signed other names. He testified to a total number of 10,381 names appearing on different parts of the petition, and that some of these names were in the same handwriting. This does not mean, however, that one person wrote all of these 10,381 names. That would be a fraud too obvious for doubt. But it means that different persons had written more than one signature on parts of the petition and that those names so written,

together with all other names on these parts, total 10,381. The objection to counting any of these signatures is that they appear on parts of the petition verified by affidavits of the circulators and that these names being false, since they were not the signatures of the persons whose names appeared, voided all the names on the parts of the petition where these names appear. In more than 100 instances the names would apparently be that of husband and wife as John Smith and Mrs. John Smith. In other instances, according to this handwriting expert, one person had written more than one name.

Plaintiff argues here that all of the names on the parts of the petition containing such names should be stricken for the reason that the affidavit of the circulator is false. It is conceded that if this be done enough names will not remain to authorize the submission of the act. In support of this contention plaintiff strongly relies upon the opinions of this court in the cases of *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335, and *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547, and especially the latter case. Both of these opinions are to the effect that each petitioner must sign his own name and that no signature may be counted unless signed by the petitioner himself. But the question before us is what is the effect upon a petition containing signatures not signed by the petitioners whose names appear on the petition. Must the entire petition be disregarded, or is it required only to strike out the particular improper signature? The answer to this question must depend upon whether the circulator of the parts of the petition was guilty of fraud in permitting this to be done. In *Sturdy* v. *Hall, supra,* the circulator was likened to an official holding an election. We there said that if it were shown only that an irregular vote had been cast it was required only that such vote be excluded, but that if the fraud were permitted by the election officer, or with his knowledge and connivance, then the signature of the election officer as to the result of the election would be disregarded as unworthy of belief. The election certificate would have lost its *prima facie* verity and only those votes would be counted which were shown by testimony *aliunde* to have been legal and

proper. So in the instant case persons wrongfully signing may not be counted and must be excluded, but only such names should be excluded and not counted unless it appears that the circulator was a party to the fraud of procuring illegal and improper signatures. This would not be true under the laws of the state of South Dakota, shown by the opinion of the Supreme Court of that state in the case of *Milford* v. *Pyle,* 53 S. D. 356, 220 N. W. 907, cited and quoted from in our case of *Sturdy* v. *Hall, supra,* and strongly relied upon by plaintiff here. This is true because as stated in the South Dakota case "where a person circulates a referendum petition (and the rule is not different in the case of petitions to initiate an act) it is his duty to see and personally know every person who signs it. Unless he does know them and see them all sign he can not honestly say that he is acquainted with each signer and that each of them signed it personally and that each of them added to his signature his place of residence, his business, his post office address and the date of signing" and that "when a person not knowing these facts makes the affidavit above set out such affidavit is false and must be knowingly false and all the names on such petition must be rejected."

But our amendment does not impose these strict requirements upon the circulators of petitions in this state as it is required only that "each part to the petition shall have attached thereto the affidavit of the person circulating the same that all signatures thereon were made in the presence of the affiant and that to the best of the affiant's knowledge and belief each signature is genuine, and that the person signing is a legal voter, and no other affidavit or verification shall be required to establish the genuineness of such signatures," that is to give them *prima facie* that effect. In *Sturdy* v. *Hall, supra,* we said: ". . . there is no explanation, or attempt to explain, by the circulators who have made false affidavits that signatures were genuine, and, certainly, it must be presumed, at least in the absence of any explanation to the contrary, that a person who made an affidavit that certain statements were true did so intentionally."

In the instant case we are faced with no such situation, for petitioner says: "At the outset . . . [we] . . . express regret over the fact that it was necessary . . . to show that many instances of *irregularities* occurred in the petitions. The instances were so numerous that they could not be overlooked. Yet (petitioner) is not urging these irregularities as indicating any criminal intention of the parties responsible therefor to willfully violate the law. Rather, the (petitioner) is of the opinion that the responsible parties were motivated by overzealousness."

In *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335, we held that certain provisions of the enabling act of June 30, 1911, had not been repealed, the unrepealed portion being: "Any person signing any name other than his own to (an initiated petition), or who shall knowingly sign his name more than once for the same measure at any one election, or who shall sign such petition when he is not a legal voter, . . . shall be guilty of a felony, and shall be imprisoned in the state penitentiary for not less than one year nor more than five years."

The preceding section deals with *signers* of petitions, as distinguished from *circulators.* But certainly, if one circulating part of a petition fraudulently signs a name, or if without authority he signs some one's name, there is active fraud, involving forgery, and a crime has been committed.

But petitioners say the transactions complained of were mere irregularities induced by overzealousness, and that no crime was committed. If there were no willful violation of the law by those who circulated the petitions, then it cannot be said that an occasional duplication of names nullifies the entire sheet upon which a long list of electors had in good faith petitioned for submission of the question at issue.

Now it may be conceded that undisputed testimony establishes the fact that names appear on the petition not signed by the party whose name appears; but if this were not done with the wrongful intent and with connivance between the signer and the circulator, we think

only the particular name wrongfully signed should be stricken and not all the names appearing on that petition.

If this rule is adopted, and we adopt it, there remains on the parts of the petition, collectively considered, a sufficient number of names to require the submission of the act to the electorate. The prayer of plaintiff's complaint is denied.

SMITH, MEHAFFY and MCHANEY, JJ., dissent.

SMITH, J., dissenting. The I. & R. Amendment was designed as a prod when the General Assembly is inert, and as a restraint when it is thought the General Assembly has been improvident; but its great and useful powers may be abused unless the persons seeking to invoke its powers are required to comply with its provisions regulating the conditions under which these powers may be employed.

It was pointed out in the opinion in the case of *Sturdy* v. *Hall, Secretary of State,* 201 Ark. 38, 143 S. W. 2d 547, that slightly more than one-half of one per cent. of the State's population may initiate an Act, and that slightly less than one-half of one per cent. may arrest legislation passed by the General Assembly through the referendum power, and that less than one per cent. may propose constitutional amendments. It was there pointed out that there was no limitation upon the number of Acts which might be initiated, nor upon the number of legislative Acts which might be referred, nor upon the number of constitutional amendments which might be proposed, and that it was, therefore, possible for this small per cent. of our population to assemble the electorate of the State at each election into a legislative assembly, and at the same time as a constitutional convention.

At the 1936 general election, three constitutional amendments were submitted. This number was increased to nine at the 1938 general election, and there were seven at the 1940 election. At these three elections, nineteen amendments to the constitution were proposed, to say nothing of numerous legislative acts initiated and referred. The practice of disregarding the General Assem-

bly is growing. The General Assembly meets every two years, and has the power to propose as many as three constitutional amendments, and may pass an indefinite number of acts after bills therefor have been considered and debated in each house and have been subject to amendment in both houses. The elector has five minutes in the election booth in which to vote upon all the questions there submitted and the various candidates for office. Section 4770, Pope's Digest. It was, therefore, said in the Sturdy case, *supra,* that "The law must, therefore, be, and is, that if a power so great may be exercised by a number so small, a substantial compliance with the provisions of the constitution conferring these powers should be required."

These powers may be exercised only by the qualified electors of the state. The I. & R. Amendment expressly so provides, and each elector must act for himself, and not for or through another, and he acts by signing a petition for the submission of a constitutional amendment or the initiation of a legislative act or for the reference of a legislative act.

We said in the case of *Hargis* v. *Hall, Secretary of State,* 196 Ark. 878, 120 S. W. 2d 335, that "The amendment contemplates that signatures must be genuine. That purpose is so expressed. By the amendment's terms, laws may be enacted 'prohibiting and penalizing perjury, forgery, and all other felonies *or other fraudulent practices* in the securing of signatures or filing of petitions.' The amendment repealed such parts of the act of 1911 as were in conflict with its purposes; but, as Judge Hart has so clearly stated, the use of language in Amendment No. 7 entirely repealing the former amendment, but limiting repeal of the statute of 1911 to such portions as were in conflict with Amendment No. 7, is conclusive of the proposition that those who wrote the new amendment recognized certain values in the act of 1911, and that it was their purpose to utilize these values in administering the amendment. We hold, therefore, that the statutory inhibition against a person signing any name other than his or her own to an initiative petition is not in conflict with or repugnant to Amendment No. 7,

and it was not repealed. But even without such statute, we think the amendment, by its own terms, contemplated that the genuine signature of electors be procured."

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

No one has any more right to sign the name of another to one of these petitions than he would have to vote for that other person at any election, and if he does so he commits an illegal act, however fully authorized his action may have been by the person for whom he signed or for whom he voted.

It is conceded that there are several thousand names on these petitions in the instant case which, under the undisputed testimony in the case, may not be counted. The largest number of this group consists in the signatures of persons who are not qualified electors, through failure to pay poll tax, and there are 3,680 names in this group alone. But if all these are stricken from the petitions, there remains the requisite number of signers, provided all the remaining names are counted.

But it further appears from the testimony without dispute that there are 210 names on the various petitions written by some one who had signed some other name.

In a majority, but not in all of these cases, a husband had apparently signed his wife's name, or a wife had signed her husband's name. These signatures are unauthorized, because each person must sign his or her own name. Now, merely striking these names would still leave the requisite number of signers; but it is insisted that

all names on all petitions in which these wrongful signatures appear must be stricken for reasons later to be discussed. It is conceded that if this be done, the petitions do not contain the requisite number of signers. The controlling question in the case is, therefore, whether all these names shall be stricken.

In the Sturdy case, *supra,* we stated the rule announced by textwriters, and approved by the decisions of this court, there cited, applicable to election contests. It is to the following effect. If one casts an illegal or fraudulent ballot, his fraud vitiates his own ballot only, unless it be shown that the election officials connived at and were parties to such fraudulent voting, in which latter event the certificate of the election officials as to the result of the election is without verity and will be disregarded, "even though the fraud discovered is not, of itself, sufficient to affect the result." The reason for this rule, as stated by Judge McCrary, in his great work on Election, (4th Ed.) § 574, which this court has approved in the cases cited in the Sturdy case, *supra,* being ". . . that an officer who betrays his trust in one instance is shown to be capable of the infamy of defrauding the electors, and his certificate is, therefore, good for nothing."

We said in the Sturdy case, *supra,* that where the circulator of a petition, who is the sole election officer, is shown to have made a false affidavit, the petition to which that affidavit is attached has lost its *prima facie* verity, and in such case no names could be counted appearing on this petition to which a false affidavit was attached, unless it were otherwise shown that there were valid signatures on the petition.

This must necessarily be true if the mandatory provisions of the constitution and its enabling act designed to prevent fraud are to be given effect.

Now, it must be remembered, as was said in the Sturdy case, *supra,* that "The I. & R. Amendment provides that 'No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions.' That compensation would be a

matter of agreement between the contracting parties, and might, in some instances, although not in the present case, be based upon the number of signers obtained, and the law must be declared as it should be applied in any case. There would, therefore, be a constant temptation for the circulator of petitions to increase his compensation by loose practices in obtaining signatures. The constitution contemplated this possibility, and attempted to guard against its consequences."

It is insisted in the brief for defendant, and was strongly urged in the oral argument before the court, that the parties here are among the state's best citizens, and are endeavoring to promote public morality. This is conceded; but the same rule must be applied here that would be applied to an act initiated by a group less disinterested.

Section 13289, Pope's Digest, reads as follows: "Each and every sheet of every such petition containing the signatures shall be verified on the back thereof in substantially the following form, by the person who circulated said sheet of said petition by his or her affidavit thereon as a part thereof:

"State of Arkansas,

"County of.....

"I,....., being first duly sworn, state that (here shall be legibly written or printed the names of the signers of the sheet) signed this sheet of the foregoing petition, and each of them signed his name thereunto in my presence. I believe that each has stated his name, residence, postoffice address and voting precinct correctly, and that each signer is a legal voter of the State of Arkansas, ... county, or city or incorporated town of.....

"Signature.....P. O.....

"Subscribed and sworn to before me this the..... day of....., 19.....

"Signature.....P. O.....

"Clerk, Notary Public, or J. P.

"Forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

It thus appears that the law requires the circulator to make affidavit that each petitioner signed his own name, and did so in the presence of the circulator. If, therefore, the circulator makes this affidavit after permitting one person to sign the name of another, he has made a false affidavit, however innocent his intention, and as was said in the Sturdy case, *supra,* such a petition loses the presumption of verity, and all the names appearing on such a petition would be stricken unless it were otherwise shown that certain signatures on the petition were valid and should be counted; but there is no such proof in this case. We cited in the Sturdy case, *supra,* opinions from the courts of other jurisdictions so holding.

Defendant's brief assails that opinion, especially with reference to our quotation from the case of *Morford* v. *Pyle, Secretary of State,* 53 S. Dak. 356, 220 N. W. 907.

It is insisted by defendant that the South Dakota opinion was based upon a statute unlike § 13289, Pope's Digest, above quoted, in that the South Dakota statute requires a fuller certificate to be verified by the circulator of the petition than does our own statute, and requires the circulator to swear that the facts contained in his certificate are true, and not merely that he believes them to be true.

An analysis of our statute will show, however, that upon the vital point here at issue, our statute is not unlike that of South Dakota. Our statute requires the circulator to state only that "I believe that each has stated his name, residence, postoffice address and voting precinct correctly, and that each signer is a legal voter of the State of Arkansas, . . ."

Concerning these facts just mentioned the circulator may state his belief that the signer gave his name, residence, postoffice address and voting precinct correctly, as he would have to depend upon the signer for this information. But whether each signer had personally

signed, and had done so in his presence, is a fact which he personally knows and does not depend upon information derived from the signer. The circulator is required to swear as a fact that the petitioner signed in his presence. He knows whether this is true or not, and however good his intentions may have been he committed a fraud in law when he swore to a fact not true. An affidavit conforming to § 13289, Pope's Digest, appears as a part of each and all of the petitions filed in this cause. It will be observed that the affidavit is divided into two parts, and that a period separates the parts. In the first part the circulator is required to swear that the signer signed in his presence. A period completes that sentence, following which the circulator is permitted to swear that he believes that the signer stated his name, residence, postoffice address and voting precinct correctly. There is, therefore, no difference in essential respects between our statute and that of South Dakota, and the opinion of that court as to the effect of a false affidavit is applicable here, that effect being that all the names appearing upon a petition supported by a false affidavit must be stricken, and may not be counted.

The effect of these views is that the petitions do not contain enough names which may be counted to require the submission of the proposed act, and the writ of prohibition prayed should be granted.

I am authorized to say that Justices MEHAFFY and McHANEY concur in the views here expressed.

CRAIG *v.* STATE.

4273 164 S. W. 2d 1007

Opinion delivered October 12, 1942.

Kenneth C. Coffelt and *Wm. J. Kirby,* for appellant.

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

GREENHAW, J. Appellant was charged in separate informations with the illegal sale of liquor and the illegal possession of liquor for the purpose of sale in Saline county on June 6, 1942, in violation of §§ 12 and 1 (c) respectively of art. VI of Act 108 of 1935, as amended by Act 356 of 1941. By agreement these cases were consolidated for trial, and verdicts were rendered upon

which judgments were entered finding appellant guilty, and fixing his penalty at a fine of $500 and six months' imprisonment in the Arkansas penitentiary on each charge. A motion for new trial, including a number of assignments of error, was filed and overruled, from which is this appeal.

According to the evidence, Jack Naylor, a Malvern policeman, and C. R. Hope, a Grant county deputy sheriff, were asked by the prosecuting attorney to assist him in catching appellant selling whiskey. Each of these men was given two one-dollar bills with his initials marked thereon, and the serial numbers were taken down.

Naylor, Hope and the prosecuting attorney drove out past appellant's house on the night of June 6, 1942, the prosecuting attorney getting out of the car and Naylor and Hope returning to appellant's house, where they stopped. Naylor asked appellant if he had anything to drink, and appellant told him to come inside. Naylor went in alone and purchased a pint of liquor for $1.75, giving appellant two one-dollar bills and receiving from him five nickels.

Later that night appellant's house was raided at the request of the prosecuting attorney by Officers Blooker and Robbins of the State Police Department and Sheriff Ross McDonald of Saline county. Blooker found the marked bills, along with other bills and change. Two cases of whiskey, from one of which two pints were missing, and a case of gin were found. Blooker stated that he had found two cases of whiskey in appellant's house when he raided it on May 21. Sheriff McDonald also testified to previous raids on appellant's house, when considerable whiskey was found there.

Appellant denied making the sale to Naylor, stating that Naylor obtained this whiskey by reaching and taking it and leaving two one-dollar bills, all without appellant's consent, and further denied giving him five nickels or any other sum in change. He further testified that he had not made any sales of whiskey for 30 days prior to this occurrence, and that the whiskey found there was for his own personal use. Since appellant concedes that

there was sufficient evidence to support valid verdicts and judgments of conviction, we deem it unnecessary to discuss the evidence at length.

Appellant contends that the court erred in permitting Blooker to testify about other occasions when he had raided the premises of defendant for whiskey and had found and confiscated liquor, and that the court likewise erred in permitting Sheriff Ross McDonald to testify about previous raids having been made on the defendant when liquor was found. We are unable to agree with the contention of appellant that the admission of this testimony constituted reversible error. This testimony tended to show the nature of the business in which appellant was then engaged, and was competent for this purpose.

Appellant assigns as error the giving by the court of instructions Nos. 1 and 3. Instruction No. 3 reads as follows: "You are instructed that if you find from the evidence in this case beyond a reasonable doubt that the defendant had in his possession a quantity of intoxicating alcoholic liquor for the purpose of selling the same in Saline county, Arkansas, at any time within one year next before the filing of the information herein, as alleged in said information, then you are told to find the defendant guilty and fix his punishment at a fine of not less than $500 nor more than $1,000, or imprisonment in the state penitentiary for any period not to exceed one year, or both fine and imprisonment."

Appellant contends that this instruction was erroneous in that the penalty set forth in the instruction is not the penalty provided in the statute involved, and for the further reason that the instruction covered any offense committed within one year, when the evidence showed that he had been tried and either acquitted or convicted of all offenses prior to that charged in the information.

Paragraph (c), § 1 of Act 356 of 1941 provides that the illegal possession of liquor for sale shall be a felony, and upon conviction the accused "shall be fined not less than $500 nor more than $1,000, or confined in the Arkansas state penitentiary for not less than nor more than

12 months, or punishable by both fine and imprisonment in the Arkansas state penitentiary."

After a consideration of the context of this section and the language of other sections of this act, we have concluded that it was the intention of the legislature to fix the imprisonment penalty for a violation of this section at not less than one month nor more than 12 months in the Arkansas penitentiary. The units of time with which this section dealt were months, and we have concluded that the expression "not less than nor more than 12 months" was a misprision or clerical error. The other section of this act which deals with the sale of intoxicating liquor under which appellant was also charged provides a fine of not less than $500 nor more than $1,000 or imprisonment in the Arkansas state penitentiary for not less than one month nor more than 12 months. Appellant was given penitentiary sentences of six months under each of these sections. We are unable to see whereby appellant's rights were in any way prejudiced by instructing that the penitentiary sentence if given should not exceed 12 months.

Furthermore we are unable to say that the instruction of the court was erroneous because it did not limit the findings of the jury to this particular offense, which occurred on June 6, 1942, but stated that if it was found from the evidence that appellant at any time within one year next before the filing of the information had in his possession intoxicating alcoholic liquor for the purpose of sale in Saline county, Arkansas, he would be guilty.

Appellant did not ask for an instruction limiting the consideration of the jury to this specific instance, nor one instructing the jury that the evidence of other similar offenses would be considered by them only for the purpose of determining whether appellant was in the liquor business. In the case of *Noyes* v. *State,* 161 Ark. 340, 256 S. W. 63, in which a liquor violation was involved and it was shown that appellant was guilty of other similar violations, the court instructed the jury that if they found that the defendant at any time within 12 months next before the filing of the information transported intoxi-

cating liquors, they should convict him. The objection to the instruction in that case was that it was not made clear that the 12-month period was referred to solely for the purpose of fixing the statute of limitation governing misdemeanors. The court there said: "We do not think that the instruction is ambiguous. If the defendant, however, thought that the instruction was likely to mislead the jury about the particular time and transaction relied upon for his conviction, he should have asked a specific instruction upon this point, and, not having done so, he is in no attitude to complain on appeal."

Appellant in the instant case did not ask for a specific instruction upon this point. No reversible error was committed in giving instruction No. 3.

Instruction No. 1, complained of in assignment of error No. 18, reads as follows: "You are instructed that if you find from the evidence in this case beyond a reasonable doubt that the defendant at any time within one year next before the filing of the information herein did sell intoxicating alcoholic liquor in Saline county, Arkansas, without having an Arkansas State License therefor as alleged in the information herein, then you are told to find the defendant guilty of selling intoxicating liquor without a license and fix his punishment at a fine of not less than $500 nor more than $1,000, or assess his punishment at a period of any time up to one year in the Arkansas penitentiary, or both fine and imprisonment."

The penalty for the illegal sale of liquor, with which appellant was charged and which is the basis of this instruction, is provided for in § 3 of act 356 of 1941. This section provides that a defendant, upon conviction of the illegal sale of liquor, shall be deemed guilty of a felony and upon conviction thereof "shall be fined not less than $500 nor more than $1,000, or by imprisonment in the Arkansas penitentiary for not less than one month nor more than 12 months."

The court, therefore, erred in instructing the jury that if they found the defendant guilty of illegal sale of

liquor they could fix his punishment at both fine and imprisonment, and due to this erroneous instruction the jury fixed the punishment at a fine of $500 and imprisonment for a period of six months in the Arkansas penitentiary. This error, however, may be corrected without prejudice to appellant by modifying the judgment so as to eliminate therefrom the part thereof sentencing him to imprisonment in the Arkansas penitentiary for a period of six months. See § 4070, Pope's Digest.

We have considered all of the assignments of error upon which appellant relies, and fail to find any errors which warrant a reversal.

The judgment of conviction upon the charge of selling liquor is, therefore, modified by eliminating therefrom the provision for a penitentiary sentence, leaving in effect the provision thereof assessing a fine of $500 against appellant, and as thus modified is affirmed. The judgment of conviction upon the charge of illegal possession of liquor for the purpose of sale is affirmed.

RUSHTON *v.* ISOM.

4-6836 164 S. W. 2d 997

Opinion delivered October 19, 1942.

Harry B. Colay, for appellant.

Melvin T. Chambers, for appellee.

SMITH, J. This is a suit to quiet the title to a lot "200 feet by 240 feet in the east one-half of block 8 of the original survey of the town of Emerson."

This relief is prayed upon the following allegations and testimony. The lot was owned by a bank of which T. S. Grayson was president. Grayson agreed to sell the lot to appellee for the cash consideration of $225, and appellee entered into the possession of the lot in 1934. It was contemplated that the purchase price be paid by the 1st of the following year, but being unable to make the payment at that time, appellee requested Henry Rushton to pay for the lot and to take a deed to himself as security until she could repay him the purchase money. Rushton paid the bank the $225 purchase money, and took a deed to the lot in his own name, as it was agreed he should do. Extensive repairs were required, and were made, the cost of which is disputed, and there is some controversy as to who paid for them, including the cost of digging a well.

Rushton died without having made a deed to appellee. After his death his widow and heirs-at-law conveyed to a son of Rushton, and when the widow and heirs refused to make appellee a deed, this suit was brought to compel this action, and from a decree awarding that relief is this appeal.

If the case presented no facts other than those just recited, the relief prayed would have to be denied, for the reason that as the agreement between appellee and Rushton for the purchase of the lot rested in parol, and Rushton paid his own—and not appellee's—money for the lot, the statute of frauds would forbid its enforcement.

It was held in the case of *Robbins* v. *Kimball,* 55 Ark. 414, 18 S. W. 457, 29 Am. St. Rep. 45, to quote a headnote,

that "One who pays for land and takes deed to himself is not bound by a parol agreement to let another have an interest in the land upon payment of a portion of the expenses incurred in acquiring the title, nor by a parol agreement to purchase for himself and the other jointly."

This holding has been reaffirmed in a number of subsequent cases which are cited and reviewed in the case of *George* v. *Donohue,* 191 Ark. 584, 86 S. W. 2d 1108.

But there are other facts which must be considered, one of which alone is decisive of the case, that is, the validity of a receipt reading as follows: "On this day the 31st of August, 1937, I, Henry Rushton received from Lavada Isom the sum of $300, making a total of $550 received from her for the purchase of the following land and improvements thereon 200 x 240 feet of land, east side of block 8, original survey, located in the town of Emerson, county of Columbia, state of Arkansas. (Signed) Henry Rushton."

It may also be said that the statute of frauds is not pleaded in this case, and that, according to appellee's testimony, she was placed in possession of the lot pursuant to her agreement to purchase it, and remained in possession of it until 1940, at which time she was ejected, whereupon she brought this suit.

All the witnesses, including several who testified on behalf of appellants as handwriting experts, admit that the name signed to the receipt is the genuine signature of Henry Rushton. It was their opinion, however, that the typewritten recital of the payment of money did not appear on the paper when Rushton signed it.

In their opinion, the paper in question was the top of a paper writing, probably in pencil, which Rushton had signed, and that this writing had been erased and the typewritten matter appearing above Rushton's signature substituted, although Rushton signed with pen-and-ink.

We have this writing before us, as did the chancellor below, where it was examined under a magnifying glass. He reviewed the testimony and announced the following finding and conclusion:

"There is no way of knowing what Mr. Rushton did, he is dead, and except for these witnesses there is no one to testify to the transaction. If it had been written on newspaper, or on paper that had been used for some other writing, still I do not think it smacks of fraud. One erasing a letter couldn't have done that good a job. To take a letter and erase all the writing on it is quite a job, and couldn't be done so neatly as to show, or to look like it hadn't been erased. The receipt shows they bought this piece of property and that they paid the purchase price of the property."

Without reciting the extensive and conflicting testimony upon the question whether the receipt is a forgery, we announce our conclusion to be that we are unable to say that the chancellor's finding upon this issue is contrary to a preponderance of the evidence. If this receipt is genuine, and is not a forgery, then the testimony is conclusive that the trust existed which the court declared.

There appears to the case of *Kimmons* v. *Barnes,* 205 Ky. 502, 266 S. W. 891, 42 A. L. R. 5, an exhaustive annotation, extending from page 10 to page 126 of the volume last cited, upon the effect of an oral promise of one to buy land for another. Cases from our own as well as from English courts and the courts of all the other states are cited. These are to the effect that, if one is given money by another to purchase land, and the agent takes the conveyance to himself, a trust results by operation of law and will be declared by the courts. Here, Rushton did not pay appellee's money, but paid his own money; but that he bought as agent and for the benefit of appellee is conclusively shown by the fact that he accepted from her the purchase money and the cost of the repairs. He was, therefore, her trustee.

Among the numerous cases cited by the annotator in the Kimmons case, *supra,* and from which he quotes, is that of *Avery* v. *Stewart,* 136 N. C. 426, 68 L. R. A. 776, 48 S. E. 775, where it was said: " 'If the legal title is obtained by reason of a promise to hold it for another, and the latter, confiding in the purchaser and relying on his promise, is prevented from taking such action in

his own behalf as would have secured the benefit of the property to himself, and the promise is made at or before the legal title passes to the nominal purchaser, it would be against equity and good conscience for the latter, under the circumstances, to refuse to perform his solemn agreement and to commit so palpable a breach of faith.' "

Appellee testified that she advised Rushton that she was prepared to complete payment for the lot, but that when she did so he gave her the receipt copied above, and when she asked Rushton why he did not give her a deed, he answered that his wife would not sign it, and that the receipt would suffice until a deed could be procured. Rushton died without executing the deed, but that fact does not affect the obligation of his widow and heirs to appellee to divest themselves of the legal title which Rushton held as trustee for appellee's benefit. As Rushton had title only as trustee, his widow had no dower or other interest in the land.

The decree vesting title in appellee is affirmed.

ARKANSAS POWER & LIGHT COMPANY *v.* ABBOUD.

4-6779 164 S. W. 2d 1000

Opinion delivered October 19, 1942.

House, Moses & Holmes; Hays & Wait and *J. M. Smallwood,* for appellant.

Ferguson & Madole; Caviness & George and *Caudle & White,* for appellee.

GRIFFIN SMITH, C. J. November 10, 1941, in an appeal styled "*Abboud* v. *Arkansas Power & Light Company,*" the trial court's judgment on an instructed verdict was reversed because jury questions were involved. 203 Ark. 6, 155 S. W. 2d 584. See, also, concurring opinion at page 10 of the Arkansas Reports, and at page 586 Southwestern Reporter. On retrial judgment was in favor of the plaintiff for $3,999. The power company has appealed. Its contention is that most of the service interruptions were occasioned by acts of God, others by agencies over which it had no control, and that due care was exercised.

In August, 1940, plaintiff elected to base her suit upon contract as distinguished from tort. An amended complaint alleged that in August, 1936, C. B. Fowles, the power company's district manager, advised appellee to purchase all-electric equipment, including units necessary to operate a commercial hatching plant. Assurance

was said to have been given, which is referred to as a guarantee, that the company would supply adequate electric service to efficiently operate the plant. It was further alleged that, relying upon representations service would be sufficient, appellee (January 5, 1937) began business as Danville Electric Hatchery, the various units having a capacity of 32,000 eggs.[1] Average cost of 95,000 eggs was four cents, or $3,800. Plaintiff's contention is that if continuous current sufficient to operate the machines had been supplied, 66,500 chicks would have hatched, resulting in net profit of $1,400.

Severed service ranged from thirty minutes to forty-six hours. Chickens actually hatched were cripples of very little value. Appellee estimates that sales amounted to $100 or $200.[2]

Power supplied the area involved comes from Sterlington (La.) by way of the company's North Little Rock substation, thence to Morrilton, Russellville, Dardanelle, Ola, and Danville. Appropriate transformation of voltage is made at various points. From transformers at Russellville the step-down is to 13,000 volts for dispatch to Dardanelle. Between Russellville and Dardanelle the service is tapped for use of Bernice Anthracite Coal Mines. The lateral leading from the power company's primary wires to the mines is owned by the coal company and is maintained by it. Switches, with fuse protection, were on a pole set in the coal company's property adjoining the power company's lines. The coal company employed an electrician who was supposed to inspect and repair these switches and the lines from such connections to the mines.

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[1] January 5, 7, 12, 14, 19, 21, 26, 28; February 2, 4, 9, 11, 16, 18, 23, 25; March 2, 4 and 9, ninety-five thousand eggs were placed in the machines, 5,000 on each date. They were withdrawn January 26, 28; February 2, 4, 9, 11, 16, 18, 23, 25. March 2, 4, 9, 11, 16, 18, 23, 25 and 30.

[2] Periods of service interruption alleged in the complaint were: January 12, 1937, two hours forty minutes; January 19, five hours; January 23, two hours; January 24, twenty-four hours; January 25, eight hours; February 2, thirty minutes; February 9, three hours fifteen minutes; February 21, one hour forty-five minutes; February 24, two hours; March 3, four hours; March 15, two hours.

The interruption of January 19, according to a power company witness, resulted from the act of a coal company agent who "used a heavy fuse, and it wouldn't strip out." It seems, however, that an oversize fuse was not the cause, because a power company lineman testified that ". . . . somebody at the mine had fused the switch with copper wire—made it solid." A dog had crawled into the mine company's substation. It then got into the conductor and caused a short-circuit, with resulting interruption of five hours at Danville.

It is in evidence that the power company had been gradually improving its service during the past few years. Some of the property was acquired prior to 1916. Appellee, in August, 1936, made her contract for electricity shortly after she had returned from a convention in Kansas City, where an inspection of electrically-heated incubators and brooders had been made. Appellant's answer denies any special contract to supply continuous current sufficient to operate machines such as those Mrs. Abboud says were being discussed. Fowles testified appellee came with catalogues and other printed matter illustrating units she desired, and that she asked whether the company's lines to and equipment at Danville [were sufficient] ". . . to operate the machines plaintiff desired to install." It is conceded that Fowles ". . . informed plaintiff the current furnished by defendant corporation's lines at Danville was sufficient to operate the machines such as plaintiff contemplated installing."

A construction of this language in the concurring opinion of November, 1941, was that the expression "enough current," testified by Mrs. Abboud as having been used by Fowles, had reference to sufficient voltage, amperage, etc.,—that is, the energy sufficient to operate heating units and fans. It was then said that the term "continuous current sufficient to operate the machines" contemplated maintenance of an unbroken flow; or, if broken, duration should not be so protracted as to interfere with incubation of eggs or care of the product.

T. H. Abboud, appellee's husband, testified he was present when appellee discussed their needs with Fowles.

They had "gone over" past troubles—such as interruption of power—and Fowles is represented as having said: "You go on back, lady. The Arkansas Power & Light Company is a service organization. We will take care of your needs." This was in response to appellee's statement that "We've got to know if we are going to have this current." Appellee's further testimony was that Fowles agreed ". . . to furnish sufficient, adequate current, continuous current, to operate the hatchery."

A letter written by the power company April 7, 1937, was received by appellee in response to complaints of bad service. It is printed in the margin.[3]

Although in the complaint appellee stated that service interruption January 23 was two hours, in her testimony the period is fixed as forty-six hours. Her statement was that the current went off at ten o'clock Saturday night; that it remained "dead" that night and all day Sunday, ". . . and came on Monday morning for a little while."

The law as declared in the former appeal is that the contract did not require the defendant to compensate damages if an act of God prevented it from furnishing sufficient energy to operate the plant, or if the trouble was traceable to acts over which the company had no control. . . . "It was only bound on the contract in case it was guilty of negligence in furnishing electrical power," says the opinion.

The first interruption complained of occurred January 12. Five thousand eggs had been placed January 5,

[3] "Referring to our conversation last night regarding the interruption of our service for approximately 30 minutes which I understand inconvenienced and endangered the hatching of eggs in your incubator. You were also interrupted two or three days during the recent sleet storm, and I would suggest that you put in some other form of heating as an emergency. I understand that there are several types of incubator heating for emergency use. We cannot any more guarantee continuous service than you can guarantee the hatching of 1,000 chicks from 1,000 eggs. Ninety per cent of our interruptions are caused by the elements over which we have no control. We make every effort to give the best of service possible, and always get our men out during any kind of weather to repair the lines and renew service. Our interruption last night was caused by lightning striking an insulator on our high line below Pottsville."

and an equal number January 7. The break covered a period of two hours and forty minutes, but on the same day five thousand additional eggs were put in the machines. Whether this act occurred before, after, or during the period of interruption is not clear. It is argued by appellant that appellee was negligent in continuing to deposit eggs in the machines after the contract had been breached. Conversely, it should be remembered that appellee had invested approximately $5,000 in electrical equipment, relying, as she says, upon Fowle's assurance that sufficient current would be supplied.

Publisher George Upton of Dardanelle Post-Dispatch, testified that during early January, 1937, severe weather occurred, with ice on trees, streets, and elsewhere. Recurrences were at intervals of a week or ten days:—"Foliage and ground were covered and glazed with ice: trees broke—practically all of them, as I recall. . . . This would have happened [according to my newspaper files] the week previous to January 21, [because the item refers to] 'last week'."

Appellee insists this testimony does not connect the interruption of January 12 with the storm. However, J. M. Patterson, weather observer at Danville for ten years, testifying from his records, found the following: "January 9, ice bending trees; January 10, ice still bending trees; January 11, ice on trees; January 12, sprinkle." Patterson then stated unequivocally that "During January sleet and ice were freezing on the timber. [Conditions] were the severest I have any recollection of in this part of the country. . . . Ice and sleet [caused the interruption of two hours and forty minutes at Danville complained of by Mrs. Abboud]. . . . I got my first call—my first trouble—developed about four o'clock that afternoon at Belleville. . . . Limbs broke off [of trees] and fell on our lines."[4]

The next interruption occurred January 19, and has been attributed to the coal company switch.

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[4] Patterson gave his profession as "railroading"—a section foreman.

Appellee says power was off forty-six hours, beginning January 23. These breaks are accounted for by appellant with testimony by its linemen, and by an excerpt from Dardanelle Post-Dispatch, which was read into the record by its publisher. The newspaper reference is shown in the footnote.[5]

January 23, 24 and 25, were Saturday, Sunday, and Monday. These days corresponded with periods mentioned in the Post-Dispatch article. Editor Upton testified that "Every machine in my office is electrically equipped. I was vitally interested and went out to see what they were doing." Employes of the power company, he said, were engaged making repairs. Telephone lines were also down. His final statement is:—"The sleet storm was all over the country."

There is no explanation of the thirty-minute interruption of February 2.

Appellant says the undisputed evidence is that the break of February 9 (three hours and fifteen minutes) was caused when lightning broke a porcelain insulator at Morrilton, and that a blown fuse was responsible for the interruption of February 21, lasting an hour and forty-five minutes.

The defense is that lightning struck a transformer February 24 and occasioned the two-hour stoppage. While lightning as a cause may be inferred from the testimony of Henry Mabry, his exact statement is that ". . . trouble developed in the substation [at Danville]—burned the lightning arrester off the distribution system." The "bad" transformer was disconnected and two good ones were utilized ". . . in order to give them light temporarily. The next morning we had to interrupt the service to change the transformers." A new transformer was sent from Russellville. The witness

[5] [Headline]: "Freezing Rain Does Much Local Damage." The text is: "The beautiful shade trees of Dardanelle, a feature of the city that is noted and admired by every visitor, suffered heavy damage last Friday, Saturday and Sunday, by the freezing rain and sleet storm that encrusted every branch and twig with a heavy coating of ice. Weighed beyond the breaking point, few trees escaped the loss of at least several limbs, and some were entirely destroyed. Sunday afternoon most of the streets of the city were blocked to traffic by dense masses of ice-covered trees."

testified that the two units temporarily connected would have burned out if the overload had continued.

Trouble March 3 was incidental to repairs to poles and lines, ". . . these repairs, of course, having been necessary as a result of the severe sleet storms during January." One period of stoppage was three hours and forty-five minutes, another was for fifteen minutes.

The final interruption (two hours) occurred March 15, when poles supporting wires carrying 33,000 volts were replaced. It was necessary that the current be shut off because the line ". . . couldn't be handled with 'hot sticks'."

OTHER FACTS—AND OPINION.

Appellee testified she was told the power service from Russellville to Dardanelle would be improved. At the former hearing she testified that Fowles told her the company would reroute the line where it crossed the Arkansas river. At the time in question the stream was spanned from a tower on the north side to anchorage on Dardanelle Rock on the south side. In consequence, primary wires were strung along Front street in Dardanelle in close proximity to shade trees. Subsequent to appellee's losses the wires were attached to the bridge and brought across the river. Inferentially it is insisted that if this had been done between August, 1936, when appellee made her contract, and January, 1937, when the sleet storms occurred, falling limbs would not have interrupted service. It is in evidence that ice and sleet more than an inch in thickness encrusted the wires, adding materially to their weight and to the tension under which they were normally operated.

There is nothing in the evidence to show that the sleet storms would not have damaged the lines if the bridge-route had been utilized. Testimony is convincing that communication was paralyzed by extraordinary conditions. What acts of precaution the power company could have adopted to guard against the unusual stress is not shown; and, of course, an assumption that the weather's fury would have been felt at one place, but not

at another, is speculative. It is not denied that limbs on Front street trees were kept trimmed as far back as property-owners would permit. No break occurred in the power company's river span.

As we have formerly shown, the first batch of 5,000 eggs was "set" January 5, and a second lot of 5,000 was placed January 7. January 12, when the first trouble came, appellee deposited a third lot of 5,000 eggs. Thereafter eggs were put in the machines, regardless of difficulties that were being experienced. While the shut-downs of January 12, 23, 24 and 25, were undoubtedly caused by natural agencies over which the power company had no control, and could not successfully guard against, the interruption of January 19 would not have occurred if appropriate fuses had been used in the coal company's switch. The power company depended upon the coal company's electrician for maintenance of a system so vitally tied in with the Russellville-Dardanelle lines that use of copper wire as substitute for fuses caused a short-circuit and consequent interruption for five hours. There appears to have been a want of inspection by the power company, or a delegation of authority carelessly exercised, or an improper installation where the mine company's wires tapped the power company's service. In either case liability would attach.

Inclusive of January 19, 25,000 eggs had been placed in appellee's machines. To what extent five hours without heat affected them, or how badly these eggs and an additional 5,000 placed January 21 were damaged by the interruptions of January 23, 24, and 25, is obscure. The next "setting" was January 26, one day after protracted trouble had been experienced on account of sleet storms.

Apportionment of damages to 30,000 eggs as a result of interruptions due to negligence January 19 when either 20,000 or 25,000 were in the machines,[6] and to acts of God January 23, 24, and 25, is impossible. It is difficult to unscramble an egg; nor has anyone suggested a

[6] The number would be 20,000 if power was shut off January 19 before 5,000 eggs were placed that day, or 25,000 if the shut-down occurred after the deposits had been made. Mrs. Abboud's testimony does not clarify this point.

practical way to place Humpty-Dumpty back on the wall in an unimpaired condition.

If we disregard the thirty-minute interruption of February 2 as perhaps of little consequence, the next obstacle confronting the power company is satisfactory explanation of why three hours and fifteen minutes were required to repair a broken insulator at Morrilton February 9, or why a fuse was blown February 21, with resulting interruption of an hour and forty-five minutes. Accepting as true the testimony that trouble developed in the substation at Danville February 24 and that a lightning-arrester was burned from the distribution system, it is not shown, except by inference, that lightning damaged the arrester; or, if such were the facts, the power company did not discharge the burden placed upon it of showing that the equipment had been properly installed.

Mabry's testimony is that when one of three transformers was damaged at Danville February 24, two others were connected and made to carry the load. The following morning they were overheating; therefore service was discontinued until a third transformer could be installed. The jury may have thought that if the two transformers carried the burden placed upon them during the night, they were not insufficient for daytime service when most of the lights were off and a much smaller load was in prospect. Also, the jury may have believed, in the absence of convincing testimony to the contrary, that cumulative periods of four hours March 3 to repair poles could have been lessened if temporary wires had been strung in order to prevent long disconnections.

The overlapping periods during which power was not available, considered in relation to the intervals from January 5 to March 9 when eggs were placed in machines; the percentage of damage caused by interruptions attributable to negligence in comparison to loss resulting from the acts of God—these are matters impossible of accurate computation. They are baffling alike to lay-witness, expert, juror, and judge.

Of one thing we are certain: there was substantial evidence that some of the trouble complained of was caused by external forces not within the power company's control, and in respect of which there is no showing the company was negligent in not anticipating it might occur.

The judgment can not stand for an amount in excess of $1,999.50, or one-half. If appellee will enter a remittitur of $1,999.50 within fifteen days, the judgment will be affirmed; otherwise the cause will be remanded for a new trial.

BAKER *v.* ALLEN.

4-6825 164 S. W. 2d 1004

Opinion delivered October 19, 1942.

R. W. Tucker, for appellant.

Dene H. Coleman and *Chas. F. Cole,* for appellee.

SMITH, J. Appellant, for himself and for the benefit of all other citizens and taxpayers of Independence county, brought this suit to recover certain fees alleged to have been paid to and to have been collected by appellee without authority of law. He predicates his suit upon an initiated salary act enacted by the electors of Independence county at the 1936 general election. Among its other provisions this Act provided for the separation of the offices of sheriff and collector, and fixed a salary of $2,400, payable in monthly installments of $200, for each office. Section 6 of this Act reads as follows: "The offices of sheriff and ex-officio collector are hereby severed and hereafter there shall be a tax collector elected in the manner provided by law, same as other county officers, at the general election."

At the same election at which the Act was adopted, appellee was elected sheriff and collector, and filled both offices until the next election, at which time he was re-elected sheriff, and another person was elected collector.

The suit was filed September 5, 1941, and it is alleged that appellee wrongfully collected the salary of collector for the two-year period ending December 31, 1938, while serving during that period of time as sheriff of the county. The complaint also alleges that appellee was wrongfully allowed certain fees as mileage on

process served for the county, and wrongfully converted and failed to account for certain mileage fees collected in civil litigation, which the salary act required him to collect for the use and benefit of the county.

An order was made requiring appellant to give bond for costs, and upon his failure to comply with this order the suit was dismissed, and from that judgment is this appeal.

An answer was filed by appellee, with a motion to dismiss. It was denied in the answer that appellee had collected any unauthorized fees, and the statute of limitations was pleaded as to the claim for the $4,800 collected by appellee as collector while serving also as sheriff.

It is urged for the affirmance of the decree from which is this appeal that as there is no bill of exceptions no issue is presented for the decision of this court. But we do not agree with that contention. No testimony was heard, but we have before us the complaint and the exhibits thereto and the various motions filed in the cause, and the orders of the court made thereon, and the judgment of the court dismissing the case for the failure to file bond.

In his Supreme Court Procedure, p. 5, Stevenson says: "The record proper includes the pleadings, any exhibits thereto, statement showing service of summons, any material order of court preceding judgment, the judgment itself, motion for new trial, the order overruling same, and the grant of appeal. *Morrison* v. *St. L. S. F. Ry. Co.*, 87 Ark. 424, 112 S. W. 975."

We are of the opinion, therefore, that no bill of exceptions is required to present for review the question whether the complaint, with the exhibits thereto, stated a cause of action.

We are of the opinion also that the court below was in error in dismissing the complaint for the failure to give bond. Section 13985, Pope's Digest, is cited as authority for this action, and no other authority is asserted. It was held, however, in the case of *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579, that this statute

is inapplicable to suits of this character. That case, like this, was a suit against the sheriff and collector for the alleged failure to account for public revenues. It was there said: "We are of the opinion that the chancery court had no jurisdiction. The statute provides that the suit shall be brought at the instance of a taxpayer, and that the proceedings shall be summary. The primary object of the suit under the statute is to oust the collector from office, if it shall appear that the official acts complained of are fraudulent; and the decree for the moneys which he may have unlawfully detained is a mere incident to the main suit."

The suit is predicated upon and is authorized by § 13, of art. 16, of the Constitution, and we know of no requirement that a citizen suing under this authority shall give a bond for costs. There was no request for an audit, nor any allegation that one will be required. *Jones* v. *Adkins,* 170 Ark. 298, 280 S. W. 389.

As the decree must be reversed and the cause remanded for a trial upon the allegations of the complaint, we take occasion to dispose of certain questions discussed in the briefs.

We think appellee was, not only the *de facto,* but was the *de jure,* collector of Independence county for the biennium beginning January 1, 1937, and ending December 31, 1938. He was elected as sheriff and ex-officio collector for that period of time. Section 6 of the Salary Act, above quoted, did not contemplate the election of a collector except "at the general election," which would, of course, be the next ensuing election. This is the express—and only—provision of the Salary Act for filling that office. There was no authority under the Act for the election of a separate collector at the 1936 general election, as the offices of sheriff and collector were not separated until the Act had been adopted at the 1936 general election, and "hereafter," as the Act states, which means "thereafter," the tax collector shall be elected, in the manner provided by law, at the general election, which could only be the next ensuing election. We conclude, therefore, that as appellee was elected to

fill both offices he was entitled to the emoluments of both offices, as, together, they did not exceed the $5,000 limitation imposed by the Constitution. *State, ex rel. Poinsett County* v. *Landers,* 183 Ark. 1138, 40 S. W. 2d 432. But, even so, those fees were paid more than three years before the institution of this suit, and the suit is, therefore, barred by the three-year statute of limitations. *State, use Garland County,* v. *Jones,* 198 Ark. 756, 131 S. W. 2d 612.

This statute of limitations is applicable also to mileage fees collected more than three years before the institution of this suit.

The decree will, therefore, be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

HARPER *v.* FUTRELL.

4-6841 164 S. W. 2d 995

Opinion delivered October 19, 1942.

J. S. McConnell and *Jackson & Clement,* for appellant.

George R. Steel and *George E. Steel,* for appellee.

GREENHAW, J. Appellee, Dan Futrell, brought a replevin action against appellant, Ray Harper, in a justice court of Howard county, seeking to obtain possession of a 1939 model six-foot Frigidaire. No complaint was filed, the basis of the action being the affidavit executed by appellee stating, among other things, that he was the owner thereof and entitled to its immediate possession, and that same was in the possession of appellant. Upon trial in the justice court appellee was awarded the possession of the refrigerator.

An appeal was prosecuted to the circuit court. No written pleadings were filed in this case by either party, other than the affidavit. The jury in circuit court returned a verdict in favor of appellee for the possession of the refrigerator or its value in the sum of $75, upon which judgment was entered. Motion for new trial was filed and overruled, from which is this appeal.

Evidence adduced on behalf of appellee showed that he was the owner of the refrigerator and sold it to appellant on May 10, 1940, for the sum of $180.80, of which sum $30.80 covered the finance charges. A conditional sales contract was executed on that date whereby title was retained in appellee until the purchase price, including finance charges, was paid in full. Five dollars was paid on the purchase price on the date of the execution of the contract, and no further payments were ever made on the Frigidaire.

Appellant admitted purchasing the refrigerator from appellee, but denied executing the conditional sales contract, and testified that he purchased the refrigerator for the sum of $116 on March 23, 1940, executing a check for $25 at that time in part payment, and that thereafter he paid the balance due in full, including sales tax, in two separate payments.

Alfred Glasgow, an employee of appellee, testified that he saw appellant execute the conditional sales con-

tract and signed same as a witness. Expert testimony was offered to the effect that the signature on the conditional sales contract was not appellant's signature, and similar testimony was offered to the effect that it was his signature.

The conditional sales contract in question was introduced in evidence, showing the purchase price of the refrigerator was $150 and the finance charges amounted to $30.80. It further shows that a down payment of $5 was made, leaving a balance due of $175.80, to be paid at the rate of $5.86 per month.

The contract provided that "Title to said property shall not pass to the purchaser until said amount is fully paid in cash." It further provided that: "If the purchaser defaults in complying with the terms hereof, or the seller deems the above property in danger of misuse or confiscation, the seller or any sheriff or other officer of the law may take immediate possession of said property without demand. . . . The seller may resell said property so retaken at public or private sale without demand for performance. . . . upon such terms and in such manner as the seller may determine; . . . From the proceeds of any such sale the seller shall deduct all expenses for retaking, repairing and selling such property, including a reasonable attorney's fee. The balance thereof shall be applied to the amount due; any surplus shall be paid over to the purchaser."

In his motion for a new trial appellant assigned a number of errors. He contends that the court erred in refusing to give his requested instruction No. 4, which reads as follows: "You are instructed that if you find from a preponderance or greater weight of the testimony that the defendant, Ray Harper, did in fact execute and deliver to plaintiff the contract in evidence, and you further find that the said contract bears a greater rate of interest, or charge for credit, than ten per centum per annum, the contract is void and your verdict should be for the defendant."

The court did not err in refusing to give this instruction. This court has held that finance charges in con-

nection with the sale of property under a conditional sales contract are not paid for a loan of money, but are a part of the purchase price which the purchaser agreed to pay, and that there is no usury in a transaction of this kind. See *Cheairs* v. *McDermott Motor Co.,* 175 Ark. 1126, 2 S. W. 2d 1111.

Appellant also assigns as reversible error the giving of instruction No. 1 over his general objection and exception. This instruction reads as follows: "You are instructed that if you find from a preponderance of the evidence that the defendant purchased the Frigidaire from the plaintiff and executed the purchaser's agreement therefor, and you further find that he has not paid plaintiff the purchase price, then your verdict will be for the plaintiff for the possession of the Frigidaire or its value."

The verdict of the jury reads as follows: "We, the jury, find for the plaintiff for the possession of the refrigerator or the sum of $75 as value thereof." The attorney for appellant immediately upon the return of this verdict and before the jury was discharged from consideration of the case objected to the verdict for the reason that it did not fix the balance due under the conditional sales contract, as required by the statute. The court overruled his objection, and an exception was saved.

The statute in question, § 11388 of Pope's Digest, reads as follows: "In any action in a justice court, or circuit court of this state, where it is attempted to foreclose any mortgage, deed of trust or to replevy, under such mortgage, deed of trust or other instrument, any personal property, the defendant or defendants in said action shall have the right to prove or show any payment or payments or set-off under such mortgage, deed of trust or other instrument, and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days and satisfy the judgment and retain the property."

This statute is applicable in a case of this kind. Under its provisions it was error to instruct the jury

that if they found for the plaintiff they would find for possession of the refrigerator or its value. The jury should have been instructed that if they found for the plaintiff for the possession of the refrigerator they should also find the balance due thereon, in which event appellant would have had the option of paying the balance due within ten days and retaining the refrigerator. Such an instruction was not given.

In the case of *Shaffstall* v. *Downey,* 87 Ark. 5, 112 S. W. 176, the jury returned the following verdict: "We, the jury, find in favor of the plaintiff a return of the property in question, to-wit: one bay mare or its value, $105, and we further find that the defendant is due the plaintiff $25." Judgment was there entered in accordance with the verdict. This court, in reversing that case, held that the lower court erred in the form of judgment entered; that the plaintiff was entitled to possession of the mare only for the purpose of foreclosing the mortgage, and that judgment should have been rendered for the possession of the property or the balance due on the mortgage, in accordance with the provisions of § 6869 of Kirby's Digest, now § 11388 of Pope's Digest. See, also, *Fore* v. *Chenault,* 168 Ark. 747, 271 S. W. 704.

Instruction No. 1, given on behalf of the plaintiff over the general objection and exception of defendant, was an incorrect statement of the law and was inherently wrong, under the facts in this case, and therefore the general objection to this instruction was sufficient. In the case of *Arkebauer* v. *Falcon Zinc Co.,* 178 Ark. 943, 12 S. W. 2d 916, this court said: "It is also contended by appellee that a general objection to this instruction is not sufficient. We do not agree with appellee in this contention. If an instruction is inherently wrong, an incorrect statement of the law, as instruction number one in this case is, a general objection is sufficient."

Appellee contends that he was not seeking to recover the property under the terms of the conditional sales contract, and that § 11388 is, therefore, not applicable. However, it is undisputed that appellee sold appellant this refrigerator, and that at the time of the sale all of

the purchase price was not paid. Appellee introduced in evidence the conditional sales contract retaining title in him, and his right to recover was predicated upon that contract. Under these facts it is clear that the conditional sales contract was the basis of appellee's cause of action, and, under § 11388 of Pope's Digest, appellant was entitled to have the jury instructed to find the balance due on the purchase price of the Frigidaire in the event they found appellee was entitled to recover.

Having reached the conclusion that the giving of plaintiff's instruction No. 1, and refusing to instruct the jury to find the balance due on the refrigerator in the event they found for plaintiff, constituted reversible error, we deem it unnecessary to discuss the other assignments of error relied on by appellant for a reversal of this case, as they are of such character that they no doubt will not arise upon a retrial.

The judgment is, therefore, reversed, and the cause remanded for a new trial.

PHILLIPS MOTOR COMPANY *v.* PRICE, ADMX.

4-6828 165 S. W. 2d 251

Opinion delivered October 19, 1942.

Percy A. Wright and *Reid & Evrard,* for appellant.

Ivy & Nailling and *A. F. Barham,* for appellee.

HUMPHREYS, J. Two separate suits were brought in the circuit court of the Osceola district of Mississippi county by appellees against appellants to recover damages growing out of a collision between two automobiles between 1 and 2 o'clock a. m., February 5, 1941, on U. S. highway No. 61 in said district and county, on account of the immediate death of Nelson Catalina and Vernon Dean Price, occupants of one of the automobiles, through the alleged negligence of Cal Gossett who was driving the other automobile.

It was alleged in both complaints that at the time Cal Gossett negligently ran into the automobile occupied by Catalina and Price, Gossett was operating an automobile owned by the Phillips Motor Company and was engaged in business for said Phillips Motor Company. It was also alleged that Loyce Donaldson, intervener as a plaintiff, owned the automobile occupied by Catalina and Price.

In the Catalina suit damages were prayed for the benefit of the estate of Nelson Catalina, and for the benefit of his parents, as his next of kin.

In the Price suit damages were prayed for the benefit of the estate of Vernon Dean Price and for the benefit of his mother, as his next of kin. In that case Loyce Donaldson, the owner of the automobile, prayed for judgment for the damage done to his automobile in the collision.

Answers were filed by appellants in each case denying each and every material allegation therein and alleg-

ing that the collision occurred solely as a result of the negligence of Vernon Dean Price and Nelson Catalina.

The causes were consolidated for the purposes of trial, and at the conclusion of the evidence appellants requested that verdicts be directed in their favor in each case, which motions were overruled over appellants' objections and exceptions.

The causes were then submitted to a jury upon the pleadings, the testimony and correct instructions relative to the law of negligence and contributory negligence and to the law governing liability of a master for a negligent act of a servant when the servant is engaged in the business of his master.

The jury returned a verdict in the Catalina case for $2,000 for the benefit of the next of kin as compensation for the loss of contributions and for the benefit of his estate in the sum of $500 to cover funeral expenses.

The jury returned a verdict in the Price case in the sum of $4,800 for the benefit of the next of kin and $200 for the benefit of the estate to cover funeral expenses. The jury also rendered a verdict in favor of Loyce Donaldson, in the Price case, for $150 as compensation for damages to his automobile.

Separate judgments were rendered by the court on each verdict from which an appeal has been prosecuted to this court by appellants.

Appellants contend for a reversal of the judgments upon two grounds, one being that there is no substantial evidence in the record tending to show that Cal Gossett, who was also killed in the collision, was guilty of any negligence, and the second being that, at the time of the collision, Cal Gossett was not engaged upon any business for appellant, Phillips Motor Company, and that, even if he were negligent, there is no substantial evidence in the record showing that Cal Gossett was, at the time, engaged in the performance of any business for Phillips Motor Company.

There were no eye-witnesses to the collision. All three parties involved were so near dead when discovered that they were speechless and almost breathless. All

three died on the scene or while being taken to the hospital. The Gossett automobile was afire, and it would have burned up in a very short time if the first witness on the scene had not extinguished the flame. The collision occurred at about 1:30 a. m. on February 5, 1941, on a gradual curve in U. S. highway No. 61 in the Osceola district of Mississippi county. Prior to the collision the Gossett automobile was being driven by Cal Gossett in a northerly direction, and the automobile owned by Loyce Donaldson, occupied by Catalina and Price, was proceeding in a southerly direction. After the collision within the curve the automobiles were about 150 feet apart and each was headed in the direction from which it was known to have been coming. After the collision each had turned around. The left front fender and headlight of the Gossett automobile was completely demolished and the witnesses said that it was injured all along the left side. The front left wheel of the Donaldson car was knocked off and the body or axle was let down and made a cut in the pavement of considerable length and width and pointed in the direction of the automobile as it skidded and turned over and finally landed on the west shoulder of the highway. The Donaldson car was damaged all over, or, as some witnesses said, "completely demolished." A few feet north of the cuts in the pavement on the west side of the middle line a lot of glass and dirt was found. A small amount of scattered glass was found on the east side of the middle line of the pavement. A map was prepared and introduced in evidence showing the curve in the highway, the relative positions in which the witnesses found the two automobiles after the collision, the location of the dirt, glass and cut places in the pavement, etc., which map is inserted in this opinion in aid of the statement of facts. (See end of opinion for copy of the map.)

The evidence showed that during the evening before the collision young Catalina and Price were out driving with some lady friends and refreshed themselves with soft drinks. There is evidence to the effect that during the evening Cal Gossett was playing pool and occasionally taking a can of beer.

The undisputed evidence is to the effect that the Phillips Motor Company had sold the automobile to Cal Gossett, and that the contract had been assigned to a finance company, but that he was using the car as an employee for the Phillips Motor Company just as he had been doing before he bought it. At the time of the collision the car had the Phillips Motor Company dealer's license on it, but it seems that all employees of the Phillips Motor Company operated under this character of license whether the car or cars were owned by the Phillips Motor Company or by the employees.

The place of business of the Phillips Motor Company was in Blytheville. On the day before Cal Gossett was killed, Mr. Phillips, the head of the Phillips Motor Company, gave all of the employees a banquet early in the evening. Cal Gossett and the other employees were there. After the banquet they all went back to the Phillips Motor Company's place of business and from there each went his own way. The regular hours for employees to work were between 7:30 a. m. and 6:00 p. m., but if one had a prospect he might contact him at any time and at any place. After the banquet, Cal Gossett informed several of his friends that he was going to Luxora to assist his brother-in-law in checking up the pool business preliminary to taking over the financial management of the pool hall. His brother-in-law had been drafted and wanted him, Gossett, to become acquainted with the business so that he could check up on it for him during the time his brother-in-law was in the army. Gossett then drove over to his brother-in-law's pool hall for that purpose, and during the evening he played some thirteen or fourteen games of pool before his brother-in-law came in. After his brother-in-law came in and they were getting ready to close the pool hall, he and his brother-in-law went to the cash register and checked up the day's business and his brother-in-law gave Gossett some instructions concerning how to check up the business and look after it during his absence in the army. After they closed the pool hall, Gossett, his brother-in-law and some others drove out to what was called "The Spot," some distance from Luxora, to purchase some cigarettes. After

purchasing the cigarettes, they drove back to Luxora, and Cal Gossett got in his car and went north on highway No. 61 toward his home, and it was while on his trip home that the collision occurred, some time near 1:30 a. m. as heretofore stated.

Billy Long testified that his father, Lee Long, wanted to see Mr. Gossett about buying a truck, and that he informed Gossett on the day before he was killed at Blytheville that his father wanted to see him, and that Gossett had told him he would see him later that night; that he would be at Luxora and would talk to him.

Lee Long testified that he had sent his old truck to Blytheville by his son for Gossett to look over, and that at the time his son informed him that Cal Gossett would be in Luxora that night; that on that night around 10:00 o'clock he went to the pool hall and saw Gossett, and they walked out on the street and had a talk concerning the exchange of trucks; that they talked a few minutes and Gossett told him what he would do and also told him he would see him the next day; that no deal was made that night and the matter was dropped there.

We think it is questionable that this evidence on the part of the Longs was sufficient to show that Cal Gossett had gone to Luxora for the purpose of attending to any business for the Phillips Motor Company. His primary purpose in going to Luxora from Blytheville was to attend to his own private business in connection with taking over the financial management of the pool hall which belonged to a Mr. Eberdt, his brother-in-law, and that the conversation with Lee Long was an incident. Even according to Lee Long no deal was consummated and the whole matter was passed until the next day. Certainly, after he had this conversation with Lee Long, he was not engaged in his master's business while he was playing pool in the pool hall nor while he and his friends drove out to "The Spot" to get cigarettes, which was some distance from Luxora, and it is not contended that he was engaged in any business for his master, the Phillips Motor Company, after he had the conversation with Lee Long.

The court, therefore, erred in submitting the issue to the jury of whether Cal Gossett was transacting business for the Phillips Motor Company at or immediately before the collision between his car and the car belonging to Loyce Donaldson. The court should have peremptorily instructed a verdict in favor of the Phillips Motor Company at its request.

We take a different view of the evidence tending to show negligence on the part of Cal Gossett. We think all the evidence tends to show that Cal Gossett was driving northward on the highway, turned his car onto the left side thereof and ran into the Donaldson car and demolished it. We think from all physical facts the jury might have reasonably inferred that the collision was a result of Cal Gossett's negligence. It is true there are no eye-witnesses to tell the tale, but this is not required. Negligence may be established by circumstantial evidence. This court said in the case of *Arkmo Lumber Company* v. *Luckett,* 201 Ark. 140, 143 S. W. 2d 1107, that: "Negligence that is the proximate cause may be shown by circumstantial evidence as well as direct proof. . . . It will be sufficient if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred."

It was also said in the same case: "The settled rule, which has been many times approved by this court, is that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions."

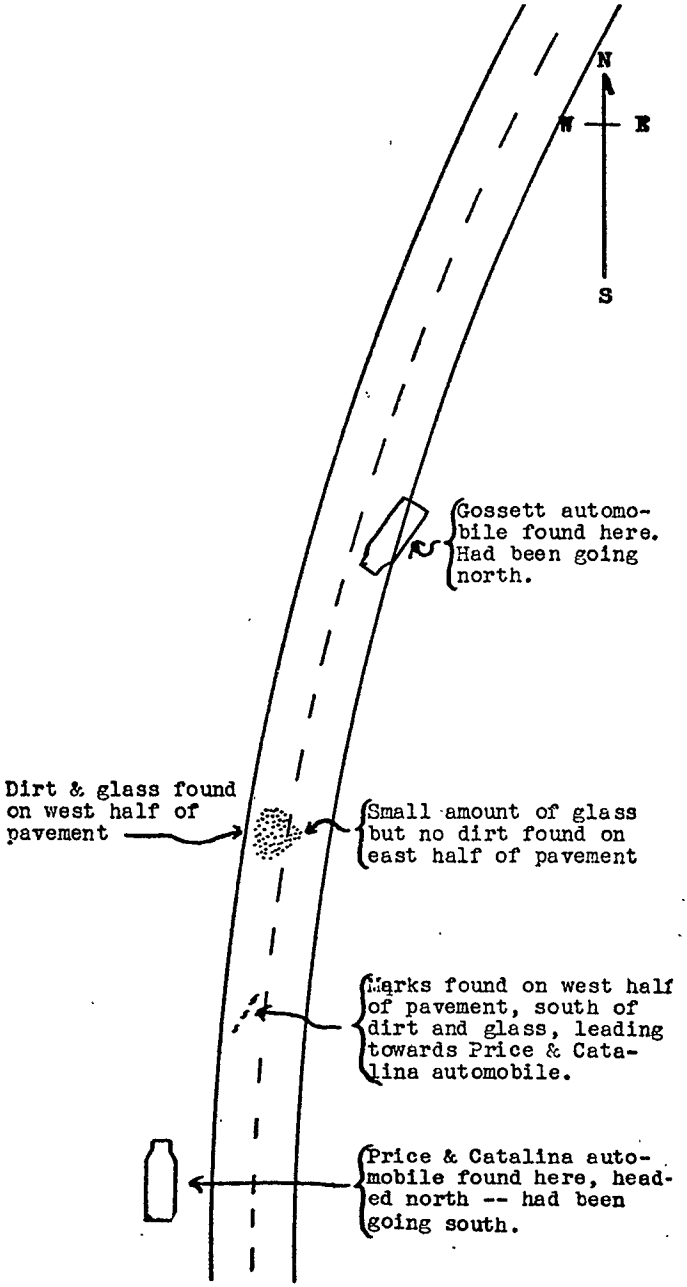
We think the jury were warranted in finding that the indentations on the west side of the highway, the large amount of dirt and glass found on the west side thereof and the condition and location of the two automobiles after the wreck showed that the wreck occurred on that side of the highway and was caused by Cal Gos-

sett in wrongfully driving his automobile onto the west side thereof and colliding with the Donaldson car.

Appellants argue that some intervening car might have wound in and out and struck both cars, but there is no evidence whatever to warrant such a conclusion. The witnesses who appeared immediately after the collision testified that they did not meet any car coming into or going out of the curve. It was suggested that perhaps Cal Gossett drove onto the west side of the highway, across the middle line, to avoid striking some pedestrian, but to say that would be indulging entirely in speculation and, if he had done this, there would have been an eye-witness to the collision.

We think under all the circumstances there is substantial evidence in the testimony to sustain the verdict against Mrs. Cal Gossett as administratrix of the estate of Cal Gossett, deceased.

The judgment is, therefore, reversed and dismissed as to the Phillips Motor Company and affirmed against Mrs. Cal Gossett as administratrix of the estate of Cal Gossett, deceased.


N
W
E
S
Gossett automobile found here. Had been going north.
Dirt & glass found on west half of pavement
Small amount of glass but no dirt found on east half of pavement
Marks found on west half of pavement, south of dirt and glass, leading towards Price & Catalina automobile.
Price & Catalina automobile found here, headed north -- had been going south.

McCALL *v.* McCALL.

4-6690 165 S. W. 2d 255

Opinion delivered October 19, 1942.

[redacted]

Ada Marett Carter, for appellant.

John F. Park, for appellee.

GRIFFIN SMITH, C. J. The decree appealed from granted J. C. McCall a divorce on the allegation that he and Bama McCall had lived apart for three consecutive years without cohabitation.[1]

The wife sued January 31, 1938, alleging that Mildred Hays had succeeded to her husband's affections, and that they were living together. The prayer was for separate maintenance.[2] Ten days later the court ordered monthly payments of $30 *pendente lite.*

February 21 the husband answered and cross complained. He asked for an absolute divorce, with equitable division of certain property listed and evaluated.

June 28, 1939, the temporary order directing payment of $30 was modified by reducing payments to $15 April 22, 1941, McCall filed an amendment to his cross complaint in which it was stated that monthly payments of $15 ordered February 9, 1938, were directed to be discontinued October 3, 1940, but through error the order had not been placed of record. June 3, 1941, the wife filed an answer to her amendment to the defendant's cross complaint, alleging that $560 was delinquent; also,

[1] Act 20, approved January 27, 1939, subdivision 7.

[2] The plaintiff's allegation was that McCall was a railway brakeman who earned approximately $200 per month.

that in 1932 the husband procured a $2,000 policy of insurance. The insured failed to pay premiums, in consequence of which Mrs. McCall asked reimbursement of $136.68 for amounts she had paid.

August 31, 1939, an order was issued directing the sheriff ". . . to arrest McCall and place him in the Pulaski county jail for safekeeping until the further order of this court; provided, however, he may make bond in the sum of $90 guaranteeing payment of maintenance of $45. . . ."[3]

The decree of June 5, 1941, recites that at a hearing had June 28, 1939, McCall was denied a divorce on his cross complaint and the cause was continued.

Without detailing transactions sustained by a preponderance of the evidence showing the husband's misconduct and disregard of the marital relation, it is sufficient to say that under the construction given subdivision seven of Act 20 of 1939, the court did not err in granting McCall a divorce on his allegation that separation had been continuous for three years. *Jones* v. *Jones,* 199 Ark. 1000, 137 S. W. 2d 238.

But it is insisted there is no bill of exceptions because oral testimony when transcribed was not approved until there had been an intervening term of court, and when the appeal was granted time was not asked. Agreement of the parties was that when the stenographer's work should be completed it would be submitted to the court, "and when so approved by the chancellor, filed as depositions and as a part of the record in this case."

Elvin v. *Morrow, ante,* p. 456, 162 S. W. 892, is relied upon to exclude all testimony. In that case it was said that one of the methods of bringing oral matter up for review was to have the testimony taken down in writing in open court "and by leave filed with the papers in

[3] In response to court order, Missouri Pacific Railroad Company filed a statement showing McCall's average "earned and paid wages" to be $2,258.03, or $187.50 per month. The lowest monthly earning was $10.66 for March; the highest $232.38 for June. During January, February, and March, 1941, earnings were $437.40, a monthly average of $145.80. Total for fifteen months was $2,695.43, or an average of $179.69, plus.

the case." In the instant case the agreement was that *when* approved the transcription of evidence should be treated as depositions. It is true this transaction—approval of the chancellor—occurred at a term subsequent to that at which the decree was rendered; but the agreement was unrestricted and should be liberally construed in the interest of justice.

The judgment is reversed, with directions that alimony of $30 per month be paid from this date. It is further ordered that on remand the amount delinquent be determined under the several court findings. When so ascertained appellee shall pay arrearages at the rate of $10 per month.

DICKENS *v.* TISDALE.

4-6838 164 S. W. 2d 990

Opinion delivered October 19, 1942.

Jack Machen, for appellant.

Stevens & Cheatham, for appellee.

Melvin T. Chambers, amicus curiae.

HOLT, J. Emma Dickens Tisdale died testate in Columbia county, Arkansas, August 31, 1940. Appellants are the only heirs of J. L. and Amanda Dickens, deceased. Appellant, W. C. Dickens, is the brother of the testatrix, Emma Dickens Tisdale, and appellants, J. W. and J. H. Dickens, are her nephews. Appellee, W. O. Tisdale, is her surviving husband. Under the terms of her will she disposed of all of her property. Following the preamble, the will contains eight numbered paragraphs.

This litigation involves the construction of that part of paragraph four which is as follows: "Four: Of the remaining royalty acres of which I may die seized and possessed, I give unto the heirs of J. L. and Amanda Dickens, deceased, thirty-five royalty acres to be vested in said heirs of J. L. and Amanda Dickens forever; it being understood the rents, royalties and all other proceeds of this thirty-five acres are to be my husband's until his death."

In the trial below and here on appeal (quoting from appellants' brief) appellants' contention was, and is, "that under this paragraph of said will, and upon the death of the testatrix, they became vested with the fee simple title to an undivided 1/32nd part of all the oil, gas and other minerals underlying the lands left by the said Emma Dickens Tisdale, deceased, with the right to use and enjoy the same when produced, if ever; and, that the limiting clause, 'it being understood the rents, royalties and all other proceeds of this thirty-five acres are to be my husband's until his death,' is void as being an attempt on the part of the testatrix to deprive the estate, first given, of all of its essential legal properties and as being inconsistent with and repugnant to the preceding grant to them in fee."

It was the contention of appellee, W. O. Tisdale, husband of the testatrix, that under the provisions of paragraph four, *supra,* he acquired a life estate in the thirty-five royalty acres mentioned therein, and that appellants only acquired a remainder over after the termination of his life estate. This contention of appellee, Tisdale, was upheld by the trial court, and we think correctly so.

The general rule in the construction of a will, running through a long line of our cases, is clearly stated in the very recent case of *Rufty* v. *Brantly, ante,* p. 32, 161 S. W. 2d 11, wherein we said: "All the cases are to the effect that the primary purpose of construing a will is to arrive at the testatrix's intention in making it, and the rule of construction applicable in all cases is that the will should be read in its entirety, from its four corners, as many cases express the thought"; and also in *Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1037, where it is said: "The purpose of construction of a will is to ascertain the intention of the testator from the language used, as it appears from 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. *Fitzhugh* v. *Hubbard,* 41 Ark. 64; *Gregory* v. *Welch,* 90 Ark. 152, 118 S. W. 404; *Cockrill* v. *Armstrong,* 31 Ark. 580; *Smith* v. *Bell,* 6 Pet. (U. S.) 68, 8 L. Ed. 322. See, also, *Norris* v. *Johnson,* 151 Ark. 189, 235 S. W. 804; *Lockhard* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018." See, also, the case of *Sheltering Arms Hospital, et al.,* v. *Shineberger,* 201 Ark. 780, 146 S. W. 2d 921.

We think it clear that the testatrix intended by the words "it being understood the rents, royalties and other proceeds of this thirty-five acres are to be my husband's until his death" to so limit the estate conveyed to appellants in the preceding clause that it would not take effect until her husband's death. In other words, the estate which she did convey to appellants was the remainder over in the thirty-five royalty acres in question upon the termination of the life estate of her husband, W. O. Tisdale. It will be observed that this clause is only separated from the preceding clause by a semicolon and is a part of the same paragraph—and being the last clause, it will control the intention of the testatrix. If further evidence be needed that such was her intention, we find in paragraph three of the will that Mrs. Tisdale, the testatrix, devised to each of the three appellants and other kinsmen, two royalty acres in other land which

was to take effect immediately upon her death, and not at the death of her husband, and in a separate paragraph —paragraph four in question here—she gave thirty-five other royalty acres, which she owned at her death, to the appellants here in addition to the royalty acres given them under paragraph three, effective, however, at her husband's death and not at her own death, as provided in paragraph three. The language used in both paragraphs is clear and unambiguous.

Appellant argues, however, that while such might have been her intention, she did not do so for the reason that the last clause in paragraph four, *supra,* is void and appellants acquired under the language remaining in said paragraph a fee simple title to the thirty-five acres which became effective at the testatrix's death. We think, however, that this court in *Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1037, has ruled to the contrary. In that case this court had before it for consideration the following provision contained in the will: "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 clause of the fourth item provides equally for each of the seven children of the testator, and devises an estate in fee simple to each of them, sons and daughters alike. The last clause of this item, however, announces an unmistakable intention to limit the interest of his daughters to a life estate in their respective shares, as clearly as his intention in the opening clause had by its terms created an ownership in fee. There is no ambiguity or obscurity in either of these clauses, and no room for the operation of the rule that a clear grant of the fee by an earlier provision of the will will not be modified or qualified by a later obscure and ambiguous provision, as said by the Tennessee court. Since the last clause in a will governs in its construction in determining the intention of the testator, we are constrainted to agree to the holding of the Tennessee court, that it was the intention of the testator to devise to his said three daughters a life estate only, with a remainder in fee to their children, and if no children, then to the children of the testator then living, their heirs and assigns (*Gist* v. *Pettus,* 115 Ark. 400, 171 S. W. 480; *Little* v. *McGuire,* 113 Ark. 497, 168 S. W. 1084; *Jackson* v. *Lady,* 140 Ark. 512, 216 S. W. 505), the devise in the first clause of the item being restricted accordingly." See *Fleming* v. *Blount,* 202 Ark. 507, 151 S. W. 2d 88.

Appellants frankly make this statement in their brief: "It would be foolish for appellants to insist that under paragraph four of the will there was not manifest an intention on the part of the testatrix that the appellee should receive a benefit from the thirty-five royalty acres devised to the appellants." If the testatrix intended that appellee have the benefits from these thirty-five royalty acres, we think it clear that appellee, under the terms of paragraph four, not only acquired the benefits to be obtained from the thirty-five royalty acres in question, but that he acquired a life estate therein with remainder over to appellants at his death. We think, too, that the meaning of the term "royalty acres" as used in the instrument before us is the commonly accepted meaning, and

that is—that part of the oil that goes to the landowner, whether it be in place or after production.

Finding no error, the decree is affirmed.

AMERICAN EXCELSIOR LAUNDRY COMPANY *v.* DERRISSEAUX.

4-6837 165 S. W. 2d 598

Opinion delivered October 19, 1942.

Mike Danaher and *Palmer Danaher,* for appellant.

Henry W. Smith, for appellee.

McHANEY, J. Appellants, American Excelsior Laundry Company and R. Chester List, operate a laundry and dry cleaning business in Pine Bluff, Arkansas, under the trade name of List Laundry & Dry Cleaning Company. On May 21, 1932, they entered into a written contract, under the trade name, with appellee, employing him to solicit and deliver laundry and dry cleaning on their rural route, which included all points in and between the towns therein named and between that territory and Pine Bluff, and agreed to and did furnish the necessary transportation for such purpose. He was paid 15 per cent. of all laundry and cleaning secured and

collected for by him in his territory. It was to continue in force "so long as it is mutually satisfactory to both parties to continue it." The final paragraph in the contract provides: "Allen Derrisseaux agrees that he will not at any time within five years after the termination of this agreement engage in the laundry and dry cleaning business in any of the above mentioned cities in any capacity, either for himself or as employee of any other person, and will not solicit or deliver laundry or dry cleaning in said territory in any manner during said period of time."

Appellee worked under said contract from its date, May 21, 1932, to August 28, 1941, on which date he quit and engaged in business for himself, soliciting and delivering laundry and dry cleaning over the same route.

Appellants, on October 10, 1941, brought this action to enjoin appellee from soliciting or delivering laundry or dry cleaning in the territory described in said contract and for damages. Appellee answered, admitting the execution of said contract and pleading its breach in certain particulars by appellants. By an amendment to his answer, he alleged that the above quoted provision of the contract was void as being in restraint of trade, no mutuality of obligation and no consideration.

Trial resulted in a decree dismissing the complaint for want of equity. The court held that the above quoted paragraph of the contract "is contrary to public policy, tends to stifle competition and is, therefore, void." This appeal followed.

For a reversal of this decree appellants rely strongly on *Bloom* v. *Home Ins. Agency,* 91 Ark. 367, 121 S. W. 293. There the late Judge FRAUENTHAL, for the court, quoted from a Michigan case there cited, the following: "Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most

advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract." *Up River Ice Co.* v. *Denler,* 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480.

Continuing, the court in the same case said: "Ordinarily, the agreement to refrain from a calling within a given space and for a specified time must accompany a sale of a business property itself. But if the enterprise is disconnected with any plant or tangible property, and is a business with a good will and custom, it is still valid to agree, as a protection to the purchaser thereof, from competition in that line of business, to discontinue such calling, and abstain from such business."

There, Bloom sold an established business, an insurance agency, to the Home Insurance Agency and bound himself in writing not to enter into the business of soliciting fire insurance in Pine Bluff for a period of five years. He did so and was properly enjoined. The other cases cited by appellants, including those cited in the Bloom case, were cases involving similar situations to that of Bloom, where one of the parties had sold to the other his business or property and had agreed not to engage in the same business for a limited period, in all of which it was held that the agreement was valid and the offending party would be enjoined. See *Hampton* v. *Caldwell,* 95 Ark. 387, 129 S. W. 816; *Wakenight* v. *Spear & Rogers,* 147 Ark. 342, 227 S. W. 419; *McClure* v. *Young,* 193 Ark. 188, 98 S. W. 2d 877.

Here, appellee, Derrisseaux, did not sell appellants anything. He simply entered their employ where he continued for more than nine years, when he quit and went in business for himself. Perhaps that is the only business

he knows. He had the right to quit at any time. The contract did not bind either party to continue the relationship for any definite period of time, and, as said in *Love* v. *Miami Laundry Co.,* 118 Fla. 137, 160 So. 32, "Courts are reluctant to uphold contracts whereby an individual restricts his right to earn a living at his chosen calling." See, also, *Witmer* v. *Arkansas Dailies, Inc.,* 202 Ark. 470, 151 S. W. 2d 971, and *Marshall* v. *Irby,* 203 Ark. 795, 158 S. W. 2d 693.

In the latter case we quoted with approval from Restatement of the Law of Contracts, vol. 2, § 515, p. 988, under the heading "When a Restraint of Trade is Unreasonable." Two of a number set out are "(b) imposes undue hardship upon the person restricted, or (c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially."

We are, therefore, of the opinion that the above quoted paragraph of the contract between the parties is against public policy and void, in that it unduly restricts appellee's right to earn a living in his calling and did not involve a "transfer of good will or other subject of property." *Marshall* v. *Irby, supra.* So held the learned chancellor, and the decree is accordingly affirmed.

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

4-6845 165 S. W. 2d 364

Opinion delivered October 26, 1942.

Thos. B. Pryor, Thos. B. Pryor, Jr., and *Thomas Harper,* for appellant.

R. E. Hough, Wall & Green and *Partain & Agee,* for appellee.

GREENHAW, J. Appellee brought this action against the trustee in bankruptcy of the Missouri Pacific Railroad Company and H. C. Crawley and Earl Holloway, the engineer and fireman respectively in charge of the engine of a freight train, to recover damages for personal injuries he alleges he sustained about 1:30 p. m. March 29, 1941, as a result of a collision between the automobile he was driving and said freight train at the Missouri Pacific crossing on Main street in the town of Muldrow, Oklahoma.

Appellee, among other things, alleged that he was a citizen and resident of the state of Oklahoma, and was driving his automobile in a southerly direction, and that in approaching the crossing his view of a train approaching from the west was obstructed on account of a building and obstacles along the track; that defendants, Crawley and Holloway, in approaching the crossing operated their train at a negligent rate of speed through the town of Muldrow and negligently failed to ring a bell or sound a whistle or give any signal or warning of the approach of the train, and that they negligently failed to exercise ordinary and reasonable care to maintain a lookout for persons or property as the train approached the crossing; that after discovering plaintiff upon or approaching the crossing they negligently failed to exercise ordinary care to avoid striking the automobile or warn plaintiff.

Appellants filed an answer denying the allegations of the complaint, and further stated that if plaintiff was injured as alleged, such injuries were a result of his own contributory negligence in failing to exercise ordinary care for his own safety, failing to keep a lookout, failing to stop, look and listen at a railroad crossing although he knew or in the exercise of ordinary care should have known of the approach of the train, and that he carelessly and negligently drove his automobile onto the track in front of the train, and further pleaded that plaintiff's injuries were caused proximately and directly by his own negligence and want of care.

The jury returned a verdict in favor of appellee for $15,000, upon which judgment was entered and from which is this appeal.

Appellants contend that the court erred in refusing to direct a verdict for them for the reason that the undisputed evidence shows that appellee's own negligence was the proximate cause of his injuries, and even if there was evidence of negligence on the part of appellants, the undisputed evidence shows that appellee was guilty of contributory negligence as a matter of law, thus barring his right to recover, and that there was no evidence of a substantial nature which tended to show any negligence

on the part of appellants proximately causing appellee's injuries.

The evidence showed that the tracks of the railroad ran east and west through the town of Muldrow, and that Main street ran north and south. Appellee was in his automobile on the north side of the track and had started on a business errand to a point on the south side of the track. He testified that he was driving the automobile at about 15 miles per hour, and when he reached a rough place in the street, about 30 feet north of the railroad crossing, he slowed down and looked and listened for a train. He first looked to the west as far as he could see, to the section house, and did not see or hear a train, and then looked back east, shifted gears and started across the tracks, looking to the left, or east, for the reason that the depot was on the north side of the track and east of the crossing, and obstructed his vision to the east.

He continued to look to the east until he was practically on the track, and then looked forward, and about that time, when he had almost finished crossing the track, he heard a whistle and his automobile was struck by a freight train coming from the west, resulting in the collision and serious injuries to him.

He further testified that the section house, which was located about 450 feet west of the Main street crossing facing the railroad, and the trees in front of it obstructed his vision in that direction, and that one had to be practically on the track before he could see any further than the section house. The first warning he had that there was a train from the west was when the whistle blew at a time when the train was so close he could not get off the track in time to avoid being struck, at which time the train was about the same distance from him as the length of the court room. The whistle was not sounded nor the bell rung before. His hearing was not deficient before the collision, and he was in good health and 34 years of age and making from $72 to $80 per week as a carpenter.

Barto McConnell testified that he was on Main street, about 60 feet north of the crossing, at the time of

the collision. Just before the car got to the crossing there is a rough place and the car slowed up, practically stopped, and the driver apparently threw the car into second gear and eased onto the crossing, and by that time he discovered the train. It looked like the car was about half way across the track when the train struck it. Witness heard no signal or noise indicating the approach of the train until the train whistled about the time it struck the automobile. It did not whistle or sound its bell before that time, and if the whistle were blown or the bell rung about a quarter of a mile from the crossing he did not hear it. The street where the collision occurred was the main street of Muldrow and there were business houses on both sides of the track, and there is a section house and a tool house and some trees in the yard west of the crossing which might obstruct the vision of one approaching the crossing from the north.

Bill Jones testified that he was about 100 yards southeast of the crossing at the time of the collision; that in his best judgment the whistle was not blown or the bell rung.

Alex Vaughan testified that he was at his home, about a mile north of Muldrow, on this occasion, and saw the train proceeding east in the direction of the Main street crossing, but did not see the collision. He went in the house when the train was near the crossing in question, but he watched the train from the time it crossed a trestle until shortly before it entered the Main street crossing. "Q. How great a distance had the train traveled from the trestle until it got to the crossing where the accident happened? A. Approximately a mile. Q. Did it ever blow that whistle in that mile? A. Not until after it passed the section house, I know. Q. Was it ringing the bell during any of that time? A. Not that I know of, it was too far away for that, of course, but I know it did not blow the whistle."

Morgan Newman, a justice of the peace, testified that at the time of the collision he was one block south of the crossing on Main street, and that he did not hear the train whistle or the bell ring before the crash; that

west of the Main street crossing within the city limits there are two more railroad crossings, and he did not hear the whistle nor the bell sound for any of these crossings. The section house was about a block west of the Main street crossing, and the vision of one approaching the crossing from the north is obstructed by the section house, trees and tool house until he gets on the railroad.

Riley Vaughan testified that he was about 75 yards from the railroad, behind Blackard's store, at the time of the collision. He did not hear the train whistle until about the time it struck the car, and he did not hear the bell ring. He further testified that the section house, tool house and trees were an obstruction to one's vision looking west in approaching the crossing from the north.

W. T. Wilson testified that at the time of the collision he was standing about 150 feet south of the crossing. He did not hear the whistle blow nor the bell ring before the collision. He has looked west from a point just north of the crossing, and on the north side of the railroad there is a section house with trees in front of it and a tool house west of the section house. The trees had some leaves on them at the time, and were between the section house and the track.

Houston Brashfield testified that at the time of the collision he was in front of Blackard's store, about 100 feet away, and saw the train strike the car. He did not hear the train whistle nor the bell ring, and would have heard it if it had whistled.

Buddy Plank testified that on this occasion he was at the trestle about one-half mile west of Muldrow fishing, and heard and saw the train in question. If the whistle was blown or the bell rung between the time it passed him and got into town he did not hear it, and knows it would have attracted his attention, and could not have whistled without his hearing it. "Q. Do you mean to say it could not have whistled without you hearing it? A. Yes, sir. Q. Were you watching it? A. Yes, sir, for a good ways."

Both the engineer and fireman testified that the regular crossing whistle was given, and that the bell was

rung as they approached the Main street crossing, and that the train was making about 45 miles per hour. The train consisted of the engine, tender and 47 cars. The track was a little up-grade coming from the west. There were two crossings west of the Main street crossing, and when the train approached them the whistle was blown.

The fireman testified that as they passed the section house, about 450 feet west of the Main street crossing, he saw the car approaching the crossing at a low rate of speed, and he thought it was going to stop, as it slowed down 25 or 30 feet from the crossing. Then it moved on toward the crossing, and when they were about 150 feet from the crossing he told the engineer they were about to strike a car. The engineer immediately applied the brakes in emergency, but they were unable to avoid striking the car. The bell was ringing all the way through the town until the train stopped, and the engineer was blowing the whistle for the Main street crossing when he told him they were about to strike a car. The engineer did not undertake to slow the train until he told him about the car, 150 feet from the crossing. "Q. Why hadn't you seen him before you got by the section house? A. Well, I suppose maybe the section house may have had something to do with my not seeing him before then, and maybe I wasn't looking at that particular place. . . . I did not see him until we got by the section house. Q. The tool house is also on west of the section house? A. Yes, sir. Q. Both on the right-of-way? A. Yes, sir."

The engineer testified that the bell was ringing during this time and that he whistled at all of the crossings, including the Main street crossing. When the engine was about 150 feet from the crossing the fireman told him an automobile was coming onto the crossing, and he began a long whistle until the engine occupied the crossing, and he grabbed the brakes, pushed in the emergency and turned on the sand. The train stopped 22 car lengths from the crossing. He undertook to stop as quickly as he could and could not materially reduce the speed before reaching the crossing.

The conductor and a brakeman on the train testified that the standard crossing whistle had been sounded for

this crossing, and the brakeman said the bell was ringing and had been since the other side of Muldrow.

Other witnesses testified on behalf of appellants, some of whom testified that the whistle was blown for a considerable distance before the train entered the Main street crossing, others that they only heard the train whistle when it was near the section house. or between the section house and the Main street crossing, and still others did not remember whether the whistle was sounded before, at the time of or after the collision.

Pictures of the scene of the accident were taken three or four days thereafter and were introduced in evidence. These pictures show the section house and trees on the right-of-way west of the Main street crossing. It is conceded that the section house and trees are about 450 feet west of this crossing, and that the tool house is west of the section house and somewhat nearer the track. It is also conceded that the train was traveling at approximately 45 miles per hour or at a rate of 66 feet a second, and at that rate of speed it would have required only 7 seconds for the train to cover the distance between the section house and the crossing in question.

The collision in question occurred in the state of Oklahoma, and the test of liability depends upon the laws of that state. *Texas & Pacific Ry. Co.* v. *Stephens,* 192 Ark. 115, 90 S. W. 2d 978; *St. Louis, Iron Mountain & So. Ry. Co.* v. *Hesterly,* 98 Ark. 240, 135 S. W. 874.

Section 11961 of the Oklahoma statutes of 1931 provides: "A bell of at least 30 pounds weight, or a steam whistle, shall be placed on each locomotive engine and shall be rung or whistled at the distance of at least 80 rods from the place where the said railroad shall cross any other road or street."

In the case of *M. K. T. Railway Co.* v. *Stanton,* 78 Okla. 167, 189 Pac. 753, the court said: "The statute which requires a railroad company to give certain signals at highway crossings was not intended to furnish a standard by which to determine in every case whether or not such company had failed to discharge its duty in

respect to giving sufficient warning to the traveling public of the approach of its trains. It was intended rather to prescribe a minimum of care which must be observed in all cases."

In support of appellants' contention that there was no negligence on their part, and that appellee's injuries were brought about solely by his own negligence, which proximately caused the collision and resulting injuries, and that for this reason they were entitled to a directed verdict, they cite the case of *M. K. T. Ry. Co.* v. *Flowers,* 187 Okla. 158, 101 Pac. 2d 816. We have carefully considered the Flowers case, and it is clearly distinguishable in facts from the instant case.

In *St. Louis, Iron Mountain & So. Ry. Co.* v. *Hitt,* 76 Ark. 227, 88 S. W. 908, this court quoted with approval from the case of *Richmond & D. Rd. Co.* v. *Powers,* 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642, as follows: "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

The court withdrew from consideration of the jury the question of keeping a lookout, and also the question of discovered peril. The evidence as to whether the signals required by the Oklahoma law were given in this case was squarely in conflict, and we think there was substantial evidence which warranted the court in submitting to the jury this question, and also the questions of the speed of the train and the alleged negligence of appellee, and the court's refusal to direct a verdict did not constitute reversible error. See *St. Louis, Iron Mountain & So. Ry. Co.* v. *Kimbrell,* 117 Ark. 457, 174 S. W. 1183, also *St. Louis-San Francisco Ry. Co.* v. *Whitfield,* 155 Ark. 560, 254 S. W. 323, which involved a railroad crossing collision in Oklahoma.

In *Safeway Stores, Inc.,* v. *Moseley,* 192 Ark. 1059, 95 S. W. 2d 1136, this court said: "We find it neces-

sary to consider only the question raised by the appellant for an instructed verdict. In viewing the evidence adduced, we must give to it its highest probative value in favor of the appellee and indulge every inference reasonably deducible from the testimony to support the finding of the jury."

It is a well established rule that this court will not pass upon the weight of the evidence, this being the exclusive province of the jury, whose verdict should be upheld when it is based upon substantial evidence. *Lewis* v. *Shackelford,* 203 Ark. 500, 157 S. W. 2d 509.

Appellants next complain of errors in the giving and refusing of instructions. A careful examination of the instructions in question reveals no reversible error on the part of the court.

Appellants also contend that the court erred in refusing to sustain appellants' challenge to four jurors who admitted they had served as jurors in that court within the preceding two years, the ground for this challenge being that such jury service was prohibited by Act 135 of 1931, and that this act was not effectively repealed by Initiated Act No. 3 of 1936. We are unable to agree with this contention. We have heretofore upheld the validity of Initiated Act No. 3 (Acts 1937, p. 1384). *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131.

Appellants finally contend that the verdict of $15,000 is clearly excessive.

The evidence shows that after his injury appellee was confined in a hospital for a period of four weeks. He was intermittently conscious and unconscious for a week or ten days. After he returned home he was confined in bed for two weeks before he sat up, and after this he was "up and down" for four or five weeks. His injuries consisted of laceration on the back of his head, stitches being used to close the wound, a fractured collar-bone, a fracture without displacement of the transverse processes of the second and third lumbar vertebrae, and six fractured ribs. In addition to these injuries, Dr. Ben Pride, who treated him, testified that he has a knot on the left shoulder where the collar-bone was fractured,

and this shoulder is one and a half or two inches higher than the right shoulder, and an operation would be required to correct this condition, but this condition would not have a disabling effect on him to any great extent. He testified there were other injuries, and appellee suffered great pain, complaining of pain in the abdominal region and other places, and in his opinion he also received internal injuries; that at the time of the trial appellee appeared to be in good physical condition; that a fracture of the transverse processes is not considered serious unless there is displacement, and there was no displacement in this case.

Appellee testified that his injuries caused him to suffer great pain, and that he was not able to work by reason of his injuries until the latter part of September, 1941, being approximately six months that he did not work; that his senses of hearing and sight have been injured, and he continues to suffer pain and at times is dizzy and suffers lapse of memory. Prior to his injuries he was a carpenter, earning $1.125 an hour. He was given a job as a carpenter at Camp Chaffee in September, and was paid $1.125 an hour, the same pay that he received before the injury. He has continued to work at Camp Chaffee, doing regular carpenter work, and his foreman on this job and another man who worked with him testified that they did not observe anything wrong with him, and that he made no complaint to them about having sustained any injuries, or that he was unable to do the work assigned to him, and he was still so employed at the time of the trial.

When appellee went to work as a carpenter at Camp Chaffee after the accident, he was examined by Dr. E. J. Morrow, in a routine examination. Dr. Morrow testified that his examination disclosed nothing out of the ordinary in appellee's physical condition at that time. He examined his eyes, ears, nose, throat, heart, lungs, and for hernia and former injuries and deformities. He stripped him to make the examination, and found no abnormalities of a noticeable type, and passed him.

It is undisputed that appellant lost about six months time due to his injuries, and that hospital and doctor

bills amounted to almost $600. When he resumed work he did about the same type of work as a carpenter that he had been doing before his injury and drew the same pay therefor. There is no evidence that his earning capacity has been materially, if at all, reduced.

Placing the most liberal construction upon the evidence of which it is susceptible, it does not sustain a judgment for more than $7,500. Therefore, if appellee will enter a remittitur within fifteen days for the sum of $7,500 the judgment will be modified and affirmed; otherwise it will be reversed and the cause remanded for a new trial.

AMERICAN SURETY COMPANY OF NEW YORK *v.* FIDELITY & DEPOSIT CO., OF MARYLAND.

4-6847 165 S. W. 2d 65

Opinion delivered October 26, 1942.

House, Moses & Holmes, for appellant.

Rose, Loughborough, Dobyns & House, for appellee.

HUMPHREY, J. On September 19, 1938, the State of Arkansas, through its attorney general, Jack Holt, brought suit in the Pulaski circuit court against Ed F. McDonald, the Fidelity & Deposit Company of Maryland and the American Surety Company of New York wherein judgment was prayed against each of said defendants for the sum of $5,996.12, with interest at the rate of six per cent. from May 12, 1938.

The complaint alleged that Ed F. McDonald was elected secretary of state for the term beginning 1933 and ending January, 1935; that he executed two general or official bonds in the sum of $5,000 each, one being signed by the Fidelity & Deposit Company of Maryland and the other being signed by the American Surety Company of New York, and that the Fidelity & Deposit Company of Maryland, on December 29, 1932, signed a disbursing agent's bond in the sum of $6,000 for Ed F. McDonald; that all three bonds were signed, approved and filed in accordance with law prior to the time Ed F. McDonald entered upon his duties as secretary of state; that the two general or official bonds contained the following recital: "Whereas, the above bounden Ed F. McDonald, was on the 8th day of November, 1932, elected to the office of secretary of state for a period beginning January 9, 1933, and ending January 9, 1935.

"Therefore, the condition of the above bond is such that if the said Ed F. McDonald shall well, truly and faithfully discharge and perform the duties of his office, and at the expiration of his term of office shall render unto his successor in office a correct account of all sums of money, books, goods, valuables, and other property, as it comes into his custody, as such secretary of state, and shall pay and deliver to his successor in office or any other person authorized to receive the same, all balances, sums of money, books, goods, valuables, and other property, which shall be in his hands, and due by him, then the above obligation shall be null and void; else the same to remain in full force and virtue."

It was further alleged that the disbursing agent's bond contained the following recital: "The conditions of the above bond is such that if the said Ed F. McDonald as such disbursing agent, or anyone he may designate to act for him, shall well, truly and faithfully disburse appropriations of said office according to laws governing same and especially Act 781 of the 1923 General Assembly. At the expiration of his term of office he shall render unto his successor in office a correct account of all sums of money, books, goods, valuables and other property which shall be in his possession as such disbursing agent of said office. And shall, further, pay and deliver to his successor in office, or any other person authorized to receive same, all balances, sums of money, books, goods, valuables and other property, which shall be in his possession and due by him, then the above obligation shall be null and void; else the same to remain in full force and virtue"; that the two general or official bonds were required to be and were executed, approved and filed under the provisions of § 5406 of Pope's Digest which is as follows: "The secretary of state shall, before he enters upon the discharge of his duties, enter into bond, with good and sufficient security, to the governor and his successors in office, in the sum of five thousand dollars, to be approved by the governor, conditioned that he will well and truly perform and discharge the several trusts and duties of secretary of state, and in all things touching and concerning the said office shall well, truly and faithfully execute and perform the same; which bond shall be filed with the auditor"; that the disbursing agent's bond executed by Ed F. McDonald was signed, approved and filed under § 4366 of Pope's Digest, which is as follows: "Each disbursing agent shall be required to give bond, in such amount as shall be deemed necessary by the auditor of state, and said bond shall be protection to the state or any of its creditors in case of losses sustained by reason of the action of said person. The bond shall be made by a surety company and the premium shall be a proper charge against the state. The bond shall be approved by the governor and filed in the office of the state auditor. Each disbursing agent shall

select a person to act for him in his absence and the actions of such person shall be considered the actions of the disbursing agent and the disbursing agent shall be responsible under his bond for same. The disbursing agent shall notify the auditor of state of the selection of such person. *Id.* § 3."

It was further alleged that during the period Ed F. McDonald served in office as secretary of state, from January 9, 1933, and by virtue of said office as disbursing agent, he purchased certain supplies for the state in the total sum of $5,996.12, for which vouchers were issued and paid in the sum of $5,996.12, but which were never delivered to the state or received by the state although both the vendors and Ed F. McDonald stated that the goods were delivered to the state in first class condition at the state capitol.

The prayer of the complaint was that the state of Arkansas have judgment against the secretary of state and the two surety companies and each of them in the total sum of $5,996.12 with interest.

The American Surety Company of New York filed an answer containing a general denial of all liability on its bond for any acts of Ed F. McDonald.

Ed F. McDonald filed an answer denying each and every material allegation in the complaint.

While this suit was pending the surety companies effected a settlement of the alleged liability in the sum of $3,264.70, or $1,632.35 each. At the time of the compromise and settlement, each surety company contended that the other was liable for the full amount of the debt, but they agreed to make the settlement, and that each would contribute one-half, and that they would submit the question of their liability at a later date. This was done, and the circuit court of Pulaski county adjudged that each should pay one-half of the amount of the compromise, from which judgment the American Surety Company of New York duly prosecuted an appeal to this court.

According to the stipulation of facts and the complaint in this case, the disbursing agent McDonald pur-

chased the merchandise for which vouchers were issued and paid and the merchandise was never delivered to or received by the state of Arkansas. It follows that the disbursing agent's bond was initially and primarily responsible for the shortage or fraud practiced upon the state.

Appellee argues and contends that the statute under which the disbursing agent's bond and the bond itself is responsible only for any fraud or shortage that exceeds the amount of any particular appropriation for any department of the state. We do not think this a fair construction of the statute authorizing the disbursing agent's bond or of the conditions of the bond itself. The disbursing agent's bond was for $6,000 and the conditions thereof were such that "if the said Ed F. McDonald as such disbursing agent, or anyone he may designate to act for him, shall well, truly and faithfully discharge appropriations of said office according to laws governing same and especially Act 781 of the 1923 General Assembly. At the expiration of his term of office he shall render unto his successor in office a correct account of all sums of money, books, goods, valuables and other property which shall be in his possession as such disbursing agent of said office. And shall, further, pay and deliver to his successor in office, or any other person authorized to receive same, all balances, sums of money, books, goods, valuables and other property, which shall be in his possession and due by him, then the above obligation shall be null and void; else the same to remain in full force and virtue." These conditions applied to the appropriations made for any department of government and did not limit the liability to excess expenditures above the appropriation. Such was not the purpose of Act 781, approved March 28, 1923. That act declared its own purpose. Said act (§ 4373 of Pope's Digest) reads as follows:

"The purpose of this act is to fix a definite responsibility on some one person to act for each agency of the state government in disbursing the funds appropriated to it by the general assembly. The auditor of state, with the consent and approval of the governor, is hereby

authorized to make such rules and regulations, in addition to the specific provisions of this act and not inconsistent therewith, as are necessary to carry out said purpose. *Id.*, § 10."

We do not mean to say or intimate that the only protection the state had against fraud or shortages was the disbursing agent's bond. We think the state was also protected by the general or official bond or bonds for all shortages or frauds under the conditions of and the statute authorizing the execution of the general or official bond or bonds of the secretary of state. The general or official bond or bonds protected the state against shortages or frauds which were not or could not be collected under the disbursing agent's bond and for any shortages or frauds in excess of the amount of guaranty of the disbursing agent's bond.

This court ruled in the case of *Briggs* v. *Manning,* 80 Ark. 304, 97 S. W. 289, (quoting syllabus 4) that: "The bond of a sheriff executed in his capacity as public adiministrator is primarily liable for any losses resulting from his failure to comply with its conditions, and remedies on it must be exhausted before recourse can be had to his official bond as sheriff."

We think the rule announced in *Briggs* v. *Manning, supra,* should be applied in the instant case and, as applied, the disbursing agent's bond with the Fidelity & Deposit Company of Maryland as surety is primarily liable for shortages or frauds in the wrongful disbursement of moneys up to and including the sum of $6,000.

In the instant case the liability did not exceed $6,000. It was much less. In fact, under the compromise agreement, it was only $3,264.70. The amount of the bond will not be exhausted by the payment of the total sum, and the circuit court should have, under the undisputed facts, adjudged the total loss against the Fidelity & Deposit Company of Maryland instead of adjudging that each of the surety companies should pay one-half of the shortage.

It follows that judgment must be rendered here in favor of the American Surety Company of New York

against the Fidelity & Deposit Company of Maryland for $1,632.35.

The judgment is, therefore, reversed and judgment is entered here against appellee in favor of appellant for $1,632.35.

SPRIGG *v.* WILMANS.

4-6846 165 S. W. 2d 69

Opinion delivered October 26, 1942.

Pickens & Pickens, for appellant.

Hout & Mack and *Judkins & Smith,* for appellee.

SMITH, J. I. S. Wilmans died testate in Jackson county, Arkansas, and his will was admitted to probate the 8th day of July, 1929. He left no children, but was survived by his wife, who was not the only—but was the principal—beneficiary. The will is long, and contains many provisions which are unimportant in the consideration and decision of the only question presented on this appeal, and only such portions of the will are copied as bear upon this question presently to be stated.

Wilmans was reputed to be a man of wealth, and no doubt considered his estate sufficient to provide the benefactions which the will enumerated. He devised his home to his wife, $500 to a cousin, and smaller amounts to certain persons designated as good friends. These bequests were promptly paid by the trustees to whom the whole estate was devised. These trustees were three in number, one of them being a brother of the deceased. The will contained provisions for the perpetuation of the trust until its purposes had been discharged.

All the estate, real and personal, was devised to these trustees, with full power to sell and convey any part of it, or to reinvest the proceeds of sales, all for the purpose of executing the trust created.

Paragraph (D) of the will created three annuities, and reads as follows: "(D) The net income from all property, both real and personal, devised to said trustees and which shall come under their control and management shall be paid out and disbursed by them in the following order and amounts, to-wit:

"(1) They shall pay to my wife, Ella D. Wilmans, the sum of $4,000 annually, so long as she may live, payable in four installments of $1,000 each on January 1st, April 1st, July 1st and October 1st of each year, the first quarterly installment being due at the first of any month above named next following my death.

"(2) They shall pay to my cousin, Webster Robertson, the sum of $600 annually, so long as said trust may continue, payable in four installments of $150 each on January 1st, April 1st, July 1st and October 1st of each year, the first quarterly installment being due at the first of any month above named next following my death.

"(3) They shall pay to Hattie B. Wilmans the sum of four hundred dollars annually, so long as said trust may continue, payable in four installments of $100 each on January 1st, April 1st, July 1st and October 1st of each year, the first quarterly installment being due at the first of any month above named next following my death.

"If it be necessary in order to have or provide funds to make the payments directed to be made in subdivisions (1), (2) and (3) above of subsection (D) of section five of this will, the trustees herein named and their successors shall have and are here given the power and authority and here directed to sell and dispose of any notes, securities or other personal property belonging to said trust estate and, if necessary, to sell any lands belonging to said trust estate and to secure and provide funds to make such payments."

The annuities provided for in subdivisions (2) and (3) of subsection (D) of section five of the will, above copied, were paid to the annuitants there named during their lives, both now being dead.

We think it clear that the primary purpose of the testator was to provide for the payment of these annuities during the lives of the respective annuitants, for, after conferring the powers recited in subsection (D), above copied, he reaffirmed those powers in subsection (G), which reads as follows: "(G) Said trustees are hereby authorized and shall have the power to sell any

of the lands of the trust estate at any time if the same do not appear to be profitable or if necessary to provide funds to pay any annuities under this will, and to convey an absolute title thereto.''

Anticipating a possible surplus after paying these annuities, subsection (4) of paragraph (D) contained the following provision for the distribution of the surplus of the net income after paying the annuities, to-wit:

''(4) Any and all net income after the payments above provided for have been made there shall be paid to and divided equally on the first of January and July of each year among my beloved brothers and sisters, Edward B. Wilmans, Robert D. Wilmans, Mildred A. Dorsey, Lucy W. Jones, Susan R. Sprigg, and Elizabeth B. Harris, and shall be paid share and share alike to them and to the survivors or survivor of them as long as they may live, the survivor to receive the whole until his or her death.''

Beneficiaries under this subsection (4) of paragraph (D) were indebted to the testator, but as appellants' brief states, this indebtedness was considered as a ''Family affair,'' and no effort was made to collect it.

Further anticipating that a surplus would remain in the hands of the trustees after the death of the testator's wife, subsection (5) of paragraph (D) provided that:

''(5) After the death of my said brothers and sisters and within one year from that time, if my said wife be then dead, said trustees shall divide all the property of said trust estate equally among all my nieces and nephews, the children of E. B. Wilmans, Lucy W. Jones, R. D. Wilmans, Susan R. Sprigg and Elizabeth B. Harris, living at the date of the death of my last surviving brother or sister and to the descendants of such of my said nieces and nephews as may then be dead, *per stirpes,* but if my said wife be not then dead said trust estate shall continue until her death, at which time, or as soon thereafter as can conveniently be done, and not later than one year from such date, said trustees shall divide said trust estate among my said nieces and nephews living at the

time of the death of the last survivor of my said brothers and sisters and to the descendants of such of my said nieces and nephews as may be dead at the time of the death of the last survivor of my said brothers and sisters; and from the date of the death of the last survivor of my said brothers and sisters to the date of the death of my wife, if such be the event, that portion of the net income from said trust estate theretofore paid to my said brothers and sisters shall be paid to said nieces and nephews living at the time of the death of such last surviving brother or sister and to the descendants of such of said nephews and nieces as may then be dead, *per stirpes*. And division shall then be made of said trust estate as herein provided and this trust shall thereupon cease, provided that if my said cousin, Webster Robertson and Hattie B. Wilmans, or either of them, be then living, that provision shall be made by said trustees for the continued payment to them during their lifetime of the annuities given them in section five of this will."

This subsection (5) of paragraph (D) reiterates the primary purpose of the testator to provide for the support of his wife by the payment of the annuity to her during her life, as the division of the anticipated surplus was not to be made until after her death, and it was directed that the trust continue and be administered by the trustees until after that event.

Only one-half of the annuity payable to the testator's wife was paid in 1929, all of it was paid in 1930, nothing was paid in 1931, 1932, 1933, and 1934. $822.24 was paid in 1935, $4,185.10 was paid in 1936, nothing was paid in 1937 and 1938. In 1939 $397.99 was paid, and $839.98 was paid in 1940.

In January, 1941, the widow filed this suit to enforce the payment of arrearages. She named as defendants the trustees and the heirs of the testator who, under subsection (5) of paragraph (D), above copied, would be beneficiaries upon closing the trust. There were fifty-seven of these defendants altogether, and several entered their appearance voluntarily and filed no answer or other pleading, and only two of the heirs filed answers resisting the relief prayed.

These answers alleged that although there were three trustees in office at all times, only one of them, R. D. Wilmans, a brother of the testator, was active, and it was alleged that this trustee and the widow had colluded together to despoil the estate. No proof of this allegation was offered, and it is not urged here. It was prayed, however, that the trustees be required to account and show why the estate had dwindled in value so that it was insufficient to pay the widow's annuity.

This prayer was granted, and a master was appointed for that purpose. The master found the estate so involved that he was permitted to employ a public accountant to audit the estate, and a detailed report was made by the auditor of all receipts and disbursements by the trustees. This audit tells the tragic story, of which there are many counterparts in all this country, of the happenings during the period which is referred to as the depression years.

An order was entered September 16, 1941, "by agreement of counsel for the respective parties," that the property of the estate be sold by a commissioner appointed for that purpose, but reserving to the two defendants who had filed answers and others who wished to do so, the right to file further exceptions to the report of the master, based upon the audit above referred to.

After the assets of the estate had been appraised pursuant to the order of the court, they were sold by the commissioner. The assets consisted of a number of tracts of land, and contracts for the sale of other tracts of land which the trustees had made. These assets were first offered separately, and then collectively, and the latter sale providing a larger sum of money, that sale was reported to and confirmed by the court. The widow was the purchaser, and the sum bid by her was $13,000.

The court found that had the assets of the estate been sufficient to provide enough income to pay the annuity as it matured, the widow would have received, as of the date of the decree, the sum of $49,000, but that she has in fact been paid only $12,342.33, a difference of $36,657.67.

After providing for payment of costs and a fee to R. D. Wilmans as a trustee, no fee being allowed to the other trustees, it was ordered that the balance be paid to the widow in partial discharge of the unpaid annuity. Exceptions were saved, and from that decree is this appeal.

It is insisted that the compensation allowed the trustee is excessive; and in view of the results achieved it appears to be so; but it further appears that the widow is the only person prejudiced, that is if she is entitled to have the proceeds of the sale applied to the payment of her annuity.

In opposition to this claim the defense of the statute of limitations is interposed, it being insisted that having failed to collect the annuity as it matured, much of it is now barred by the statute of limitations. This is the only question presented for decision; and we have made this somewhat lengthy statement of the case that it may appear whether or not this statute is applicable. If the statute of limitations is not applicable, the decree must be affirmed, as the entire proceeds of the sale of the assets of the estate are insufficient to pay the widow the arrearage in the annuity, and, this being true, it will be unnecessary to decide whether the compensation allowed the trustee, Wilmans, is excessive, as the widow alone is prejudiced by its allowance, and she makes no complaint.

Very clearly the will creates an express trust, and the rule in such cases is that the statute of limitations is inapplicable to suits brought to enforce a trust.

At § 1486, page 899, of his excellent work on Arkansas Titles, Jones says: "Limitations will not run against an express trust unless there are facts which raise the presumption of extinguishment of the trust, or where an open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, 46 Ark. 25; see 16 Ark. 122; 20 Ark. 195; 23 Ark. 362; 28 Ark. 19; 47 Ark. 301, 1 S. W. 546; 52 Ark. 76, 12 S. W. 155; 52 Ark. 168, 12 S. W. 328; 58 Ark. 84, 23 S. W. 4; 63 Ark. 56, 37 S. W. 406; 64 Ark. 26, 41 S. W. 427; 71 Ark. 164,

71 S. W. 669; 150 Ark. 347, 234 S. W. 259; 182 Ark. 1110, 34 S. W. 2d 1063; 6 S. W. 2d 8. But it is the general rule, subject to exceptions, that limitations will run against implied, resulting and constructive trusts, 182 Ark. 1110, 34 S. W. 2d 1063; 58 Ark. 84, 23 S. W. 4; 49 Ark. 468, 5 S. W. 797; 20 Ark. 195."

At page 903, 37 C. J., title Limitations of Actions, a great many cases are cited in support of this statement of the law:

"(Section 267) 27. Trusts—a. General Rule. In case of a technical, or in other words, direct, express, continuing trust, such as is exclusively within the jurisdiction of a court of equity, the general rule, sometimes declared by statute, is that the statute of limitations does not run between trustee and *cestui que* trust, so long as the trust subsists, for the possession of the trustee is the possession of the *cestui que* trust and the trustee holds according to his title; and, moreover, so long as this condition exists, no cause of action has accrued. In order to set the statute in motion in favor of the trustee the trust must terminate, as by its own limitation or by settlement of the parties, or there must be a repudiation of the trust by the trustee and an assertion of an adverse claim by him, and the fact made known to the *cestui que* trust. This proposition is well established by all the numerous cases in which the question has arisen, and there is no conflict of authority whatever upon the subject. The rule, however, is subject to the qualification that the *cestui que* trust may be barred of his remedy through laches or such a lapse of time as will give rise to a presumption of discharge or extinguishment of the trust."

Here, the trustees have, at all times, been in possession of the trust property, and the trust was not terminated until the sale of the assets of the estate ordered by the decree from which is this appeal.

The widow has been guilty of no laches. It is true she was not paid her annuity regularly and promptly, as the will provides; but this was because funds for that purpose were not available.

As appears from the provisions of the will, hereinabove copied, the trustees were empowered to sell assets, if necessary, to pay the annuity without directions to that effect from a court, and there was no error upon the part of the court in ordering this done.

The decree is correct, and is, therefore, affirmed.

LUNDELL *v.* WALKER.

4-6842 165 S. W. 2d 600

Opinion delivered October 26, 1942.

Bridges, Bridges & Young and *Henry W. Gregory, Jr.*, for appellant.

K. T. Sutton and *John C. Sheffield,* for appellee.

GRIFFIN SMITH, C. J. Arkansas Workmen's Compensation Commission ruled in favor of the claimant, widow of Henry Walker, and circuit court affirmed.

Sam Scott, Lundell Plantation foreman whose duty it was to supervise clearing new ground, shot and killed Walker about six o'clock the morning of February 10, 1941. George Brandon, superintendent for E. W. and Raymond Lundell,[1] employed Walker in December, 1940, and assigned him to a "bulldozer" used in the work he had undertaken.

Scott's explanation was that because of Walker's inefficiency or indifference, the hourly wage of 75 cents paid during December was reduced to 50 cents January 1. Walker was dissatisfied to such an extent that it was thought best to dispense with his services and employ a substitute more agreeable and more willing. Scott wrote Brandon February 7, outlining Walker's deficiencies, and was immediately authorized to exercise the right of discharge.

Scott regularly carried a pistol because required to pass through sparsely populated areas before daylight and after dark. The shooting occurred within 30 or 40 feet of L. D. Bellah's home, near a bridge over a bayou. Scott lived three and a half miles from Bellah. Walker, who occupied an automobile house-trailer, had it stationed back of Bellah's home, on the west side of the bayou. Scott says that when he left home at five o'clock he rode to the residence of B. Dees on the east side of the bayou and tied his horse to a post. It required thirty or thirty-five minutes to make the trip. Scott passed the trailer, traversed the bayou bridge, and waited at Dees' home about five minutes before Walker appeared. He insists that Walker came "right opposite me; whereupon I called to him and said, 'Mr. Walker, I am going to have to let you go this morning.' He said, 'What is the trouble?' I replied, 'Your work is just not satisfactory.' "

Continuing, Scott testified he then noticed Walker's voice was quivering; so he turned away and untied his

[1] Lundell Plantation was owned by E. W. and Raymond Lundell.

horse, but did not mount. Walker followed and said, "If you ever 'fire' me I am going to beat you to death." Walker is then alleged to have struck Scott in the mouth, almost knocking him down. A scuffle ensued and Scott says he was knocked down:—"I then pulled my gun and told Walker to get off. When I got up I started toward the bayou, with Walker following. He was cursing and threatening to kill me. Walker obtained a stick and ran after me. He followed me across the bridge and almost caught me. At that time I turned and shot him once.[2] I bumped into my horse on the west side of the bridge, but do not know how the animal got there. I called Bellah and told him I had shot Walker."

Mrs. L. D. Bellah testified that Walker and his wife "came over to our house" Saturday night preceding the shooting. They had been informed Scott had told Bill Dees "they" were going to kill Walker or fire him. Walker said he was not afraid, that he had confidence in Brandon.

Mrs. Bellah says she was awakened early and heard Scott ride up in front of the door. The witness had just hung some "ticking" over a window. She looked out and told her husband to get up and build a fire—"they are waiting on you now." Just as Mrs. Bellah spoke to her husband, or about that time, she heard Walker on the bridge coming toward her house. Her testimony is that ". . . he walked on across the bridge [and then] Scott rode his horse right up to the end of the bridge. That is where the shooting occurred. I saw Scott ride up to the bridge, with his horse's head on it. The bridge rattles when it is used. I couldn't see Scott's gun when he fired, but I saw him on the horse. . . . I could see Walker's feet under the horse, but not his body. . . . He shot [Walker] as he was standing on the last board of the bridge. . . . The killing took place a very short time after the two men met—not over two minutes."

In detailing the conversation she claimed to have heard, Mrs. Bellah said: "Scott, when he rode up in front of Henry, told him he had a new man to put on

[2] The bullet entered an eye and ranged down toward the neck.

the bulldozer. Henry replied, 'Mr. Brandon hired me, and he will tell me to get off.' Scott then said: 'I told you I have another man, and you are not going out there.' Henry told Scott to 'put that gun up, fellow, because I'll make you eat it.' That was the last sign he made.'' Immediately after Walker told Scott to put his gun away, Scott fired, then rode up to the Bellah home and stated that he had shot the man. Mrs. Bellah also said that when Scott was standing by the porch his nose bled. He wiped it off with a handkerchief. Scott's face was not bloody: didn't have a scratch on it:—''Henry Walker did not raise a hand to fight him, or do anything to him.''

Other Facts—and Opinion

Other testimony was given, favorable to each side. It is in evidence that Scott had a bruised face and scratches when seen shortly after the shooting. He crossed the bayou at a point below the bridge. Appellee attaches significance to the fact that Scott had been in the habit of riding a spirited black horse, but the morning Walker was killed a different mount was utilized. It was also ridden by Scott the following day. Mrs. Bellah admitted she did not tell all she knew when questioned during a preliminary hearing to determine whether Scott should be held on a criminal charge. Explanation was that she didn't want to get mixed up in the affair, and that certain direct questions were not asked.

Appellants concede that findings of facts by the compensation commission are, on appeal, given the same verity that would attach to a jury's verdict, or to facts found by the judge of the circuit court where a jury was waived. But, it is insisted, ''the material and pertinent facts necessary for a determination of the case are not contradicted.''

We are reminded, first, that the object sought to be attained by Act 319 of 1939 was to compensate employes, (in case of injury) or dependents, (in case of death) when injury or death occurred while the employer-

employe relationship existed. The injury, whether limited or productive of death, must occur while the employe is engaged in the master's business. It is argued, therefore, (a) that Walker was not an employe of the Lundells when he was killed; (b) that his death "did not arise out of or in the course of his employment," and (c) that he was the aggressor.

It is certain Scott had authority to discharge Walker, although perhaps Walker had not been informed that Brandon had delegated the power. In what manner, then, did Scott exercise that right?

Under any reasoning based upon the facts, Walker was not given time to quit the premises between notice of discharge and Scott's use of the pistol. His trailer was on Lundell property, and even though the unfortunate man were called from his living quarters and summarily dismissed before starting to work, the conversation and act of killing were so much a part of the same transaction that discrimination cannot differentiate between them. Scott was serving his employers when, at an early morning hour, he rode more than three miles to transmit to Walker the ultimatum, and while Brandon did not, of course, intend that the authority to discharge should be coupled with violence, yet the agent he selected killed Walker while the master's commission to bring about a desired result was being executed.

A general rule, appropriately expressed by Judge Cooley, is that where a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of the employer, but to effect some independent purpose of his own, the master is not responsible for either the acts or omissions of the servant. The converse is that when the servant acts with reference to the services for which he is employed and for the purpose of performing the work of his employer, and not for any independent purpose of his own, but merely for the benefit of his master, acts done in such circumstances are within the scope of the servant's employment. *Bryeans, Administratrix,* v. *Chicago Mill & Lumber Company,* 132 Ark. 282, 200 S. W. 1004. See,

also, *Chicago Mill & Lumber Company* v. *Bryeans,* 137 Ark. 341, 209 S. W. 69. These cases are cited in *American Railway Express Company* v. *Mackley,* 148 Ark. 227, 230 S. W. 598.

In *Robinson* v. *St. Louis, I. M. & S. Ry. Co.,* 111 Ark. 208, 163 S. W. 500, it was held that the railway company was liable for the wilful or malicious acts of its servant when they were done within the course of the servant's employment, and within its scope. See first headnote at page 208 of the Arkansas Report, and cases cited at pages 213 and 502 of 163 S. W.

Whether, in respect of a particular transaction, the servant acted with reference to the services for which he was employed as distinguished from an independent purpose of his own, is ordinarily a question of fact referable to a jury when the right is not waived. In the instant case the period between discharge and death was too transitory to justify the claim that Walker was not an employe when shot.

The greatest difficulty is confronted when consideration is given evidence of a substantial nature indicating wilfulness, and, inferentially, a malignant design upon Scott's part. Certainly, if Scott killed because of a personal grudge and took advantage of his status as foreman to punish Walker, the circuit court erred in affirming the commission's award. On the other hand, if during conversation immediately preceding Scott's act he became excited, irrational, or unreasoning because of a purely imaginary danger, and fired while under mistaken apprehension his life was in danger, or that great bodily injury might be sustained, responsibility would attach to the masters. This was a question of fact, and it has been decided by the commission in claimant's favor. It is true there was no evidence other than circumstances attending the meeting, and its result, showing that Scott fired impulsively; but these circumstances must be considered in connection with testimony of witnesses, at least one of whom claims to have seen Scott on horseback when the shot was fired. The commissioners seemingly believed Mrs. Bellah; nor is her story of having

witnessed preliminaries, and Scott's subsequent deportment, more improbable than that of the killer because of semi-darkness. Scott testified to having seen Walker chasing him, with a club or a stick in his hand. The commissioners probably thought that if Scott, armed with a pistol, and in flight, could identify a weapon in his pursuer's possession, Mrs. Bellah could see a horse and two men.

An attorney's fee of $500 was allowed, to be deducted from final installments due appellee. The statement is made by appellee's attorneys that ". . . [Mrs. Walker] has stated to her attorneys that she has no objection to an allowance of the maximum of 25 per cent., as she feels the amount has been earned." This would be largely in excess of $500. While we do not question accuracy of this declaration, there is no testimony regarding the fee; nor was sufficiency of the allowance questioned by cross appeal.

Judgment affirmed.

JELKS *v.* ROGERS.

4-6856 165 S. W. 2d 258

Opinion delivered November 2, 1942.

Walter L. Brown, for appellant.

Thos. Compere and *Ohmer C. Burnside,* for appellee.

GREENHAW, J. Appellant prosecutes this appeal from a judgment awarding appellee $3,000 for personal injuries received by her as a result of a collision between a car operated by her husband, W. W. Rogers, and a truck owned by appellant and operated by his employee, Whit Hunt.

September 12, 1940, shortly after 6:00 o'clock in the morning, the car in which appellee was riding was proceeding eastward. Rogers testified that he had been driving at approximately 30 miles per hour, and as he approached the street in the town of Lockesburg where the highway he was traveling crossed a highway running north and south he reduced his speed, and not seeing a car on the highway which runs north and south he entered the intersection. As he did so he saw a truck which was being driven north on the other highway at a high rate of speed, as he says; and, thinking he would be unable to avoid a collision, swerved his car to the north (his left) and came to a stop or appreciably slackened his speed at a time when he was six or seven feet west of the center line of the north and south highway.

A sign reading "Road Closed—Detour" with directions thereon had been placed on the north and south highway north of the intersection, and it interfered with use of a portion of the east half of that highway. Rogers testified that the truck was forced to cross over to the west or left side of the road in order to avoid striking this sign, and that his car, which was west of the center line, was struck on the right side by the left rear wheels and trailer of the truck.

The impact caused Rogers' right door to open, and appellee fell to the pavement.

Several people saw the collision. Appellee's witnesses testified in substance that Rogers was driving at moderate speed, estimated to be between 20 and 30 miles per hour, and that he slowed down before entering the intersection; that appellant's truck was being driven at an estimated speed of 50 to 55 miles per hour; that Rogers swerved to his left to avoid the collision and was struck by the truck. Rogers and other witnesses testified that the truck proceeded about 150 feet after the collision before stopping.

Whit Hunt, the driver of the truck, testified that his speed was about 15 miles per hour; that after entering the intersection and before reaching the point where the collision occurred he saw the Rogers car approaching from the west about 30 yards away; that because of the length of appellant's truck and trailer, it was impossible for Hunt to stop his truck and avoid the collision; therefore, he proceeded across the intersection, and as he turned left to clear the highway sign the trailer was struck by the Rogers car. This occurred while his trailer and rear wheels were still on the right side of the highway. Hunt estimated Rogers' speed at 50 miles per hour.

Hunt's version of the accident was corroborated by appellant, who was in the truck, and by another witness.

Appellee was rendered unconscious by her fall, and received medical treatment at Lockesburg. She was later a patient of Dr. H. E. Cockerham of Portland and Dr. J. H. Burge of Lake Village. She was placed in the Lake Village Infirmary, where she remained for two weeks. Testimony of doctors Cockerham and Burge was that in addition to various contusions and lacerations she had suffered a brain concussion, and also chest injuries including a fractured rib and an injury to one lung. At the time of trial appellee still complained of frequent and severe headaches, blurred vision and chest pains. Medical opinion was that this condition resulted from injuries received in the collision, and if the headaches continued they would probably be attributable to the head injury.

Dr. L. G. Fincher, called by appellant, testified that he examined appellee while she was in the hospital, and

that he found no evidence of a brain or skull injury. He verified the fact that she had a fractured rib. He attributed appellee's condition to previous optical defects, she having undergone an operation for cataracts, and stated that she was also suffering from nephritis and had high blood pressure.

In his motion for a new trial, appellant assigned a number of errors, not all of which are urged as grounds for reversal.

We are unable to agree with the contention that the testimony of Berry Provence as to the speed of the truck when it passed him, about three blocks south of the intersection, was inadmissible. It was competent as a circumstance tending to show the speed of the truck at the time of the collision.

Appellant contends that the court erred in giving certain instructions and refusing others. He does not abstract any of the given instructions, although in the motion for a new trial 22 are referred to. Hence we do not know whether the refused instructions were covered by given instructions which were correct.

In the case of *Hamburg Bank* v. *Jones,* 202 Ark. 622, 151 S. W. 2d 990, this statement of the law was given: "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."

Appellant further contends that the evidence showed that he was not guilty of negligence, and that the collision was caused by appellee's husband. There was a conflict in the testimony, and it was for the jury to determine which explanation it would accept. Since the verdict was supported by substantial evidence it will not be reversed.

In the case of *Harmon* v. *Ward,* 202 Ark. 54, 149 S. W. 2d 575, we said: "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 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."

Finally appellant contends that the verdict is excessive. He did not raise this question when a new trial was asked, and it is urged here for the first time. *Miller Rubber Co.* v. *Blewster-Stephens Service Station,* 171 Ark. 1179, 287 S. W. 577, 59 A. L. R. 1237, involved a similar question. A quotation from that opinion is: "Another contention of appellant for a reversal of the judgment is that the verdict is excessive. As we understand the record, no such contention was made in the trial court nor raised in the motion for a new trial, hence is not available here. *Citizen's Fire Insurance Co.* v. *Lord,* 100 Ark. 212, 139 S. W. 1114." See, also, *Gaither Coal Co.* v. *LeClerch,* 182 Ark. 466, 31 S. W. 2d 750, in which this court said: "This objection cannot be considered by this court for further reason that it was not made one of the grounds of appellant's motion for a new trial. A question not raised in appellant's motion for new trial will not be considered on appeal."

Affirmed.

JACOBS *v.* SHELTON.

4-6855 165 S. W. 2d 262

Opinion delivered November 2, 1942.

Barney & Quinn, for appellant.

G. T. Whatley, Searcy & Searcy and *Steel & Edwardes,* for appellee.

GRIFFIN SMITH, C. J. Appellants question correctness of a decree finding that J. T. Shelton and E. B. Taylor[1] were owners of 64.86 acres in Lafayette and Miller counties lying west and northwest of a fence constructed by Shelton in 1928.

In 1938 P. M. Allen claimed and fenced the property, whereupon suit in ejectment was brought by Shelton and Taylor in Lafayette county against Raymond A. Jacobs, Mrs. M. A. Jacobs, Mrs. Gertrude Jacobs Meleton, and P. M. Allen.[2]

Although in 1924 J. T. Shelton and his son, G. T., contracted with Annie L. Dobson to purchase 300 acres as to which a part seems to be included in the area which forms the subject-matter of this appeal, appellees elected to rest their claim upon adverse possession. It is agreed there have been accretions. Appellees insist appellants had notice for more than seven years that the acreage in question was claimed by Shelton. It is also averred there was acquiescence.

R. V. Hall, engineer, and W. L. King, surveyor, testified regarding river changes, natural and artificial markers, and other matters. Maps or charts were prepared, four by Hall and one by King. There are substantial differences between the drawings and testimony of these witnesses.[3]

[1] Taylor's interest was that of lessee, he having contracted in 1935 for a five-year period.

[2] The original suit was dismissed, then filed in Miller county. The defendants cross complained, alleging they were owners of lands which are described in a quotation appearing in the body of this opinion. The cause was transferred to chancery.

[3] Appellees argue that prior to 1915 the lands were located in an irregular "S" formed by Red river, meandered by the government in 1842:—"The upper loop or semicircle of the 'S' ran far to the west and enclosed lands known as Smith's bend located in Lafayette county. The lower loop, or semicircle of the 'S,' [extended] east and enclosed lands known as Duke's bend in Miller county. Prior to 1924 Annie L. Dobson owned the lands in Smith's bend, and in 1924 sold [by contract with bond for title] to J. T. and G. T. Shelton. In 1915 there was a cutoff in Lafayette county on the east side of Smith's bend,

King referred to field notes he had made and to a rough plat showing parts of fractional sections twenty-seven, twenty-eight, thirty-three, and thirty-four, township eighteen south, range twenty-six west. They cornered at a point 2,600 feet south of the indicated present south bank of Red river where, in relation to the lands contended for, the stream's bend describes an inverted "U." These corners are 2,350 feet east of a point on the east bank of the river within the "U," and 2,937 feet west of a point on the bank where the flow is northwest. Thence the stream gradually curves west, then southwest, and then south.

Appellees maintain that when the Sheltons contracted in 1924 to purchase from Annie L. Dobson, Mrs. Dobson and her husband went with J. T. Shelton and pointed out boundaries of the lands described. Shelton claims he then went into possession. Further insistence is that there was a fence immediately north of land owned by Marcus A. Jacobs[4] in section thirty-three (Miller county) extending from an area referred to as the "blue hole" along the southern and eastern banks of what had formerly been Red river, but what is now commonly referred to as Old river. It is claimed the fence extended to where Red river cut through its banks in 1915 and created a new channel.

Appellants admit the Shelton contract of 1924 and say that the lands were in sections twenty-seven and thirty-four, east and south of Old river in Lafayette

[approximately] 700 feet west of the corner[s] of [fractional] sections 27, 28, 33, and 34. The [cut through] caused the river at this point to abruptly turn in a southerly direction. The river flowed through this cutoff southward into the old channel of Red river, (reversing the channel) to a second cutoff which occurred the same year on the west side of Duke's bend. Between 1915 and 1924 the old channel east of the cutoff across Smith's bend filled in. By reason of the abrupt turn, or 'elbow,' at the north end of the cutoff, the current's force caused the river to cave on the north and west sides and accretions to form on the east side, until by 1924 the river had moved in a westerly direction a quarter of a mile. Accretions formed to a line which covered and included the lands involved in this litigation. In the same year (1915) there was a cutoff at the western end of Duke's bend through which the river flowed from the northern cutoff going south. This cutoff, however, is not involved."

[4] Marcus A. Jacobs died in 1904, leaving his wife, Mrs. M. A. Jacobs, and two children: Raymond A. Jacobs, and Gertrude Jacobs Meleton.

county. One reference is to ". . . a part of section twenty-seven at the north end for a quarter of a mile [which] then abutted upon Red river." Appellants say they and their predecessors in title have owned lands in section thirty-three touching Red river for many years, and that they were such owners when the Sheltons contracted with Mrs. Dobson for acreage in sections twenty-seven and thirty-four.

Appellees predicate their claim upon J. T. Shelton's contention that in 1928 certain adjustments of differences were made, and thereafter, they say, it was generally understood that Shelton claimed the lands. There is testimony that north of Jacobs' holdings a fence was built from the blue hole to the cutoff of 1915, extending along the southern and eastern bank of Old river. In 1928 Mrs. Jacobs (owner of the land in Duke's Bend east of the cutoff) sold timber from it to a man named Gibson. Shelton and Gibson could not agree on lines, and, according to appellees, ". . . by mutual consent the fence was moved on the eastern and northern sides of the Jacobs lands to the center of Old river."[5] The fence is described in the margin.

Appellees emphasize that when the fence was reconstructed the Sheltons yielded lands equal in area to half the bed of Old river north and east of the Jacobs boundaries. However, it is reiterated that the enclosure soon thereafter completed embraced lands pointed to by Mrs. Dobson in 1924 as within boundaries of three hundred acres the Sheltons took possession of, less the relatively small amount between the east bank and center of Old river. Shelton's testimony regarding the agreement reached when the fence was moved is unequivocal, although he disclaimed an intent to appro-

[5] Continuing, the conditions described are: "Beginning with what is known as the blue hole [the fence] continued along the channel of Old river (which, since 1915, had become filled with soil) to a sassafras post located northwest and west thereof in the center of the channel; thence along the center of Old river to a cottonwood tree at the eastern edge of the cutoff. In the same year (1928) J. T. Shelton built a new fence from the cottonwood tree south along the east bluff [or] bank of the cutoff and the east bluff [or] bank of Old river (through which the cutoff waters originally flowed) to and into the running waters of Red river as it was then located."

priate any of the Jacobs lands. For ten years, says Shelton, he and his tenants "sprouted off" new land as it accreted, leveled it, and converted a part into meadows. Cotton and corn were planted and harvested; also beggarweed and hegari.[6] During winter months

The contention is stressed that the fence was substantial, consisting of four strands of barbed wire attached to posts appropriately set, or to trees when convenient. It was intended as a "line fence," rather than a temporary expediency to turn cattle. Its definite character was understood by all; nor was its utility questioned until 1938, when Allen, who is referred to as manager and general agent for the Jacobs family, dismantled it. There is this statement in appellee's brief:

"After each overflow either Allen and his tenants, or Shelton and his tenants, would repair damages. As the river moved westward or southward [the fence was thus rebuilt, extending] into the running waters of Red river."

In 1930 Anna L. Dobson, by deed, conveyed to the Sheltons the lands described in the 1924 contract. Included were "All of fractional south half of section twenty-eight—that is, all of said fractional subdivision lying on the southerly side of Old river in what is known as Smith's bend; all of fractional north half of section thirty-three—that is, all of said fractional subdivision lying on the northerly side of the existing channel of Red river in what is known as Smith's bend; all of fractional west half of the northwest quarter of section thirty-four—that is, all of said fractional subdivision lying on the easterly side of Old river; also all of fractional east half of the northwest quarter of section thirty-four—that is, all of said fractional subdivision lying on the easterly side of Old river."

These descriptions constitute a tongue of land extending from the northwest corner of section thirty-three east to the northeast corner of the northwest corner of section thirty-four—a mile and a half—as shown by the

[6] "Hegari" is a plant used for forage. It is also spelled "higear." the enclosure was used as a pasture.

map of township eighteen south, range twenty-six west, in Lafayette county.

A description of the land in dispute starts at a point 160 feet north and 340 feet east of the northwest corner of fractional northeast quarter of the northeast quarter of fractional section thirty-three. Thence, by various courses, it proceeds to a point on the east bank of Red river, ". . . thence in a northwesterly direction with the meanderings of the east bank of Red river to a point 160 feet north of the north line of section thirty-three, thence east 2,310 to the point of beginning."

The north line of the land described in the complaint extends in a westerly direction 1,970 feet (2,310 feet, less 340) or approximately thirty chains west from the northwest corner of the northeast quarter of the northeast quarter of section thirty-three. The distance from the northwest corner of the northeast quarter of the northeast quarter of section thirty-three to the northwest corner of section thirty-three is approximately sixty chains. Thus it will be seen that all of the lands described in the complaint as to which there is controversy falls within the bounds of those parts of sections twenty-eight and thirty-three conveyed by Dobson to the Sheltons.

In the cross complaint the land described is ". . . all that part of section thirty-three in township eighteen south, range twenty-six west, which lies in the bend and north and west of the center line of the channel or bend of the river as it existed prior to the cutoff of 1915, *and south of the present channel of Red river* as it flowed between the counties of Miller and Lafayette."

Appellants' exhibit "A" to Hall's testimony contains the notation: "Red river, 1842: from original field notes." The land runs through the south half of section twenty-eight, northwesterly through the southeast quarter of section twenty-nine, southeasterly through the northeast quarter of section thirty-two, and easterly and northeasterly through the north half of section thirty-three, with the two river channels approximately 1,000 feet apart at the east end. The eastern cutoff was through the area marked "cutoff 1915" in the southeast quarter

of section twenty-eight and the northeast quarter of section thirty-three.

Effect of the cutoff was to separate the lands Shelton and his son later bought in sections twenty-eight and thirty-three from similar lands in section thirty-four. The Jacobs lands were south of these holdings in section thirty-three, separated therefrom by the original river.

Appellants say that as a result of the 1915 avulsion the then main channel of Red river filled with silt, in consequence of which the Dobson and Jacobs lands became contiguous and have remained so ever since.

The court did not make findings distinguishing between original lands and accretions; but it is evident that during changing river channels land around and west of where sections twenty-seven, twenty-eight, thirty-three, and thirty-four cornered was not destroyed, although Hall disagrees with King as to location of the corners.

Hall's survey was made from the Miller county side of the river: King's from the Lafayette county side. The result is a difference of about 700 feet—that is, the corners as ascertained by Hall are 700 feet farther east than the corners designated by King. Testimony given by King and the plat to which he referred are based on the original U. S. government survey of fractional sections twenty-seven, twenty-eight, twenty-nine, thirty-two, thirty-three, and thirty-four, township eighteen south, range twenty-six west, east of Red river. The survey was made by John W. Garretson in November, 1845. It is on file in the state land office, and as to some of the records there we take judicial notice. Lands in the so-called "tongue," mentioned by witnesses, is in sections twenty-eight, twenty-nine, thirty-two, thirty-three, and twenty-seven, although the property sold by Dobson to the Sheltons did not extend to sections twenty-nine and thirty-two.

Hall's testimony and plats are based on the original U. S. government survey of fractional section thirty-three "on the southerly and westerly side of Red river,"

made by Israel M. Moore in December, 1841, and during January and February, 1842.

These are separate surveys and are independent of each other. An extension of the lines of either boundary of what was the "thread of the stream" of Red river in 1841 would be incorrect in respect of the other survey, except where the thread of the stream has shifted on account of erosion. Evidence shows that the thread of the stream remained in practically the same position from 1841 until 1915. The avulsion of 1915 does not appear to have changed boundary lines between counties or individuals.

Appellants think the acreage in question accreted to the Jacobs lands in Duke's bend in Miller county, building from the south to the north, extending beyond the channel of Red river as it existed in 1842. The flow, or force of the water in passing through the cutoff from its break south in section twenty-eight was southwestward across lands later purchased by the Sheltons from Dobson. The water reëntered Red river at a point in the northeastern part of section thirty-three. From the south or southwestern end of the cutoff in section thirty-three to the second cutoff farther west in section thirty-two, there was no avulsion and therefore no change of lines.

Due to a failure of witnesses to mark points on maps and plats which they seemingly indicated by gestures, it is impossible to accurately quote salient parts of the evidence. An example of the character of testimony is shown in the footnote.[7]

Irrespective of record titles as shown by exhibits and testimony, the chancellor's finding that Shelton had held adversely for more than seven years is not against

[7] While King was testifying he was asked, "How did the river act there about 1915?" Answer: "Well, all I've got to go by is just the old banks: the evidence is there. I presume it cut through from this point right here." Question by the court: "Does the cut show for itself?" A. "Yes, this bank here, that old 1915 bank. There is a pecan tree and an old house on that, so the river there did cut this. You see, this is old virgin bank and the dwelling house was there. In 1927 this was the river line right here, right around here." [Other testimony is equally difficult to associate with a known point on map or plat.]

the weight of evidence. Witnesses were interrogated by the court at a time when maps were in use, and it must be assumed that facts indicated, but which in print are hardly more than inferences, were understood and accepted.

The decree is affirmed on appeal and on cross appeal.

EDWARDS *v.* STEWART.

4-6853 165 S. W. 2d 265

Opinion delivered November 2, 1942.

Chas. F. Cole, for appellant.

Preston W. Grace, for appellee.

McHANEY, J. On October 16, 1941, judgment was rendered by default against appellant and in favor of appellees for $303.65, in the municipal court of the city of New York, borough of Brooklyn, fifth district. Thereafter, this suit was brought by appellees against appellant, in the Independence circuit court, based on said judgment, an authenticated copy of the record thereof being attached thereto. Appellant defended the action on the ground that he had not been served with summons and copy of the complaint. Trial resulted in a judgment against him for $321.75 with interest at six per cent. from December 1, 1941, and costs.

It is contended on this appeal that the evidence "is conclusive that the process server who attempted to serve appellant in La Guardia Airport failed to deliver to him a copy of the summons and complaint; failed to orally advise him of the nature of the action there; and did not even touch him with the papers she attempted to serve upon him."

We cannot agree with appellant that this is true. He so testified and was corroborated by his wife and two friends with him. But he admits that, when the process server attempted to serve him, she asked him if he were John W. Edwards, he denied his identity, and ran away to keep from being served. He denied knowing that she was a process server. On the other hand, the return on the summons shows personal service on him, which is *prima facie* evidence of service, and the judgment itself recites the fact. Also the process server, Mary Kuhner, testified very positively that "service was effected by delivering to and leaving with John W. Edwards—a true copy of the summons and complaint in this action, while the defendant was at the La Guardia Airport, borough of Queens, and at the time of service, Emma Stewart, one of the plaintiffs in this action, pointed out the defendant, John W. Edwards, to me. I left the summons and complaint with Mr. Edwards, telling him that it was a true summons for him." She further testified that at the time she delivered them to him he ran off, dropping same to the ground.

The question of service or no service was one of fact, submitted to the trial court, sitting as a jury, and, like the verdict of a jury, his finding, if supported by substantial evidence, is conclusive on appeal. We think the evidence to support the finding of service is quite substantial, if not preponderant, and the judgment must be and is affirmed.

BOCKMAN *v.* BOCKMAN.

4-6854 165 S. W. 2d 256

Opinion delivered November 2, 1942.

A. D. Whitehead, for appellant.

J. M. Jackson, for appellee.

HOLT, J. December 6, 1941, appellee, James Bockman, filed suit for divorce in the Phillips chancery court. Separation without cohabitation for three years, in accordance with the seventh subdivision of § 2 of Act 20 of 1939, was the only ground for divorce alleged by appellee. Appellant answered, specifically denying separation within the meaning of the statute, and asked that appellee's complaint be dismissed for want of equity, and for attorney's fees. From a decree granting appellee a divorce, comes this appeal.

It is undisputed that the parties here were married December 24, 1925, and lived together as husband and wife in the city of New York until May 30, 1937. A son, called Sandy, now about 14 years of age, was born to this union.

Mrs. Bockman testified that her husband, appellee, who is a physician, left New York for Arkansas May 30, 1937, with the understanding that if he were not permitted to practice medicine in Arkansas he would return to New York and enter some other business, but if per-

mitted to practice his profession in Arkansas he would send for appellant and his son, whom he had left in New York with appellant, just as soon as he had established himself. She further testified that she and the plaintiff corresponded and that it was her intention to follow him to Arkansas and live with appellee when he should send for her after becoming established. Mrs. Bockman was employed in New York City. Five letters which Mrs. Bockman received from appellee after he came to Arkansas were put in evidence as part of her testimony. These letters were written from West Helena, Arkansas, and dated August 24, 1939, January 10, 1940, June 24, 1940, July 6, 1940, and July 13, 1940, respectively. The letter of January 10, 1940, is as follows: "Dear Mary: Received your most welcome letter, sure I will try my utmost to pay anything of Sandys. Enclosed please find $50 money order, the best I can do at present (things are very slow at present). Say Mary send me some kind of a package containing some kind of good food and delicatesens (if you care to send it, send it special delivery). Boy, this food out here stinks on ice. Kiss Sandy for me, J. P.S. The reason for special delivery is there is no delay on this end," and the letter of July 13, 1940, is in this language: "Mary: You know why I joined the national guard (medical reserve) I am the only medical examiner in my county (Phillips). Because I have a chance to get nearer to North, under Army requirements. Some of the doctors have been notified, but I don't think my group has been notified for about 2 weeks. *Capt.* Coats is trying to get me a furlough. I will know within a week. Sandy is doing fine, and its a great pleasure for me to have him here. Jim."

November 22, 1940, Mrs. Bockman brought suit in the Phillips chancery court against appellee, her husband, for maintenance of herself and child. Appellee contested this suit, denying Mrs. Bockman's right to maintenance as prayed, and filed a cross-complaint for a divorce alleging separation of three years under the statute, *supra.* In that suit the trial court denied appellee, Bockman, a divorce from appellant on his cross-complaint, awarded the custody of the child to Mrs. Bockman and $80 per month maintenance. On appeal we affirmed the

decree of the lower court, denying a divorce to appellee, and after reducing the maintenance allowance from $80 to $30 per month, affirmed that part of the decree as so modified. See *Bockman* v. *Bockman,* 202 Ark. 585, 151 S. W. 2d 99.

In the instant case, appellee, Bockman, testified that he and appellant separated May 30, 1937, at which time she deserted him and has remained away from him since; that he has tried to induce her to come to Arkansas and live with him, but that she had consistently refused to do so, and that they have been separated for more than three years.

A young lady employed in the office of appellee testified that Mr. and Mrs. Bockman have not lived together for more than three years. It was the contention of appellee in the court below, and argued here on appeal, that he and the appellant have lived separate and apart for three consecutive years without cohabitation, and that, under the provisions of paragraph seven of § 2 of Act 20 of 1939, he is entitled to a divorce.

Appellant on the other hand contends, that on the evidence presented, she and appellee have not been separated for three years in such sense as would, within the terms of the statute, *supra,* entitle appellee to a divorce. The section of the statute, *supra,* involved here is in this language: "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 at the suit of either party, whether such separation was the voluntary act or by the mutual consent of the parties, and the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony." In construing this section of the statute this court in the recent case of *Serio* v. *Serio,* 201 Ark. 11, 143 S. W. 2d 1097, said: "Our construction of the statute is that it assumes that the period of living apart without cohabitation for three years must have been the conscious act of both parties in order to entitle one of the parties to a divorce." Bouvier defines cohabi-

tation: "It does not necessarily mean living together under the same roof; a man may be absent on business, . . . and yet be cohabiting in the broader sense."

On the former appeal (*Bockman* v. *Bockman,* 202 Ark. 585, 151 S. W. 2d 99) we said: "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 May 30, 1937, 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 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."

We think the preponderance of the testimony supports appellant's contention that there was no agreement, understanding or conscious knowledge on the part of appellant, Mrs. Bockman, that she and her husband were separating within the meaning of the statute when he came to Arkansas in May, 1937, seeking a new location. Her testimony is positive that it was understood, and that her intention was to follow her husband to his new location after he became established and was ready for her to join him. The letters in evidence are of a friendly nature and are not sufficient to inform appellant of any intention in appellee's mind that he had separated from Mrs. Bockman within the meaning of the statute. While it is true that these parties have lived separate and apart for more than three years, we do not think the

legislature, when it enacted the statute in question, intended, under its terms, that all that was necessary to be shown by either party was that they had lived separate and apart for three years. We think the act requires proof not only that they had lived separate and apart for three years, but in addition that they lived separate and apart without cohabitation in its broader sense as defined by Bouvier, *supra,* and that the living separate and apart without cohabitation for three years, must have been with the understanding of both parties, or their conscious act.

It is our view that appellee has failed to make this showing and that the trial court erred in granting a divorce to him. For the error indicated the decree is reversed and the cause remanded with directions to dismiss appellee's complaint for want of equity, and that appellee pay appellant $50, attorney's fee, and to continue the payment of the monthly allowance of $30.

McHaney, J., dissents.

Standard Oil Company of Louisiana *v.* Chandler.

4-6833 165 S. W. 2d 595

Opinion delivered November 2, 1942.

Thos. M. Milling and *Moore, Burrow & Chowning,* for appellant.

G. W. Lookadoo and *J. H. Lookadoo,* for appellee.

SMITH, J. This appeal is from a judgment for the sum of $2,000 to compensate a personal injury alleged to have been sustained by appellee in the pursuit of his employment by appellant. No complaint is made that the verdict is excessive. The reversal of the judgment is prayed upon two grounds, (1) that appellee was not appellant's servant at the time of his injury, and (2) no negligence was shown upon which liability could be predicated.

L. E. King was employed by appellant under the following contract:

"Hope, Arkansas.
"March 20, 1939.

"To Standard Oil Co. of La.
"Mr. J. T. Rhodes, Div. Mgr.
"Little Rock, Arkansas.

"Maintenance of Equipment

"Gentlemen:

"I hereby propose, and, if this proposition is accepted, agree to repair upon receiving specific request from you, your company-owned retail dispensing equipment wherever installed, under the following terms and conditions:

"A. Time actually spent repairing equipment will be charged at 70c per hour. Materials furnished by me will be charged at net cost less discount or allowance. Any materials furnished by you will be properly accounted for and material not accounted for will be paid for. Tools and equipment required for performing the work will be furnished by me.

"B. No charge will be made for time and cost of transportation within a distance of five miles of Hope, Ark. For jobs beyond that area time and cost of transportation will be charged at five (5) cents per mile for total mileage traveled outside such area.

"C. All work will be done in workmanlike manner so as to put the equipment in good operating condition. If, after inspection, I find that any authorized repair of hand operated gasoline equipment will cost over $5, or of kerosene or lubricating oil equipment will cost over $1, I will secure further authorization before performing the work.

"D. Bills for work performed shall be payable within fifteen days after they are rendered.

"E. I hereby agree to indemnify and hold you harmless from any and all loss and damage and from all claims for injury, death, loss and damage of any kind or character, to person or property, and by whomsoever suffered or asserted, occasioned by or in connection with any work performed by me, or any act or default on the part of myself or my agents or employees in connection therewith, either while the work is in progress or as a result of the work done.

"F. In performing work hereunder I will act solely as an independent contractor and not as your agent or employee. I will be solely responsible for any persons used or employed by me in connection with such work. I will be responsible for workmen's compensation and for contributions and taxes under state and federal unemployment compensation and social security laws arising in connection with the work and will hold you harmless from any such liability.

"G. Either party hereto may terminate this agreement upon ten days' written notice to the other party.

"(Signed) L. E. King.

"Accepted:
"(Signed) E. P. Lyons,
"Assistant Manager."

This contract was evidently prepared for the purpose of creating the relation of owner and independent

contractor between appellant and King, and, read by itself, without reference to the manner in which it was to be performed, did create that relationship; but the testimony as to the manner in which it was to be performed suffices to make a question for the jury whether that relationship did, in fact, exist.

Appellee was injured while assisting King in the installation of a gasoline pump, and this was the character of work which King was employed to perform. It will be observed that the contract is silent as to the employment and pay of laborers whose service would be required by King in the performance of his own labor, yet it is an undisputed fact that it was contemplated by the parties that King should have assistance in the installation of the pump in question, just as he had been furnished assistance in the installation of other pumps.

Appellee had rendered this assistance on other similar occasions. He was hired by King, that is, King had the right to choose his assistants. At stated intervals King made a report to appellant of the labor he had hired, showing the number of hours and the wage per hour. The laborers signed this report, and it became a voucher. King prepared one voucher showing the labor performed by himself, and another by his assistant, and upon the receipt of the vouchers by appellant a check would be mailed to King covering his own labor and that of his assistant, and with the proceeds of this check King paid himself and his assistant. So that the undisputed testimony is that, although King paid appellee his wages, the payment was made with money furnished by appellant for that purpose. This fact, together with certain others, including the fact that appellant paid King's social security tax, made a question for the jury whether appellee was appellant's servant at the time of his injury, or was the servant of King as an independent contractor. Among these other facts was the testimony of appellee to the effect that, while appellee was engaged in the installation of the pump in question and other pumps on other previous occasions, representatives of appellant, who were present while appellee was performing the duties of

his employment, made suggestions and gave directions to appellee in the performance of those duties. One of these circumstances was that during a similar installation appellee was directed by a representative of appellant to cease painting when rain began to fall. The painting was an under-cover job, and appellee was told to quit work until the following day.

King had been employed by appellant for 23 or 24 years, the first 18 of which was under a fixed salary. In 1939, King began working by the hour, but he performed the same labor under both contracts. Appellant had first call on King for his services, and it was only when appellant had no work to do that King worked for someone else. Appellee testified that while working on a similar job while King was away for several days, and during King's absence, representatives of appellant gave him his orders and supervised his work, and that on other occasions he took orders both from King and any representative of appellant who chanced to be present.

The law of this subject has been so frequently and recently stated that it would be a work of supererogation to discuss and restate it. The law of the subject as announced, after an extensive review of our own and cases from other jurisdictions, is summarized in the case of *Moore and Chicago Mill & Lumber Co.* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722, as follows: "The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. On the other hand, if control of the means be lacking, and the owner does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists. (Citing a number of Arkansas cases.)"

In passing upon the sufficiency of the testimony to present this issue to the jury, we cannot be unmindful of the fact that appellant paid appellee his wages.

At § 16 of the chapter on Independent Contractors, 27 Am. Jur., p. 497, it is said: "In the determination of

whether the contractor is independent, it is of importance to consider by whom the wages of a contractor's servants are paid, since the circumstances that wages of workmen hired by a contractor are paid by the principal employer tends, in some degree, to show that the contractor is a mere servant. But such circumstance is not decisive of a master-servant relationship, since the *prima facie* significance it possesses is rebuttable by proof that the wages are paid by the principal employer merely because the contractor is without necessary funds, or because the principal employer desires to protect his property against liens. Payment by the principal employer becomes an entirely negligible factor where the evidence shows that payment is made with money furnished by the person employed. Analogously, although the fact that wages of workmen employed by a contractor are paid by him tends to prove that the contractor is independent, it does not possess a conclusive significance in this regard."

There is an exhaustive annotation of this subject in the notes to the case of *Chicago, R. I. & P. Ry. Co.* v. *Bennett,* 36 Okla. 358, 128 Pac. 705, 20 A. L. R. 772.

In our own Moore case, *supra,* Moore, who was held to be an independent contractor, first paid his labor with his own funds. Later the wages were paid "on payrolls made out by Moore and at his direction, and receipts taken from each employee were introduced in evidence showing performance of labor on 'Arthur Moore's job.' "

Here, appellee's wages paid, as herein stated, by appellant, were not, at any time, charged to King, the alleged independent contractor, although wages were paid on vouchers prepared by King.

We conclude, therefore, that the issue whether King was an independent contractor was properly submitted to the jury; and this was done under instructions of which no complaint is made.

The remaining question is equally close and of equal difficulty; that is, whether appellant was guilty of any actionable negligence. The testimony upon this issue is to the following effect: The pump which appellee and King were engaged in installing, when appellee was in-

jured, weighed 526 pounds, and it was necessary for them to lift it over a nipple in order to install it. They lifted the pump over this nipple, and lacked about 6 inches of having it at the concrete block on which it was to be placed, when King, without warning or apparent cause, turned loose of the pump and let the weight of the pump fall down upon appellee while he was in a stooped position, thereby inflicting the injury which appellee sustained. Now, King denied this, but this conflict in the testimony was, of course, a question for the jury. Appellee did not know why King released his hold; he only knew that he had done so. King furnished no excuse for this action on his part; indeed, he denies that it happened.

Appellant cites a number of cases more or less similar, and, among others, the following: *Missouri Pacific Ry. Co.* v. *Medlock,* 183 Ark. 955, 39 S. W. 2d 518; *St. Louis-S. F. Ry. Co.* v. *Burns,* 186 Ark. 921, 56 S. W. 2d 1027; *St. Louis-S. F. Ry. Co.* v. *Bryan,* 195 Ark. 350, 112 S. W. 2d 641; *Missouri Pacific R. R. Co.* v. *Vinson,* 196 Ark. 500, 118 S. W. 2d 672; *St. Louis-S. F. Ry. Co.* v. *Ward,* 197 Ark. 520, 124 S. W. 2d 975; *St. Louis-S. F. Ry. Co.* v. *Childers,* 197 Ark. 527, 124 S. W. 2d 964.

Of these, the first and the last cases cited appear to be chiefly relied upon. In the first of these, it was held that evidence that a fellow-servant accidentally slipped, causing him to release his hold on the end of the handcar which he and the plaintiff were lifting, thereby causing injury, was held not to sustain a cause of action. That holding was quoted and affirmed in the last case, above cited, under similar facts, and it was said there could be no recovery unless it were shown that the servant who released his hold of the object being carried was guilty of some negligence in doing so.

Here, appellee testified as follows: "Q. Tell the jury what the custom was before that. A. We always had to ease them down, because we set them with a union. There is half a union on the bottom and if you drop them, you would skin them up to where they would leak. Q. You mean before you eased them down? Mr. Chowning: Let

him tell about it. A. I said we eased them down. Q. But this time he turned loose before you got it down? A. He sure did."

We think this testimony unexplained made a case for the jury upon the question whether King was negligent in prematurely releasing his hold upon the pump, and that the holding in the case of *Public Utilities Corporation* v. *Carden,* 182 Ark. 858, 32 S. W. 2d 1058, is applicable here. It was there held that a case had been made for the jury where it was shown, without explanation, that one of two servants engaged in lifting a heavy rock had released his hold without warning. See, also, *St. L. Sw. Ry. Co.* v. *Smith,* 102 Ark. 562, 145 S. W. 218; *Great Western Land Co.* v. *Baker,* 164 Ark. 587, 262 S. W. 650; *Texas Pipe Line Co.* v. *Johnson,* 169 Ark. 235, 275 S. W. 329; *Newark Gravel Co.* v. *Barber,* 179 Ark. 799, 18 S. W. 2d 331; *M. P. Rd. Co.* v. *Simmons,* 190 Ark. 876, 81 S. W. 2d 924; *C. W. Lewis Lbr. Co.* v. *Rogers,* 199 Ark. 678, 135 S. W. 2d 674.

We conclude, therefore, that the testimony is sufficient to support the verdict, and as no error appears in the trial the judgment must be affirmed, and it is so ordered.

WILSON *v.* TRIPLETT, TRUSTEE.

4-6832 165 S. W. 2d 943

Opinion delivered November 2, 1942.

Joseph Morrison, for appellant.

Triplett & Williamson, for appellee.

MEHAFFY, J. A tract of land, described in the notice of sale as: "Part N½ of section 22, township 2 south, range 7 west, containing 200 acres," was sold at the collector's sale on the second Monday in June, 1931, for the delinquent taxes due thereon for the year 1930. Not having been redeemed, the sale was certified by the county clerk to the state. On May 6, 1938, the Commissioner of State Lands issued to appellant a donation certificate for 80 acres of land described as follows: "S½ NE¼ of section 22, township 2 south, range 7 west, 80 acres," the same being donated as a portion of the lands sold and forfeited to the state at the tax sale under the description first above set forth. Subsequently a donation deed was issued. The land was correctly described in the donation certificate, and under the same description in the donation deed, and both these instruments appear to be regular and valid on their face.

It appears that, after certifying, on October 24, 1935, the sale to the state of "Part N½ of section 22, township 2 south, range 7 west, containing 200 acres," the county clerk, on January 6, 1938, made and filed with the State Land Commissioner an additional certificate showing that the land comprising the 200 acres was:

South half of the northwest quarter, 80 acres; west half of the northeast quarter, 80 acres; southeast quarter of the northeast quarter, 40 acres. Total: 200 acres.

This information was probably derived from an inspection of the tax books, which disclosed payment on all the section except the three tracts above described.

However, we think this additional certificate adds nothing to the validity of the tax sale, for the reason that the notice of sale described the land as "part N½," and it was sold and certified to the state under that description.

Immediately after receiving the donation certificate, appellants took actual possession of the land, and fenced about 30 acres of it, built a residence and other structures, and put into cultivation about 20 acres of it, and has at all times since been in possession of it.

Appellee, as trustee for the owners of the original title to the land, filed this suit on November 15, 1940, to cancel the donation certificate and the deed above referred to, and from the decree awarding that relief comes this appeal.

For the affirmance of this decree it is insisted first that appellant was in possession of the land as appellee's tenant when he donated the land and received the land commissioner's deed, and second, that the tax sale and the deed based thereon are void because of the insufficient and improper description under which the land was sold.

The decree contains no special finding, and we do not know whether the first contention was sustained or not, but, in our opinion, the testimony does not sustain it. No such allegation was contained in the original complaint, and this issue was injected into the case by a subsequent amendment of the complaint.

The important and difficult question is whether the more than two years' actual possession which appellant has had under his donation certificate and deed operates to cure the invalidity of the sale arising out of the indefinite and improper description.

Section 6947 of Crawford & Moses' Digest reads as follows: "No action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector, or Commissioner of State Lands, Highways and Improvements, for the nonpayment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the nonpayment of taxes, or who may hold such lands under a donation from the state, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized of possession of the lands in question within two years next before the commencement of such suit or action."

This section was taken from § 1 of an act approved January 10, 1857 (Acts 1857, p. 80), and it was many times held, while it was in force, that possession under a donation certificate could not be taken into account, as two years' possession under a deed based upon a donation certificate was required to make the act available to the occupant of the land.

But this section of Crawford & Moses' Digest was amended by act No. 7 of the Acts of 1937, p. 20. The amendment added, after the phrase, "or who may hold such lands under a donation deed from the state," the additional phrase, "or who shall have held two years actual adverse possession under a donation certificate from the state." The effect of this amendment is, of course, to give one in possession under a donation certificate the same protection afforded one in possession under a donation deed. In other words, this two-year statute of limitations now applies in one case as well as in the other, and many cases have held that the statute was one of limitation, barring actions brought to question the validity of the tax sale under which the donee had possession. This Act of 1857, as amended by the Act of 1937, now appears as § 8925 of Pope's Digest.

It has been held in many cases that the sale of a tract of land for delinquent taxes under the description

"part" is void for indefiniteness. These decisions have become rules of property, and we do not intend to impair their authority. Many such cases are cited in the briefs in this case, one of which is the case of *Woodall* v. *Edwards,* 83 Ark. 334, 104 S. W. 128. In that case the land was described in the notice of sale as "part NE¼, section 30, 70 acres." This acreage was in excess of the actual acreage of that quarter section, the balance having caved into the Mississippi river many years before. The land had for many years been assessed under that description, and the original owner had paid taxes prior to the delinquent year under that description.

In distinguishing that case from the case of *Cooper* v. *Lee,* 59 Ark. 460, 27 S. W. 970, that opinion states: "In *Cooper* v. *Lee,* 59 Ark. 460, a description of 'N.N.E.' of a section containing 87.19 acres in a tax sale was held void, and the court approved Judge Cooley's statement of the purpose of the description of lands in tax proceedings: 'First, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the nonpayment; and third, that the purchaser may be able to obtain a sufficient conveyance.' The court said: 'A description which is intelligible only to persons possessing more than average intelligence, or the use and understanding of which is confined to the locality in which the land lies, is not sufficient'."

The opinion in the Woodall case, *supra,* states: "The description in the deed is as follows: 'part NE¼, section 30, T. 9 N., R. 9 E., containing 70 acres.' This description followed the description in the assessment."

The tax purchaser had been in possession under this deed more than two years, but for less than seven, and the opinion further states: "The two-year statute is the shortest limitation statute barring recovery of land. It applies to void tax sales as well as valid ones, yet it must not be extended to deeds void for uncertainty in description of the land conveyed. Such a deed cannot aid or explain possession, for it lacks an identification

of any land. Neither the owner nor the public were bound to take knowledge of any tax proceedings against land so described and the title alleged to be conveyed by such deed, and hence possession under it would confer nothing more than possession without any deed, and it would require seven years of adverse possession of the land to give title."

The opinion in the case of *Cooper* v. *Lee, supra,* which the Woodall case cites, is not contrary to the holding in the Woodall case.

The land sold for the nonpayment of the taxes in the case of *Cooper* v. *Lee,* was described as "N. NE., section 2, township 15, range 6, 87.19 acres." Mr. Justice RIDDICK, in the Cooper case, after repeating the quotation from Cooley on Taxation which appears in many of our cases as to the necessity for, and the purpose of, an accurate description, said: "On the contrary, we hold that it was not a sufficient description, and that the sale of the land must be treated as a sale without notice, and therefore void." In other words, the same rule was applied as would have been applicable had the land been described as "part," inasmuch as neither description would sufficiently identify the land sold, and the sale in either case would have been void for lack of a proper description.

But, notwithstanding the express holding that the sale must be treated as a sale without notice, and therefore void, Mr. Justice RIDDICK further said:

"But it does not follow, because the sale was without notice and void, that the plaintiff can now recover. The defendant in his answer set up the two years' statute of limitations, alleging that he had been in the actual, adverse and continuous possession of the land in controversy for over two years before the suit was brought, claiming to be the owner thereof under the deed executed to him in pursuance of said tax sale. It has never been seriously doubted that, in cases where the purchaser at a sale of land for the nonpayment of taxes takes actual possession of the land purchased, under a proper deed conveying said land to him, the Legislature may pre-

scribe a period of limitation after the expiration of which the title of the original owner is barred. By the adverse possession of the purchaser the owner is excluded from the possession of his premises, and notified that an adverse claimant hostile to his interests, holds the land. Public policy, no less than justice to the tax purchaser, requires that he should bring his suit within a reasonable time, in order that all contested questions may be put at rest while the facts are recent and susceptible of proof. Cooley on Taxation (2d Ed.) 557. In this case it is not contended either that no taxes were due, or that they were paid before the sale, or that the land was redeemed afterwards. The deed is in proper form, and correctly describes the land. The agreed statement of facts justified the court in finding that the defendant had held actual, continuous and adverse possession of the land under his deed for over two years before the commencement of this action. Under our statute this barred the right of the appellant to recover. Mansfield's Digest, § 4475; *Sims* v. *Cumby,* 53 Ark. 418, 14 S. W. 623; *Helena* v. *Horner,* 58 Ark. 151, 23 S. W. 966; *Cairo & Fulton R. Co.* v. *Parks,* 32 Ark. 131."

The clear implication of this opinion which we have just quoted is that, while the land was advertised and sold under a void description, the tax deed, based on this sale, containing an accurate description, was entitled and one constituting color of title.

An examination of the transcript in that case discloses that the clerk's tax deed described the land sold as "north ½ of northeast ¼ of section three (3), township fifteen (15) south, range six (6) west." In other words, although the sale was void because of the insufficient description, the grantee in the deed, based on that sale, containing an accurate description, was entitled to invoke the benefits of the statute now appearing as § 8925 of Pope's Digest.

In the present case, while there was no sufficient description, and the sale of the land must be treated as a sale without notice, and therefore void, yet the land commissioner's deed correctly described a portion of

the land sold under the void description, and there was more than two years' possession under the donation certificate and deed, based on this sale, and the donee is protected by the statute.

A statement in the opinion in the case of *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116, is apparently opposed to this view. Special Justice T. D. CRAWFORD there said: "The court agrees with appellee's contention that the description in the tax assessment of 1907 was void, and that it described no lands and that the tax sale was thereby rendered void, even though the land was correctly described in the state land commissioner's deed. It is obvious that, under these circumstances, no title passed to the state by the forfeiture, and the lands could properly be placed on the tax books."

It appears, however, that the court was not then considering the effect of two years' possession under a deed constituting color of title, based upon a tax sale void for uncertainty of description; but was considering the question of when lands, which had forfeited to the state under a void description, might be placed back on the tax books under a correct description.

In *Halliburton* v. *Brinkley,* 135 Ark. 592, 204 S. W. 213, there had been two years' adverse possession under a tax deed which was held not to give title because the description of the lands in the deed was void and did not constitute color of title. The same holding was made for the same reason in the case of *Dickinson* v. *Arkansas City Imp. Co.,* 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170. See, also, *Hershey* v. *Thompson,* 50 Ark. 484, 8 S. W. 689. These holdings were reaffirmed in *Woodall* v. *Edwards, supra.* A more recent case to the same effect and one strongly relied upon by appellee is that of *Sutton* v. *Lee,* 181 Ark. 914, 28 S. W. 2d 697. The opinion in that case recites that the land was sold and certified to the state under a void description and that the purchaser from the state applied for a deed containing an accurate description, which the Land Commissioner refused to make; but made a deed under the same description under

which the land had been sold and certified to the state—a void description.

So that in all those cases the two years' possession had been under a deed which did not constitute color of title, because no lands were described in the deeds. In this instant case the land commissioner did what the land commissioner in the case of *Sutton* v. *Lee, supra,* refused to do; that is, he conveyed to appellant under a correct description constituting color of title.

In the case of *Finley* v. *Hogan,* 60 Ark. 499, 30 S. W. 1045, and again in the case of *Carpenter* v. *Smith,* 76 Ark. 447, 88 S. W. 976, it was held that two years' possession under a tax deed gave title although the taxes for which the land had been sold had been paid and the taxes for which the lands were sold were not due. This for the reason that the statute is one of limitations which bars a suit where there has been two years' possession under a deed constituting color of title based upon a tax sale.

In the case of *Ross* v. *Royal,* 77 Ark. 324, 91 S. W. 178, Justice McCulloch pointed out the difference, in effect, between § 7114 of Kirby's Digest (later appearing as § 10119 of Crawford & Moses' Digest, and now appearing as § 13883 of Pope's Digest), and § 6947 of C. & M.'s digest (now appearing as § 8925 of Pope's Digest), the former being a statute limiting, for a period of two years, the time within which tax sales might be attacked, while the latter was a statute of limitations having no reference to the validity of a sale where the tax purchaser had occupied the land for a period of two years under his deed (or donation certificate). In that case it was said: "The statute under consideration [§ 8925 of Pope's Digest] is plainly a statute of limitation, and begins to run, not from the date of the sale, but from the date actual possession is taken under the deed. *Haggart* v. *Ranney,* 73 Ark. 344, 87 S. W. 703; *McCain* v. *Smith,* 65 Ark. 305, 45 S. W. 1057." (Act No. 7 of the Acts of 1937, above referred to, modifies this opinion, as herein shown.) "Actual possession of land taken and held continuously for the statutory period of two years under a

clerk's tax deed or donation deed issued by the commissioner of state lands bars an action for recovery, whether the sale be merely irregular, or void on account of jurisdictional defects."

The case of *Schuman* v. *Kerby,* 203 Ark. 653, 158 S. W. 2d 35, is relied upon to support appellee's contention that § 8925 of Pope's Digest may not be applied where the land was advertised and sold under an indefinite and insufficient description, although the deed to the purchaser contained a correct description. In that case it was said: "This section, as it plainly appears and as it frequently has been held to be, is a statute of limitation, which, when its provisions are applicable, concludes all inquiry into the validity of a tax sale where the property sold was sufficiently described."

The point here considered was not there presented, as the city lots there sold for taxes had been both advertised under a proper and sufficient description and had been sold and conveyed under a proper and sufficient description by the state land commissioner, and no emphasis is to be placed upon the word "sold" appearing in the quotation above copied.

We have reached the conclusion, therefore, that appellants are entitled to invoke the provisions of § 8925 of Pope's Digest, and that appellee's suit to cancel appellants' deed is barred by that statute.

The decree of the chancery court is reversed, and the cause remanded, with directions to vacate the decree cancelling appellants' deed from the State Land Commissioner, and quieting the title in appellants.

LYNCH *v.* HAMMOCK, CHANCELLOR.

4-6950 165 S. W. 2d 369

Opinion delivered November 2, 1942.

Buzbee, Harrison & Wright, for petitioner.

Peter A. Deisch and *E. E. Hopson,* for respondent.

HOLT, J. August 19, 1942, Dr. R. H. White, president of Desha County Medical Society, filed a petition in the Desha chancery court seeking to enjoin Dr. M. B. Lynch from practicing medicine within the state of Arkansas. On the same day, Dr. Lynch filed answer denying petitioner's right for the injunctive relief prayed. On this same date a hearing was had on the petition and answer, and the trial court issued a temporary restraining order against Dr. Lynch in accordance with the prayer of Dr. White's petition. On the day following this order, August 20, 1942, Dr. Lynch filed in this court petition for writ of prohibition against Honorable E. G. HAMMOCK, chancellor of the Desha chancery court. He alleges in this petition that "the petitioner, Dr. M. B. Lynch, was made party defendant in an action in the Desha chancery court in which Dr. R. H. White, president of the Desha County Medical Society, sought to restrain the petitioner from practicing medicine and on August 19, 1942, a restraining order was en-

tered against this petitioner. The respondent is judge of the court in which said restraining order was issued and is attempting to assert jurisdiction over this defendant in this cause without legal ground.

"The petitioner is a graduate of the University of Tennessee, which is a Grade 'A' Medical School, and has served his interneship in a recognized hospital, Baptist Memorial Hospital of Memphis, Tennessee. He is a duly licensed physician and surgeon in the state of Tennessee and is authorized to practice his profession under the laws of that state.

"The petitioner is engaged exclusively in doing medical first aid work near Rohwer, Desha county, Arkansas, upon employees of Linebarger Senne Construction Company, the contractor for the construction of Rohwer Relocation Colony in Desha county, Arkansas, and upon the employees of the subcontractors and collateral contractors engaged in construction of this project. Linebarger Senne Construction Company, its collateral, its subcontractors and collateral contractors are engaged in the construction of a camp or colony for Japanese evacuees; the work of the contractors and the medical first aid work of your petitioner is being performed exclusively upon lands of the United States of America, over which the state of Arkansas, and its subordinate agencies have no control whatever. In doing his medical first aid work upon the said reservation the petitioner is violating no law of the state of Arkansas and no court of the state of Arkansas possesses jurisdiction to restrain or impede him from carrying on his work exclusively upon said jurisdiction. The construction of the improvements upon the site of the colony is being conducted under the authority of the War Department of the United States of America and is a part of the national war effort. The contract of Linebarger Senne Construction Company is with the United States of America, through the War Department, which said contract requires that a practicing physician and surgeon be present on the reservation for the purpose of rendering medical first aid to said employees and the petitioner is present upon the said reservation solely and exclusively for the purpose of

fulfilling this part of the contract. The petitioner is not practicing medicine and surgery in Desha county, Arkansas, generally, nor in any other of the seventy-four counties of the state of Arkansas. The petitioner does not hold himself out as a practicing physician and surgeon except upon said Government Reservation under the circumstances above set out.

"At the present time there are approximately two thousand employees upon the said Government Reservation engaged in construction, and this large number necessitates the constant attendance of a physician and surgeon for the performance of medical and surgical first aid on injured employees. There are no hospital facilities upon the reservation and all serious cases, after examination by the petitioner, are immediately referred to physicians who are practicing generally in the state of Arkansas and hospitals which are receiving patients generally. The nature of the medical and surgical work of the petitioner is exclusively in fulfillment of the contract of the contractors with United States of America.

"The answer of the defendant to the action filed by Dr. R. H. White as president of the Desha County Medical Society set up substantially all of the facts alleged in this motion, which facts were by the plaintiff admitted to be true. A copy of the said answer is attached hereto, marked Exhibit '1' and is made a part of this petition.

"The petitioner alleges that the Desha chancery court of which respondent, Hon. E. G. Hammock, is chancellor, is without jurisdiction to proceed against the petitioner and unless a temporary writ of prohibition is issued by this court the defendant will be compelled to refrain from the practice of medicine and surgery upon said Government Reservation to his great personal detriment and to the detriment of injured employees upon the project and to the hindrance of the war effort.

"Wherefore, the petitioner prays for a temporary writ of prohibition directed to the Desha chancery court, Hon. E. G. Hammock, Chancellor, prohibiting the said court from proceeding further in the said suit of the Desha County Medical Society, by Dr. R. H. White, pres-

ident, and upon a hearing, the petitioner prays that such writ of prohibition be made permanent."

Demurrer was interposed to Dr. Lynch's petition for writ of prohibition, by the respondent, and by agreement the matter was heard in vacation before one of the judges of this court, on the petition and demurrer on August 20, 1942, which resulted in a temporary writ of prohibition against respondent, effective until September 28, 1942, when this court reconvened in regular session. On the latter date the cause was submitted on briefs and argued orally before this court. The temporary writ was continued in effect until October 5, 1942. October 5, 1942, this court entered a *per curiam* order making the temporary writ of prohibition permanent.

The cause is before us at this time on respondent's motion for a rehearing. The entire record before us consists of the petition for injunction, the answer thereto, the restraining order of the lower court, the petition for a writ of prohibition by Dr. Lynch against the chancellor of the Desha chancery court, respondent's demurrer to the petition for writ of prohibition, and the order granting temporary writ of prohibition, by one of the members of this court, on August 20, 1942.

Respondent, by demurring to petitioner's petition for a writ of prohibition, admits the truth of every allegation contained in the petition, which is well pleaded. See *Gall* v. *Union Nat'l Bank of Little Rock, Trustee,* 203 Ark. 1000, 159 S. W. 2d 757.

On the record here, the sole question presented is whether a licensed physician of another state, not licensed in Arkansas, who confines his practice to workmen engaged in constructing federal buildings upon property owned by the United States is subject to the laws of Arkansas relating to the practice of medicine and surgery (§§ 10739-10744, Pope's Digest). Respondent contends that Dr. Lynch would be subject to the Arkansas laws, and petitioner argues that he would not be.

The petition alleges, and by his demurrer respondent concedes, that the land on which Dr. M. B. Lynch confined his practice, called the "Japanese Relocation

Colony," is owned by the United States, title having been acquired by purchase. The state of Arkansas has yielded jurisdiction over the area in question by § 5644, Pope's Digest, which provides: "The state of Arkansas hereby consents to the purchase to be made or heretofore made by the United States, of any site or ground for the erection of any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, lock, dam, fish hatcheries, or other public buildings of any kind whatever, and the jurisdiction of this state, within and over all grounds thus purchased by the United States, within the limits of this state, is hereby ceded to the United States. Provided, that this grant of jurisdiction shall not prevent execution of any process of this state, civil or criminal, upon any person who may be on said premises. Act April 29, 1903, p. 364, § 1."

Article 1, § 8, c. 17 of the Constitution of the United States provides that congress shall have power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; . . ."

We think there can be no doubt that the buildings constructed by the government on its property to be used for the relocation of the Japanese come within the term "other public buildings of any kind whatever" as used in § 5644, *supra,* and under the above provision of the United States constitution as "other needful buildings," in this time of war stress. The Supreme Court of the United States in *Surplus Trading Company* v. *Cook,* 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091, held that certain blankets located within Camp Pike on land owned by the United States and lying within Pulaski county, Arkansas, (now known as Camp Robinson) were not subject to taxation by this state for the reason that Arkansas had

surrendered and ceded its jurisdiction over the area to the United States, and the court said: "It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction."

The War Department of the United States by proclamation No. WD 1, issued August 13, 1942, has designated the property in question here as a military area. Section 1 of that order provides: "1. Pursuant to the determination of military necessity hereinbefore set out, all the territory within the established boundaries of . . . Jerome Relocation Project, approximately one mile northeast of Jerome, Arkansas; and Rohwer Relocation Project, adjacent to and west of Rohwer, Arkansas, are hereby established as military areas, and are designated as war relocation project areas."

We think the issue here has been decided against respondent's contention by this court in the very recent case of *Young* v. *G. L. Tarlton, Contractor, Inc., ante,* p. 283, 162 S. W. 2d 477. In that case it was charged that appellees, two Delaware corporations engaged at the time in constructing military buildings for the United States at Camp Robinson, were violating the laws of this state because they had failed to qualify in Arkansas as foreign corporations. This court, however, rejected that contention, saying, "the laws of this state relative to the domestication of foreign corporations have no application for the reason that appellees were engaged in construction work for the United States at a military post under the jurisdiction of the United States."

In the instant case, it is conceded that Dr. Lynch is confining his practice to the area owned by the United States, administering to the employees of the construction company, which is carrying out a contract which it has with United States under the terms of which it is required to keep available a physician to look after the health of these employees while engaged in the construc-

tion work under the contract. We think it clear, under the above authorities, that the laws, *supra,* affecting the practice of medicine and surgery in Arkansas do not control and cannot apply to the rights of Dr. Lynch to practice on property, the jurisdiction over which has been surrendered to the United States, and the title to which property has been acquired by the United States by purchase.

Respondent's motion for a rehearing is denied.

DUNLIS, INC., *v.* FIDELITY COMPANY, TRUSTEE.

4-6860 165 S. W. 2d 612

Opinion delivered November 9, 1942.

Raymond Jones, for appellant.

Ben D. Rowland and *Philip McNemer,* for appellee.

HOLT, J. Appellee, Fidelity Company, Trustee, sued appellant, Dunlis, Inc., in the Little Rock municipal court for $150, which it was alleged was due for five months' rental, at $30 per month, on certain property of appellee occupied by appellant.

From a judgment in favor of appellee in the amount of $150, Dunlis, Inc., appealed to the circuit court. January 12, 1942, appellee filed motion in the circuit court for permission to increase the amount, $150 sued for in the municipal court, to $300, the increase of $150 representing five months' additional rental which had become due since the judgment in the municipal court. This motion the court granted over appellant's objections and exceptions. There was a jury trial in the circuit court January 14, 1942, which resulted in a judgment for $300 in favor of appellee. This appeal followed.

The facts are that on February 15, 1940, appellee, as lessor, and J. E. and Reba Highfill as lessees, entered into a written lease agreement under the terms of which appellee leased to the Highfills for a period of three years, two store rooms on Kavanaugh Boulevard in the city of Little Rock, at a rental of $30 per month, rent payments to begin, however, January 1, 1941, it being stipulated that lessees were to have the property rent free until this latter date. The Highfills operated under this lease until September 24, 1940. On this latter date the Highfills entered into a written sales contract with appellant whereby they sold to appellant for a consideration of $600 all of their right, title, equity, interest and good will in this property. The contract of sale described the property and interest of the Highfills as "a certain business and properties and good will located at 2917 Kavanaugh Street, Little Rock," and the "equity in said property and business." This contract of sale was signed by Dunlis, Inc., L. A. Lipscomb, President, P. P. Baird, Vice President, and J. E. Highfill and Mrs. J. E. Highfill, Jr. Following this sale by the Highfills to appellant, on the following day, September 25, 1940, with the express understanding and agreement among all the parties, the Highfills, Dunlis, Inc., and appellee, Fidelity Company, trustee, the Highfills surrendered the pos-

session of the property and premises to appellant, appellant taking possession. The following indorsements were made upon the lease agreement, *supra,* between the Highfills and appellee: "September 25, 1940. We, the undersigned, do hereby assume the above lease and agree to fulfill all terms included therein. Dunlis, Inc., L. A. Lipscomb, President, P. P. Baird, Vice President. This lease is hereby assigned to Dunlis, Incorporated. Fidelity Company, By: E. J. Pope, Vice President."

Appellant has had possession and the use of the property since September 25, 1940. After appellant had occupied the property for some time it sent the following letter to appellee: "Dunlis, Inc., 410 West Third St., Little Rock, Arkansas. Mr. Pope, c/o Fidelity Company, Peoples National Bank Building, Little Rock, Arkansas. Dear Mr. Pope: Due to the business conditions and as a conservative move, several weeks ago we decided to discontinue business at our No. 2 location, 2917 Kavanaugh Boulevard. We, of course, appreciate that we have this property under lease rental for a period of three years beginning January 1, 1941; naturally this lease agreement will have to be carried out by us. This of course places a burden upon this going corporation, a burden that we would like to discard as soon as possible by sub-leasing. With your assistance it is possible that the property could be rented, the opportunity to do so would be presented to you much sooner than to us. To that end we solicit your co-operation. Thanking you, we are, Yours truly, Dunlis, Incorporated. By L. A. Lipscomb, President." J. E. Highfill and his wife, Reba, both testified that "they did not have nor did they claim any interest whatever in the leased premises."

Appellant first contends that there is no valid, enforcible rental lease contract between it and appellee; that the relation of landlord and tenant is absent; that the possession and title to real property is involved, and that the court was without jurisdiction.

It is our view that none of these contentions can be sustained. It is apparent that until September 25, 1940, the appellee and the Highfills occupied the position of

landlord and tenants, and the facts appear to be undisputed that on this date, with all the parties agreeing, the Highfills sold their interest in the leased property to appellant, and with the consent of all parties the Highfills surrendered and abandoned the lease and appellant was substituted as a new lessee, by agreement, in the place of the Highfills. Under these facts the Highfills were no longer bound to appellee for the rents, but appellant, as substituted lessee, obligated itself, as appellee's tenant, for the monthly rentals becoming due from and after September 25, 1940. In 35 C. J., p. 1088, § 272, the textwriter says: ". . . Where a landlord grants a new lease to a stranger with the assent of the tenant during the existence of an outstanding lease, and the tenant gives up his own possession to the stranger who thereafter pays rent, or where in any other way a new tenant is by agreement of the tenant and landlord substituted and accepted in place of the old, there is a surrender by operation of law, and no additional consideration is necessary. It is immaterial that the old lease is not canceled, or that the original lessee signs the new lease as surety; and it is equally immaterial that the lessor in his pleading mistakenly asserts or assumes that the legal effect of the transaction between the original and the substituted tenant was a transfer of the lease." We think it clear, therefore, that the position of landlord and tenant existed between appellee and appellant, and this being true, the title to the property is in no sense involved. By the letter set out, *supra,* appellant admits that it has the property in question here "under lease rental for a period of three years, beginning January 1, 1941; naturally this lease will have to be carried out by us." No written assignment of the Highfills of their lease to appellant was necessary in the circumstances here, in order to bind appellant on the lease.

The matter comes down, therefore, to a simple suit on a written contract by a landlord against his tenant for rentals due, and clearly, the municipal court, and the circuit court on appeal, had jurisdiction.

It is finally contended by appellant that (quoting from its brief) "it was an abuse of the circuit court's

discretion, amounting to prejudicial error, for said court to allow the appellee, on the day of trial, and without notice, to amend its complaint so as to sue for double the amount sued for in the municipal court, and to refuse, upon proper motion, to continue the case until appellant could have an opportunity of pleading to the complaint, as amended, thereby forcing it to go to trial on the same day the complaint was amended; and that in no event, could a judgment be legally rendered against appellant for more than the amount which was involved in the municipal court, which amount was $150 and costs.'' We think this contention is untenable.

At the time judgment was rendered for $150 in municipal court, only five months' rental was due. When the cause came on for hearing on appeal in the circuit court, where the cause was tried *de novo,* ten months' rental was due, in the amount of $300. We think the trial court committed no abuse of discretion, or error, in sustaining appellee's motion to amend its complaint and prayer for a judgment in the sum of $300, which represented the amount of $150 recovered in the municipal court plus the five months' rental which had accumulated since the municipal court judgment and the trial date in the circuit court. Indeed we think it was the duty of the circuit court, in furtherance of justice, to save time, expense, and a multiplicity of suits, to amend the pleadings to conform to the proof. It is difficult to understand how appellant could possibly have been prejudiced or surprised by the action of the court in permitting the amendment. The amount of the judgment ($300) obtained in the circuit court was within the jurisdiction of the municipal court as well as the circuit court. When the complaint was amended in the circuit court there was but one cause of action present, the rent due appellee for ten months. The action in the municipal court was for rent due appellee, at that time. We think no new cause of action has been added in the circuit court, since it was still an action for rent for an amount within the jurisdiction of the municipal court.

In 49 C. J., p. 507, § 670, the author states the general rule in this language: ''. . . An amendment,

however, may ask for more relief upon the original cause of action than can be granted at the time the suit was begun." In support of the text the case of *Warfield* v. *Oliver,* 23 La. Ann. 612, from the Supreme Court of Louisiana is cited. In that case the court said: "This was an action to enforce the obligations of a plantation lease executed by the defendant as lessee. . . . The defendant filed an exception to the prematurity of the action begun December 15, 1870, because a portion of the claim for rent was not then due, and did not become due till December 31, 1870. On the eleventh of April, 1871, the exception was sustained, with leave, however, to amend, it appearing that the rent, nearly due when suit was begun, was now long past due, and the amendment was made and issue joined thereon. We see no error, but good sense and justice in this permission to amend." In *K. C. So. Railway Co.* v. *Anderson,* 104 Ark. 500, 149 S. W. 58, this court announced the rule in this language: "It has been repeatedly held by this court that after an appeal is taken from the justice of the peace court, the circuit court may permit an amendment by adding claims which were not included in the original demand, or by increasing the amounts of such demand, only keeping out any new causes of action. *St. Louis, I. M. & S. Railway Co.* v. *Bryant,* 92 Ark. 425, 122 S. W. 966," and in *Birmingham* v. *Rogers, et al.,* 46 Ark. 254, this court held, quoting headnote "2," "Upon an appeal from a justice of the peace, the plaintiff may amend his action in the circuit court by adding a claim against the defendant which was not included in the original action before the justice." In the body of the opinion the court says: "This was a matter subject to the sound discretion of the court, but generally such amendments are allowable in furtherance of justice, and should be allowed when no unfair advantage may be taken of the defendant."

Finding no error, the judgment is affirmed.

4-6851 165 S. W. 2d 615

Opinion delivered November 9, 1942.

[redacted]

John S. Mosby and *Charles Hudson, Jr.*, for appellant.

Rowell, Rowell & Dickey, for appellee.

HUMPHREYS, J. On May 22, 1941, the appellees, four in number, filed separate applications with the Arkansas Corporation Commission on the ground of public necessity and convenience for authority under act 367 of the Acts of the General Assembly of 1941 and in compliance with the provisions thereof to transport certain specified commodities over the principal highways of the state of Arkansas.

Notice of the applications was given to all transportation lines operating over the routes designated in the applications, and appellants, being among the number, appeared and protested against granting licenses or permits to appellees on account of public necessity and convenience.

The four applications were consolidated for the purpose of trial. After hearing the testimony, the commission granted the applications of the appellees and issued permits or licenses of convenience and necessity over highway routes in this state for which certificates or permits had long before been issued by said commission to appellants to transport over the routes the following commodities: "Cotton, cotton linters, cotton seed, other farm products both in raw and manufactured form, including, feed, meal, hulls, potatoes, (flour excluded) fertilizer, livestock, dairy products, light machinery and pipes, dressed and rough lumber, building materials, excluding brick and tile, electrical construction materials and poles, fuel oil for Pine Bluff and Little Rock shippers."

An appeal was taken from the order of the commission granting petitioners permits or licenses on account of necessity and convenience to transport freight over the principal highway routes of Arkansas, specifically designated, to the circuit court of Pulaski county, third division, and, on a hearing of the consolidated petitions by said court on the same record made before the commission, the court sustained the order of the commission granting licenses to the petitioners, from which is this appeal to this court for trial *de novo*.

There can be no doubt that it is the duty of this court to try this class of cases *de novo* on the record made before the commission and on appeal before the circuit court. This court has so ruled in the case of *Missouri Pacific Railroad Co.* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644. This court reaffirmed and approved the ruling in the Williams case, *supra,* in the case of *Potashnick Truck System, Inc.,* v. *Missouri & Arkansas Trans. Co.,* 203 Ark. 506, 157 S. W. 2d 512. In the last case cited this court said: "We said in the case of *Missouri Pacific Railroad Co.* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644, that the statute under which this proceeding was had required this court, upon the appeal to it, to hear the matter *de novo,* and to render such judgment upon the appeal as appeared to be warranted and required by the testimony. And so we do, but we cannot ignore the fact

appearing in the record before us that a protracted hearing was had, both before the commission and in the circuit court on appeal, and, while the burden was upon petitioner to make the affirmative showing that the public convenience and necessity required the issuance of the permit, that finding has been made, and should now be affirmed unless it appears to be contrary to a preponderance of the testimony. We hear chancery appeals *de novo,* but, when we have done so, we affirm the findings of the chancellor on questions of fact unless his findings appear to be contrary to a preponderance of the evidence. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160."

We have carefully read the testimony in this case with the view of determining whether the order of the commission granting permits to appellees to haul commodities designated in their applications over the highways of this state also designated was contrary to a clear preponderance of the evidence.

The testimony introduced before the commission was broad in scope and took a very wide range. Twenty-two business men of Pine Bluff, Warren, Sheridan and Little Rock testified as to the character of business in which they were engaged and the extent of their shipments of freight over the highway routes designated by petitioners in their applications for licenses, and that they had been employing petitioners at intervals to haul commodities of various kinds in trucks over the highway routes involved from five to ten years. All of them testified, in substance, that in their respective businesses it was necessary and convenient to be able to call upon petitioners at irregular intervals to haul their commodities. They stated, however, that they had never been refused service by appellants when they called upon them, and the services of appellants rendered them were satisfactory when they used them.

Three witnesses testified on behalf of appellants. They testified, in substance, that they had gone to great expense to equip themselves to haul all commodities designated in petitioners' applications over the designated highway routes, and that if they were called upon

in the future to transport in their trucks any goods or commodities requiring additional equipment, they would provide such equipment and furnish every necessary facility to accommodate shippers on and along all designated routes.

The undisputed evidence in the record reflects that appellants have never refused to haul commodities or freight which petitioners propose to handle over the routes applied for.

A great preponderance of the testimony is that appellants have sufficient trucks and equipment to accommodate any and all freight traffic over the routes designated which petitioners propose to handle.

It follows that the permits issued to appellees to haul designated commodities over designated highways specified in their respective applications were contrary to a clear preponderance of the evidence. As stated above, the undisputed evidence was to the effect that none of the witnesses appearing on behalf of appellees ever applied to appellants to haul commodities of any kind over the highways designated in appellees' petitions without being accommodated and that the service rendered, when requested, was satisfactory. A clear preponderance of the evidence was to the effect that appellants owned ample equipment with which to haul all commodities over the highways designated in appellees' petition if and when called upon to do so.

In passing it may not be amiss to state that appellants proffered in the course of the trial to procure any additional equipment not presently owned by them which public necessity and convenience might require.

In construing regulatory statutes governing the Corporation Commission of Arkansas prior to Act 367 of the Acts of the General Assembly of 1941, this court adopted in the case of *Missouri Pacific Rd. Co.* v. *Williams, supra,* a rule as follows: "The general rule is that a certificate may not be granted where there is existing service in operation over the route applied for, unless the service is inadequate, or additional service would benefit the general public, or unless the existing carrier

has been given an opportunity to furnish such additional service as may be required."

In applying this general rule to the facts in the instant case we have concluded that according to a great preponderance of the evidence, appellants were furnishing over the routes applied for by appellees adequate service, and that it was not necessary for the benefit of the general public to issue permits to appellees for additional service. We have also concluded that appellants were not given an opportunity to furnish additional service if any should be required for the benefit or convenience of the general public.

In other words, the evidence did not warrant the commission in issuing certificates to appellees to haul freight and commodities over the highway routes designated in appellees' petition. The issuance of such certificates was contrary to much of the undisputed evidence and contrary to the great preponderance of the evidence.

Appellees contend, however, that appellants had no right under Act 367 of the Acts of the General Assembly of 1941 to appeal from the findings and judgment of the Corporation Commission and to the circuit court. After setting out the general duties and powers of the commission in six subdivisions of § 6 thereof it is provided in subdivision (e) of § 7 of said act that: "Any final order made under this Act shall be subject to the same right of appeal by any party to the proceeding as is now provided by § 2019 and 2020 of Pope's Digest of the Statutes of Arkansas in respect to appeals from the orders of the Commission . . ."

We think under subdivision (e) of § 7 of Act 367 of the Acts of the General Assembly of 1941 the absolute right of appeal was granted to the parties to this suit, and that the reference to §§ 2019 and 2020 of Pope's Digest related to the proceedings or manner of perfecting the appeal. It was not an attempt on the part of the Legislature to amend or extend said sections of Pope's Digest and does not come within the constitutional inhibition of § 23 of art. V of the Constitution of

the State of Arkansas for the year 1874, which is as follows: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

Certainly the Legislature did not intend by granting an appeal to the interested parties to deny them the right of an appeal. The purpose and intent was after granting interested parties, or the parties to a suit, the right to appeal reference was made to certain sections of the statute for the manner and method of perfecting an appeal.

This court in a number of cases has recognized the right of interested parties to take an appeal from the final orders of the Corporation Commission to the circuit court and from the circuit court to the Supreme Court. The latest case in which the right of appeal by the parties to the suit, or interested parties, was recognized in the case of *Potashnick Truck System, Inc.*, v. *Missouri & Arkansas Trans. Co., supra.*

The judgment of the circuit court approving the orders of the Arkansas Corporation Commission is reversed, and the orders of the Commission are set aside, and the cause is remanded with directions to enter orders denying the applications of appellees.

HOWARD *v.* HOWARD.

4-6861 166 S. W. 2d 12

Opinion delivered November 9, 1942.

Eugene Coffelt and *Alvin Seamster,* for appellant.

Vol T. Lindsey, for appellee.

GREENHAW, J. Appellee brought this action against appellant, his wife, to secure a decree of divorce and the custody of their two minor children. He alleged that they had lived separate and apart without cohabitation for a period of more than three consecutive years prior to the filing of the complaint, pursuant to subsection 7 of § 2, Act 20 of the Acts of 1939. Some time thereafter he filed an amendment to the complaint alleging adultery on the part of appellant as an additional ground for divorce.

Appellant filed an answer denying the allegations of the complaint and the amendment to the complaint, and by way of cross-complaint asked for a divorce on the ground of willful desertion for a period of more than one year.

The cause was tried and a decree entered on December 4, 1941, in which the cross-complaint of appellant was dismissed for want of equity and a divorce granted to appellee. In this decree the court adjudicated and settled property rights of the parties, gave to appellant

possession until June 1, 1942, of the home where she and the children resided, divested her of all interests in the real estate of appellee and vested same in appellee, and made a temporary order with reference to the custody and maintenance of the minor children, from which is this appeal.

Appellee has filed in this court a motion to dismiss the appeal for the reason that the testimony of witnesses taken in open court was not transcribed and filed during the term at which the case was tried, but was filed May 18, 1942, after both the January and April terms of the Benton chancery court had intervened, and chiefly relies upon the case of *Elvin* v. *Morrow, ante,* p. 456, 162 S. W. 2d 892.

We are unable to agree with this contention. This case was tried upon depositions which had been taken pursuant to agreement, and also upon the oral testimony of witnesses in open court. At the beginning of the trial the following stipulation was entered: "It is agreed by and between the parties hereto that the evidence may be taken orally in open court in shorthand by Bernice L. Bottens and by her transcribed to typewriting upon request of either party and when the evidence is so transcribed to be filed either in term time or in vacation as depositions in the case, and when so filed by her to become a part of the record herein."

It will be observed that under the terms of the stipulation the evidence could be transcribed and filed either in term time or in vacation, and the fact that same was not transcribed and filed during the term when the trial was had and the decree entered did not preclude the filing thereof after the term had lapsed. We have so held under somewhat similar facts. See *McCall* v. *McCall, ante,* p. 836, 165 S. W. 2d 255.

The evidence showed that appellant and appellee were married in Benton county, Arkansas, in January, 1924, and lived together as husband and wife in Benton county, Arkansas, until some time during the year 1936, when appellee left the state of Arkansas, and thereafter obtained work in oil fields in Kansas, Oklahoma, New Mexico, Texas and Illinois.

Two children were born to this union, Don Orba, a son, who was 13 years of age, and Dawna, a daughter, who was nine years of age at the time of the trial. Appellee owned a farm near Bella Vista, upon which they lived and which constituted the homestead. When appellee left, appellant and the children continued to reside there. Thereafter they went to various places where appellee was working, and lived with him for short periods of time. They lived together in Seagraves, Texas, during the fall of 1937, and from this place appellant and the two children were sent by appellee to their home in Benton county, where they have since resided.

Appellee and numerous witnesses testified that he and appellant have not lived and cohabited together as husband and wife since January 7, 1938; that he returned to Benton county from time to time to see the children, but that he and appellant did not live and cohabit together as husband and wife.

The court made the following findings of fact:

"The court finds from the evidence that the plaintiff is entitled to an absolute divorce from the defendant on the two grounds as alleged in the complaint and that the cross-complaint of the defendant should be dismissed for want of equity.

"The court finds from the evidence that the plaintiff and defendant have lived separate and apart without cohabitation at all times since January 7, 1938.

"The court finds that it is proper, under the existing conditions, that the defendant should have the custody of said children until the 1st day of June, 1942, and that the plaintiff pay to said defendant for the care, custody and maintenance of said children the sum of $30 per month, from date until June 1, 1942, at which time the plaintiff is to have the care, custody and control of said minor children until the third Thursday in August, 1942, at which time the court will make permanent orders as to said children and allowances, depending upon the situation of the parties existing at said time.

"The court further finds from the evidence that the defendant is awarded, as her share of the plaintiff's property, all household goods now situated upon the premises occupied by the defendant belonging to the plaintiff and all personal property now on the farm except the ten calves owned by her son, Don Orba Howard, and is to have the automobile now in her possession, and that the defendant is permitted to occupy the farm of the plaintiff without committing any waste thereon until June 1, 1942, at which time the plaintiff is to have possession thereof."

A decree was entered in conformity with these findings.

It would serve no useful purpose to set out in detail the evidence in this case. Suffice it to say that in our opinion the court's finding that appellant and appellee had lived separate and apart without cohabitation for more than three years prior to the filing of the complaint was supported by a preponderance of the evidence which justified granting a divorce on this ground under subdivision 7 of § 2 of Act 20 of 1939.

In the case of *Greer* v. *Greer,* 193 Ark. 301, 99 S. W. 2d 248, this court said: "As to the sufficiency of the evidence to support the chancellor's finding, it may be stated at the outset, that the same rule applies in a divorce action as in other chancery actions, that the findings of fact by a chancellor will not be disturbed by this court unless such finding is against the preponderance of the evidence."

According to the evidence, we think that both appellant and appellee were guilty of misconduct which no doubt was taken into consideration by the court in adjudicating their property rights as provided in said Act 20. We are unable to say that the action of the court in this respect was erroneous and not supported by a preponderance of the evidence.

The decree dismissing the cross-complaint of appellant, but giving her certain personal property and divesting her of her interest in appellee's real estate, and granting a divorce to appellee is affirmed.

The decree appealed from, in so far as it affected the custody and maintenance of the minor children, was not final, it being specifically provided therein that the final order with reference thereto would be entered the third Thursday in August, 1942. The appeal was filed in this court on May 20, 1942, and therefore any order which may have been made subsequently is not before us.

While the evidence showed that the appellee was born and reared in Benton county, Arkansas, and had always claimed that as his home and legal domicile, paying his taxes, including poll tax, there, and had never voted in any other state nor established or claimed a permanent home elsewhere, yet the undisputed proof was that he was in oil field construction work which necessitated his going from place to place in various states, thereby creating a situation which in our opinion would not be conducive to the best interests of the minor children were he to have their custody at this time. We are of the opinion that the interests of the minor children would be best served if their custody were awarded to appellant for the present, with provision for their adequate maintenance at the expense of appellee, and the further provision that appellee be permitted to visit them and have them visit him at all reasonable times. The chancery court will, of course, retain jurisdiction to make such further orders for the custody and support of the children as it from time to time may deem meet and proper.

The custody of the minor children is therefore awarded to appellant until such time as the chancery court may deem it to the best interests of the children to make other orders, and this cause is remanded to the lower court to the end that suitable and proper orders for visitation and support of the minor children may be made in the premises.

The record does not affirmatively show that appellee has property in this state other than the rural acreage now occupied by appellant and the two children. Inasmuch as the interest of the children is the paramount consideration, appellee is enjoined from disposing of such property, or encumbering it except in such manner

as may meet the approval of the chancery court—this for the benefit of the children as distinguished from appellant.

The costs of this case, including those on the appeal, will be assessed against appellee.

TURNAGE *v.* RITCHIE GROCER COMPANY.

4-6858 165 S. W. 2d 604

Opinion delivered November 9, 1942.

Claude E. Love and *W. R. McHaney,* for appellant.

Mahony & Yocum and *A. L. Brumbelow,* for appellee.

GRIFFIN SMITH, C. J. The issue is whether W. H. Turnage, A. D. Blakely, and Carl Lewis were partners in a grocery business; or, in the alternative, if it should be held that as between themselves there was no intention to create the relationship, is Turnage, because of conduct, estopped to deny his connection.

Blakely and Alvin Pitts, with $2,000 supplied by Turnage, went from Smackover, Arkansas, to Arp, Texas, and opened a place of business in February, 1938. Contract between the parties was in triplicate, but prior to trial all were lost. Evidence is abundant that if Turnage had rested his rights on the agreement and had refrained from activities relating to the business, the liability now asserted against him could not be sustained.

Blakely communicated to Turnage his displeasure at Pitts' attitude. This occurred approximately two

months after the store was opened. Responding to Blakely's complaints, Turnage wrote the letter shown below.[1] Blakely says that when Pitts went "haywire" by drawing from $200 to $250 monthly for personal use, he (Blakely) proposed to purchase from Pitts, or to sell. Since Pitts did not have money with which to acquire Blakely's interest, and was not willing to accept the offer made by letter, Turnage and his lawyer went to Arp and concluded an arrangement whereby for $250 paid by Turnage, Pitts "bargained, sold, and conveyed whatever interest he had" to Lewis, whom Blakely had recommended to Turnage as one with whom he would like to be associated. Evidence of the transaction, as quoted in the preceding sentence, was indorsed by Pitts on the back of two of the originals of the contract made before business was begun in Texas.

There is testimony of mutual intentions to have the new agreement formally written and signed, but this was not done.

Turnage contends that as between himself and Blakely and Pitts, the status was that of debtor and creditor: that is, he made a personal loan with the understanding interest at ten percent per annum would be paid and a third of the profits would be applied toward liquidation of the obligation.

The enterprise was not profitable. Two months after Lewis became a partner with Blakely they moved the stock of goods to Smackover. Turnage says this was without his knowledge. However, he rented a building for accommodation of the parties and interested himself in other ways.

On petition of Ritchie Grocer Company Lewis and Blakely were superseded when on May 1, 1939, Homer T. Rogers was appointed receiver. Five creditors filed claims which, exclusive of interest, amounted to $1,509.59.

[1] The communication was addressed to Alvin M. Pitts:—"This is to certify that from this day on, A. D. Blakely is manager, buyer, and boss. He is to have full charge. I will give you $150 for your so-called interest—not one cent more—to be paid to you by A. D. Blakely who will draw a draft on me for that amount. However, if you wish, you may stay and work under Blakely for the sum of $15 per week only." The letter is dated April 28, 1938.

Turnage listed his advances, contending the item was an allowable debt. The receiver concluded Turnage was a partner rather than a creditor, and disallowed. Chancery sustained.

Before one can be held liable for partnership debts, the relationship must have been formed by express agreement or conduct from which agreement is implied or the party sought to be charged must have created an estoppel.[2] "To determine whether a given agreement amounts to a partnership between themselves," said Chief Justice Hill,[3] "is always a question of intention. But a different test prevails where the rights of third parties are concerned. It was formerly held that participation in profits was conclusive evidence in actions by creditors. This rule has been modified so that a participation in profits is not conclusive, but 'it is a cogent test for trying the question,' and 'is conclusive unless there are some circumstances altering the nature of the contract'."

In the instant case a preponderance of the evidence is that the contract was that when Turnage had been repaid from a third of the profits, his connection terminated, provided that in the meantime interest had been met. Interest was payable from profits. There is the statement in appellant's brief that Blakely and Pitts (and, presumably, Blakely and Lewis when Lewis was substituted for Pitts) were to pay ". . . ten percent on the money loaned them, and if profits were more than ten percent, one-third of [such profits] would be applied toward liquidation of the debt: that is, if there were an excess over the interest."

There is evidence that notes were given Turnage by Blakely and Pitts; that the accord between Blakely and Lewis was consummated before a definite agreement was reached with Pitts, and the Blakely-Pitts notes "were cancelled and destroyed." It is also contended that a mortgage covering fixtures was executed to secure the notes.

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[2] *Haycock* v. *Williams*, 54 Ark. 384, 16 S. W. 3; *Mehaffy* v. *Wilson*, 138 Ark. 281, 211 S. W. 148.

[3] *Buford* v. *Lewis*, 87 Ark. 412, 112 S. W. 963.

Turnage involved himself when he departed from the contract. Under its terms he did not have the right of interference—foreclosure, etc.—until a year from the time his advance of $2,000 was made. Yet within two months he designated Blakely as "buyer and boss," stating in the letter that Blakely should have "full charge." It is conceded by Turnage that fixtures were purchased in his name. Blakely and Pitts made a down payment from the original fund advanced by Turnage, and Turnage signed a note evidencing the balance agreed upon.

J. L. Daniels, Ritchie Grocer Company credit manager, went to Smackover to investigate the business. Daniels says he made the usual inquiries, then went to Turnage, who told him to do whatever he desired. In the course of conversations regarding Smackover Grocery Company—the trade name adopted by Blakely and Lewis—Turnage said he owned "everything over there." Turnage did not say he was a partner. Neither did he request that additional credit be extended, or guarantee payment of accounts which subsequently accrued. Pitts testified he sold his interest to Turnage. Blakely also testified Turnage bought Pitts' interest.

When the business opened at Smackover, Turnage made the necessary deposit for electric light connections. Current was billed to him. The lease on the building occupied in Smackover involved more space than that required for the grocery business. Although Blakely joined Turnage in signing the lease, rentals were paid to the owner who lived in Ohio, and not to Turnage.

There is testimony that Turnage counseled with Blakely and Lewis, advising them in respect of customer credits.

The court found that, in respect of creditors, the relationship between Blakely, Lewis and Turnage "was that of partners," and that "prior to April 26, 1939, they operated the Smackover Grocery Company."

The holding was correct. Affirmed.

WALKER *v.* MULLINS.

4-6864 165 S. W. 2d 607

Opinion delivered November 16, 1942.

Stevens & Cheatham, for appellant.

Harry B. Colay, for appellee.

HOLT, J. March 23, 1931, appellants, Cassie Walker and York Walker, her husband, together with Tyree Walker, executed and delivered three notes to Mrs. Della Mullins in the total amount of $588.49. The first note was for $200 and due November 1, 1931, the second note was also for $200, due November 1, 1932, and the third note was for $188.49 and due November 1, 1933. Each note bore 10 per cent. interest from maturity, and as security the Walkers executed a deed of trust in favor of Mrs. Mullins on an undivided one-twelfth interest of Cassie Walker in 360 acres of land in Columbia county. Mrs. Della Mullins died November 26, 1934. The first of the above notes was paid when due, but the principal and interest of the two remaining notes have not been paid. Appellee, A. R. Mullins, is the surviving husband

of Della Mullins, and appellees, Frank and Edwin Mullins, are the sons of A. R. Mullins and Mrs. Mullins.

The evidence shows that prior to January 2, 1937, appellants, upon being pressed to pay the two unpaid notes, agreed to execute a deed to appellees to the property described in the deed of trust, in satisfaction of the balance due on the debt, but this deed was never delivered. At the same time this agreement was made with respect to the deed, January 2, 1937, appellants, Carrie and York Walker, entered into what was termed a written "contract of sale and rent" with appellees, A. R. Mullins and his two sons, Edwin and Frank, under the terms of which it was provided that appellees agreed to sell to appellants a certain described tract of land in Columbia county containing thirty acres, the consideration being set out as eleven notes of $75 each, bearing interest from date until paid at 8 per cent. per annum, the first note due November 1, 1937, and one of the ten remaining notes to become due November 1 each year thereafter until November 1, 1947, when the last note was to become due. It was further stipulated that when all notes were paid appellees were to execute a warranty deed to the land described to appellants.

Appellants did not pay any of the eleven notes set out in this sale and repurchase agreement.

February 8, 1941, appellees filed suit against appellants to foreclose the deed of trust. Appellants denied that they owed the debt sued on and specifically pleaded as a defense the statute of limitation of five years, (Pope's Digest, § 8933). From a decree in favor of appellees is this appeal.

Appellants contended below, and insist here, that the debt sued on is barred by the five-year statute of limitation.

The trial court made certain findings and conclusions from which we quote the following: "Before the said notes and deed of trust were barred by the statute of limitations, plaintiffs began pressing defendants for payment of said indebtedness, and as a result thereof plaintiffs and defendants entered into an agreement

whereby defendants, Cassie Walker and York Walker, were to deed to plaintiffs the lands covered by their deed of trust and in turn defendants were to repurchase same by the payment of $75 per year for eleven years, which represented the interest and principal of the indebtedness contained in the notes sued on herein. This agreement was entered into on the 2d day of January, 1937. However, the deed of conveyance from the defendants to the plaintiffs was never delivered, but the plaintiffs and defendants did execute a rent and sale contract which set out the indebtedness, and conveyed the following lands in Columbia county, Arkansas, to-wit: (here follows description of the land, containing thirty acres) to defendants, provided they made the payments set out therein. The land as described in the deed of trust had been divided by the heirs of the Wm. Doss estate, and the land included in the contract of repurchase represented Cassie Walker's undivided 1-12th interest in the 360 acres aforesaid. The court finds that the aforesaid contract of repurchase, executed for the specific purpose of preventing foreclosure of the deed of trust, and including the debt sued on herein as the consideration therefor, being in writing, signed by all of the parties hereto, stayed the statute of limitations and made a new point for same to begin to run, and that said notes and deed of trust are not barred by said statute, and that plaintiffs should have judgment on their notes sued on herein."

It is our view that this finding is supported by a great preponderance of the testimony and the conclusions reached are correct. It must be borne in mind that appellants admit the execution of the two unpaid notes and deed of trust upon which this suit is based. These notes, together with the deed of trust, were executed in favor of Mrs. Della Mullins, the wife of appellee, A. R. Mullins, and the mother of Frank and Edwin Mullins, her two sons and sole surviving heirs. These notes were not paid on January 2, 1937, when the contract of sale and rent, *supra,* was entered into between appellees and appellants. There was but one debt which appellants owed appellees at that time and that was the amount due

on these two unpaid notes. While the debt in question is not specifically identified in the sale and rent agreement, we think it is identified by implication. The rights only of the appellants, makers of the notes and deed of trust, and appellees, the heirs of the grantee in the deed of trust, Mrs. Della Mullins, are present. The rights of third parties are not involved, and we think the sale agreement, *supra,* was a sufficient acknowledgment of the debt, and created a new date from which the statute of limitation began to run. On the evidence before us we think it clear also that the land described in the deed of trust as one-twelfth of 360 acres in Columbia county, which represented the interest of Cassie Walker in the estate of Wm. Doss, deceased, is the same land described in the sale and rent contract, *supra,* representing thirty acres after her interest in the Doss estate had been partitioned and set aside to her. In other words, the description in the deed of trust represents her undivided one-twelfth interest, whereas the description in the rent and sale contract represents her interest after the division.

On the question whether there has been a written acknowledgment of the existence of a specific debt sufficient to create a new period from which the statute of limitation runs, this court in a very recent decision, *Street Improvement District No. 113* v. *Mooney,* 203 Ark. 745, 158 S. W. 2d 661, said (quoting with approval from *Hunt et al.* v. *Lyndonville Savings Bank & Trust Co., et al.,* 103 Fed. 852): "In considering whether there has been a sufficient acknowledgment in writing to toll the statute of limitations, the question to be determined is the intention of the debtor. It is generally held to be sufficient if, by fair construction, the writing constitutes an admission that the claim is a subsisting debt unaccompanied by any circumstances repelling the presumption of the party's willingness or intention to pay. . . . A quotation from 19 American & English Encyclopedia of Law, (2d Ed.) 303, is: 'A mere acknowledgment of the claim as an existing obligation is such an admission as the law will imply therefrom a new promise to pay, which will start the statute anew, when it is not accompanied by anything negativing the presumption of an intention

to pay the debt.' . . . Wood on Limitations, vol. 1 (4 Ed.), p. 344, states the rule to be that where an acknowledgment is relied upon to renew a debt, four requisites are indispensable: (1) The acknowledgment must be in terms sufficient to warrant the inference of a promise to pay the debt. (2) It must be made to the proper person. (3) It must be made by the proper person. (4) Necessary formalities must attend, where such are required by statute. . . . It is then said 'From these rules it will be seen that, whatever abstruse theories may formerly have existed in reference to the principles upon which these statutes are predicated or in reference to the presumption arising therefrom, it is now well settled that no acknowledgment is sufficient to take a case out of the statute, unless it is of such a character that a new promise sufficient to revive the debt can be fairly drawn therefrom; and the theory upon which the courts proceed is that the old debt forms a good consideration for a new promise, either express or implied, and that any clear and unequivocal admission of the debt as an existing liability carries with it an implied promise to pay, unless such inference is rebutted either by the circumstances or the language used.' "

Finding no error, the decree is affirmed.

HARDIN, COMMISSIONER OF REVENUES, *v.* NORSWORTHY, COUNTY JUDGE.

4-6987 165 S. W. 2d 609

Opinion delivered November 16, 1942.

[redacted]

Herrn Northcutt and *O. T. Ward,* for petitioner.

M. F. Elms, for respondent.

GRIFFIN SMITH, C. J. Judge W. H. Norsworthy of Arkansas county, in the absence of Circuit Judge W. J. Waggoner and Chancellor Harry T. Wooldridge, enjoined John Gunnell as circuit clerk from issuing a writ of execution on a certificate of indebtedness filed in compliance with § 10 of Act 386, approved March 26, 1941.

It is contended by the commissioner of revenues that the certificate followed a finding that C. W. Trotter owed $257.65 he should have collected as tax on merchandise sold through his food market at Stuttgart. A ten percent penalty was added. Subsection (b), § 9, Act 386. The sheriff was also enjoined from levying on the taxpayer's property if a writ of execution should issue.

The certificate was filed September 11, 1942. Judge Norsworthy's injunction is dated September 14. Subsequently the chancellor issued a similar order.

Certiorari has been resorted to by the commissioner of revenues in an effort to have the injunction dissolved on the ground that the lower court's actions were void.

Contentions are, (1) that the supreme court is without jurisdiction. (2) The finding is void (a) because it is violative of § 1 of art. 7 of the constitution in that the

certificate under Act 386, issued without judicial determination, is given judgment force. (b) Act 386 is violative of Amendment No. 16 to the constitution in that trial by jury is denied. (3) Certiorari does not lie when the right of appeal exists. (4) It is denied that Trotter was accorded a hearing in response to his request, but if it should be held there had been a hearing, a letter dated August 27 was received, content of which justified Trotter in believing the matter was being held open. (5) If it be conceded that a hearing was had August 24, still the certificate was issued September 10 and filed a day later. Act 386 provides thirty days for appeal to the chancery court of Pulaski county. Since but eighteen days intervened between hearing and issuance of the certificate, it was prematurely filed.

First.—The commissioner, as petitioner, had the right of appeal. Act 355, approved March 25, 1937.

Certiorari is a remedy to quash irregular proceedings, "but only for errors apparent on the face of the record; not to look beyond the record to ascertain the actual merits of a controversy or to control discretion or to review a finding upon facts." *Lindsay* v. *Lindley,* 20 Ark. 573. In *Burgett* v. *Apperson,* 52 Ark. 213, 12 S. W. 559, it was held that certiorari may be used to correct erroneous proceedings, "as well as the want of jurisdiction." Errors in the assumption of jurisdiction are properly correctible on certiorari; but where errors relate to conclusions of law in deciding the case on its merits, they can only be corrected on appeal, unless the party is prevented from appealing by unavoidable circumstances. *Flournoy* v. *Payne,* 28 Ark. 87.

A more liberal view was expressed in *Williamson* v. *Mitchell Auto Co.,* 181 Ark. 693, 27 S. W. 2d 96, where it was said that where time for appeal has not expired, the Supreme Court will treat an application for a writ of certiorari as an appeal.

In the instant case the parties have gone beyond the record through introduction of letters and by statements; hence the proceeding will be treated as an appeal.

Second.—(a) The tax is fixed by the general assembly as distinguished from an act of the commissioner. It was the merchant's duty to collect and pay over, and to keep accurate records ". . . of gross receipts or gross proceeds of sales taxable and nontaxable." It is clear this was not done. It therefore devolved upon the commissioner to have his auditors ascertain the indebtedness in the most practicable manner expressly or impliedly authorized by Act 386. When this was done and Trotter was afforded an opportunity to refute the claim thus determined, and he did not do so because, as he admitted in correspondence, records could not be gotten, the legislative direction to the commissioner to file his certificate became a mandate and a lien attached from the time the certificate was entered.

(b) This is not a common law action wherein trial by jury is guaranteed, nor is there a statutory provision according such right.[1] Intricate accounting is involved, and a court of chancery is not without jurisdiction.

Third.—Trotter was in the commissioner's office for a hearing either August 24 or August 26. There is some uncertainty as to the exact date. A letter written on behalf of the commissioner August 26 begins with the statement: "Within a few moments after you left the office this morning, Mr. Hardin returned and I took your file to him for investigation. . . ." Thereafter Trotter wrote that he could not supply copies of invoices. Evidence that he was misled into thinking another hearing would be accorded is not sufficient to justify an order upholding the injunction on the ground that he was deceived.

Fourth.—Trotter had thirty days within which to appeal to the chancery court of Pulaski county. *Hardin, Commissioner,* v. *Gautney, Chancellor, ante,* p. 723, 164 S. W. 2d 427. The issuance of the certificate of indebtedness within that time was proper. Under Act 386 the amount fixed by the commissioner should have been paid and an action brought for refund of any excess shown

[1] *Govan* v. *Jackson,* 32 Ark. 553; *Minnequa Cooperage Company* v. *Hendricks, Judge,* 130 Ark. 264, 197 S. W. 280, L. R. A. 1918D, 477, Ann. Cas. 1918D, 687.

to have been collected. This is not a suit against the state. A fund of $2,500 was created by Act 219, approved March 25, 1941, for payment of claims of this character and an unexpended balance was available (and is still available) to satisfy a demand much larger than the one in controversy.

Had an appeal been taken in the manner provided by Act 386, the certificate would have been automatically superseded.

The injunction is dissolved.

HARRIS AND HIGGINS *v.* STATE.

4274 165 S. W. 2d 895

Opinion delivered November 16, 1942.

Alfred Featherston, for appellants.

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

SMITH, J. J. D. Harris, Herman Higgins, and Gerald Higgins, two of them young men, the other a boy, were charged, in an information filed by the prosecuting attorney, with stealing nine hogs, the property of one Rush Clark, in Clark county, Arkansas. At the trial from which is this appeal, the court dismissed the prosecution against the boy, on account of his youth. The other two defendants were convicted, and given a sentence of one year each in the penitentiary, from which judgment is this appeal.

It is admitted that the defendants took possession of the hogs, and confined all of them, except one, in a pen. There is some question whether the hogs were taken in Clark or in Pike county, but the verdict of the jury is conclusive of that question, as the jury was told to acquit the defendants unless it were found that the taking occurred in Clark county, an instruction more favorable than defendants were entitled to have given.

The hogs ran at large in an area on both sides of the river which, in that locality, formed the boundary between Pike and Clark counties. The owner of the hogs lived in Clark county, the defendants in Pike county.

Pike county has a stock law which authorizes any one to take up hogs running at large in that county, and to detain them until the charge fixed by law has been paid for their detention. The defendants were arrested when the hogs were found in their possession, and each of them signed a statement, all of which statements were offered in evidence. The taking up of the hogs was admitted in all these statements, but it was recited that the parties intended to notify Clark that they had his hogs, but that they were arrested before they had given this notice.

The defendants offered testimony, which the court refused to admit, to the effect that there was a general impression that Clark county had a stock law similar to that of Pike county, which authorized any one to take up and confine hogs running at large in Clark county. But there does not appear to have been any such law in force in Clark county.

This testimony was properly excluded, for the reason, if for no other, that the defendants did not testify that they were laboring under any such misapprehension. Their written statements having been admitted in evidence as in the nature of confessions, it was, of course, proper for the jury to consider the statements in their entirety, that is, not only their admissions as to what they had done, but also their explanation as to why they had done it. None of them claimed in these statements that they were under any misapprehension as to Clark county having a stock law similar to that in force in Pike county, which permitted any one to take up and confine hogs running at large. Defendants did not testify at the trial, and the only explanation offered by them as to their own intentions was that contained in their signed statements. Defendant Harris said, in his statement, that he wrote Clark a letter the day after he took these hogs up; but Clark was not asked anything about this letter.

Upon the question of the intention of the defendants in taking up the hogs the court gave, at their request, an instruction reading as follows: "8. You are instructed that even though you find from the evidence that all or part of the hogs alleged to have been stolen were taken possession of by the defendants in Clark county and where there is no law against hogs running at large, still if you find that they had no intention to steal said hogs at the time they took them into their possession, but intended to put them up and make the owner pay for taking up said hogs, then the defendants would not be guilty and you should acquit them."

Three other instructions of similar purport were given at the request of the defendants, and they were not entitled to have the law more favorably declared. Inasmuch as the defendants, who lived in Pike county, had gone into Clark, the adjoining county, and had there assembled the hogs, and had driven them from Clark county into Pike county, we are unable to say that the jury was not warranted in finding that this was done for the purpose of stealing the hogs.

The intent to steal is the essence of the crime of larceny; but the existence of this intent was submitted to and has been concluded by the verdict of the jury.

Judgments affirmed.

LEWIS *v.* WEBB.

4-6862 165 S. W. 2d 892

Opinion delivered November 23, 1942.

Jo M. Walker, for appellant.

Dinning & Dinning, for appellee.

HUMPHREYS, J. On April 29, 1941, appellant herein, plaintiff below, brought suit against J. W. Webb, appellee herein, defendant below, in the chancery court of Phillips county, Arkansas, alleging that she was the owner and in possession of: "The 2/3 of the south half of the northwest quarter of section seventeen, in township one south, range two east of the fifth principal meridian, also described as 53 1/3 acres off the west end of the south half of the northwest quarter of section seventeen, township one south, range two east of the fifth principal meridian, Phillips county, Arkansas."

It was alleged in her complaint that on the 7th day of December, 1938, J. W. Webb obtained a deed from Wallace Harper and wife conveying said real estate to him, and that after procuring said deed he, J. W. Webb, attempted by threats of violence to oust her tenant from said premises and has stopped him by such threats from pursuing his farm work.

She further alleged in her complaint that, at the time of the conveyance by Wallace Harper and his wife, the Harpers had no title to or rights in said premises, and that the deed casts a cloud upon her title; and being without remedy at law she prayed that said deed be canceled, set aside and held for naught, and that J. W. Webb be restrained from interfering with her possession of said premises.

On the second day of May, 1941, Hon. E. M. Pipkin, judge of the Phillips circuit court, in the absence of the chancellor and after a hearing before him, issued a temporary restraining order prohibiting J. W. Webb from going upon said property and taking possession thereof.

On May 3, 1941, J. W. Webb filed an answer to the complaint and a motion to dissolve the temporary restraining order. In his answer, he denied that Elvira W. Lewis has any title or interest in said real estate or any right to the possession thereof; that on the contrary his grantor, Wallace Harper, obtained a tax deed to said land from the state of Arkansas on the 14th day of April, 1932, and that his grantor had been and was at the time of the execution of the deed to him in the actual, open, notorious, adverse and exclusive possession of said property for more than eight years; that the said property was forfeited to the Greenbrier Drainage District of Phillips county, Arkansas, for the nonpayment of the assessments due it, and that said property was bought in by said drainage district at a sale for the purpose of foreclosing the lien of the district for the payment of taxes, and that after said district acquired title thereto he entered into a contract with said district for the purchase of said lands for the sum of $300 and paid $100 as part of the purchase price therefor, and that he is now

operating said property under a contract or agreement with said district for the purchase of said land; that thereafter he arranged for the cultivation of said land during the year 1941, but that appellant, through her husband, has interfered with, threatened and tried to intimidate appellee in the operation of said property and the cultivation of said land; that on the second day of May, 1941, the Hon. E. M. Pipkin, judge of the Phillips circuit court, at a hearing before him, issued a temporary restraining order enjoining appellee from going upon said property and taking possession thereof, and that the effect of such a restraining order will be to place appellant in the possession of said land which she does not own and in which she has no interest and will prevent appellee from using or cultivating said land during the year 1941 either in person or by tenant and prayed that said temporary restraining order be dissolved and set aside, and that upon final hearing the complaint of appellant be dismissed for the want of equity.

On May 13, 1941, after a hearing, the chancery court of Phillips county decided that he had jurisdiction of the subject-matter of the alleged cause of action and continued in effect until further order of the court the restraining order theretofore issued by the circuit judge in his absence, but required Elvira W. Lewis to give a bond in the sum of $200 conditioned for the payment of any damages that appellee might sustain on account of the issuance of the restraining order. Pursuant to the order appellant gave the required bond which was approved and filed on May 19, 1941.

In the course of the trial of the cause, a great mass of testimony was introduced including the proceedings in a number of lawsuits between parties in the alleged chain of title of appellant, the muniments of title relied on by appellant and appellee and the testimony of many witnesses relating to the actual possession of the real estate in question covering a long period of time. It could serve no useful purpose to set out all this testimony in this opinion and to do so would extend the opinion to a most unusual length. We do not regard it necessary

to do so to determine the issues involved between appellant and appellee. Suffice it to say that the particular tract of land involved in this suit, consisting of 53 1/3 acres, was owned by Beulah Hill who had inherited it from her mother and a brother. The land is a part of the 160 acres which was formerly owned by Gabe Johnson. Gabe Johnson died in the year 1912 and left four children surviving him, one of whom was the mother of Beulah Hill. Later, one of these children died unmarried and without issue and his interest was inherited by the other three children. There was a partition of the land on or about 1918, which resulted in Beulah Hill acquiring 40 acres by inheritance from her mother and 13 1/3 acres as her share of her uncle's interest, thus giving her 53 1/3 acres, being the west 53 1/3 acres of the south half of the northwest quarter of section 17, township 1 south, range 2 east, in Phillips county, Arkansas. On July 3, 1929, Beulah Hill and her father, Henry Giles, who was living with her on said tract of land, executed to appellant, Elvira W. Lewis, their note for $500 for advances which had been made Beulah Hill and Henry Giles to operate the farm, bearing interest at ten per cent. from date until paid, due and payable January 1, 1931, and executed a mortgage or deed of trust to secure same. The land was described as being situated in Phillips county, state of Arkansas, as follows: "2/3 of south half of the northwest quarter of section 17, township 1, range 2 east, containing 53.33 acres."

This note was never paid. Appellant, through her husband, made the following marginal entry on said mortgage or deed of trust: "Jan. 1st, 36, 50 int. on this mtge. Elvira W. Lewis by J. C. Lewis."

The attestation of this marginal entry on the record by the clerk was not dated. There also appears on the margin of the record of the mortgage the following entry: "$20 paid on within indebtedness the 1st day of Dec., 1937. Elvira W. Lewis by Joe M. Walker, Atty. This April 19, 1940. Attest: Jack McDonald, Clerk by H. H. Trumper."

This note was never paid, but the mortgage was foreclosed at the July term, 1940, of the chancery court of Phillips county, and the sale of the land under the foreclosure proceedings was approved on October 17, 1940. Appellant was the purchaser at the sale and procured a deed from the commissioner, and this was introduced in evidence as one of her muniments of title. The deed she procured from the commissioner contained the same description as the description in her mortgage or deed of trust. Appellant was placed in possession of the land, 53 1/3 acres off the west end of the south half of the northwest quarter of section 17, township 1 south, range 2 east, by the sheriff under a writ of assistance issued in the foreclosure proceedings, which writ of assistance described the land as it had been described in appellant's mortgage and in all of the foreclosure proceedings.

During the course of the trial appellant also introduced in evidence a deed from the commissioners of Greenbrier Drainage District of date June 3, 1941, to her conveying to her 53 1/3 acres off the west end of the south half of the northwest quarter of section 17, township 1 south, range 2 east, Phillips county, Arkansas. After the introduction of this deed by appellant as a muniment of title, appellee filed an amendment to his answer charging that said deed was procured from said drainage district through the misrepresentations and fraud of appellant's husband.

Appellant filed a reply to the answer denying that she had procured the deed from the drainage district through misrepresentations and fraud.

Much testimony was then introduced responsive to the issue joined in the amended answer and reply thereto.

The trial court, after hearing all the testimony introduced upon the issues joined in the original complaint and answer thereto and the testimony introduced upon the issue of fraud joined in the amended answer and reply thereto, found that the decree of foreclosure under which appellant obtained a commissioner's deed was void

on account of defective description of the land involved; that the mortgage debt owed by Beulah Hill and Henry Giles to appellant was barred as to third parties by reason of failure to make marginal indorsements on the record as required by the statute and that the deed of the Greenbrier Drainage District to appellant was procured by her through a misrepresentation of fact.

Based upon these findings the chancellor treated appellee's answer as a cross-complaint and canceled appellant's deed from the commissioners in the foreclosure proceedings and canceled the deed from the Greenbrier Drainage District to appellant and quieted the title to the 53 1/3 acres in appellee, from which findings and decree is this appeal.

Appellee concedes that after his grantor procured a donation tax deed from the state in 1932 the land in question was forfeited to the Greenbrier Drainage District for unpaid drainage district taxes; that the drainage district foreclosed its lien for the taxes and procured title to said land from which he never redeemed it. He also concedes that appellant obtained a deed from the Greenbrier Drainage District to said land on June 3, 1941, but alleges that she obtained this deed through misrepresentations made by her husband to the drainage district.

As we understand this record neither appellant nor appellee questions the Greenbrier Drainage District's title to said real estate and that being the case said district had a right to sell same to whomsoever it pleased. Appellee claims, however, that at the time appellant procured the deed from the Greenbrier Drainage District he had a contract with said district to buy it himself. When called upon to produce his contract he produced a receipt from the district for $100 for rent on the land for the year 1939. The writing he introduced was not such a contract upon which appellee could maintain suit for specific performance against the district. He did not make said district a party to this suit and seek specific performance of his contract or receipt. Said district is not seeking to cancel its deed to appellant on the ground that she procured the deed from it on misrepresentations

or fraud, so appellee is not in a position to do so for the district, based upon the unenforceable rent contract with the district. The rent contract gave appellee no such interest in the land itself upon which he could base an action to cancel appellant's deed from the district.

The trial court erred in dismissing appellant's complaint against appellee and canceling her deed to said land from the Greenbrier Drainage District, but on the contrary should have dismissed appellee's cross-complaint and canceled his deed to said land from Wallace Harper of date December 17, 1938.

On account of the error indicated the decree is reversed with directions to dismiss appellee's cross-complaint and cancel his deed from Wallace Harper, of date December 17, 1938, and to quiet appellant's title.

The Chief Justice did not participate in the consideration or determination of this case.

HENDERSON *v.* HENDERSON.

4-6869 165 S. W. 2d 897

Opinion delivered November 23, 1942.

McKay, McKay & Anderson, for appellant.

Wendell Utley and *Walter L. Brown,* for appellee.

McHaney, J. Appellants are the widow and all the heirs at law of W. D. Henderson, deceased, except appellee, Hoyette Henderson, who is also a son of W. D. Henderson by the appellee, Mae Henderson, the second wife of said W. D. Henderson. Appellants brought this action against appellees to cancel W. D. Henderson's deed to 150 acres of land to them, dated June 21, 1939, and recorded July 24, 1940. The grounds alleged for cancellation are that the deed was ante-dated and was not executed until on or about the date it was recorded, or, if executed on the date it bears, it was not delivered until July 24, 1940, and being the homestead of himself and wife, Roxie Henderson, it was void because not signed and acknowledged by her.

The facts are that W. D. Henderson had been married three times and had seven children, five by the first wife, one by appellee, Mae, and one by appellant, Roxie. In May, 1939, he filed suit for divorce against Mae, which resulted in a decree in his favor on June 20, 1939, he having made a previous property settlement with her for a consideration of $1,000 paid in cash. On July 6, 1939, he married appellant, Roxie. Their married life was not altogether harmonious and some time prior to June 3, 1940, he filed suit for divorce against Roxie. On the latter date the court made an order requiring him to pay Roxie suit money and lying in expenses of $250, she being enciente at the time. No decree of divorce was ever obtained in this case, and he died January 18, 1941.

As stated above, the deed in question was dated June 21, 1939, the day following his divorce from Mae and was to her and their son Hoyette. If the deed were executed and delivered on that date or at any time between that date and July 6, 1939, the date of his marriage to Roxie, it is conceded to be a valid conveyance of the land described which was his homestead. If it were either executed or delivered after July 6, it is invalid and void because not signed and acknowledged by his wife, Roxie. This was the question presented to the trial court, and, while expressing some doubt about it, the deed was sustained and the complaint dismissed for want of equity.

The same question is presented by this appeal. The question is purely one of fact, even though the parties appear to disagree as to the *quantum* of proof required to cancel the deed. Appellant says that only a preponderance of the evidence is required to show either that the deed was not executed on June 21, 1939, or that it was not delivered on that date, and cites *Thomas* v. *Langley,* 200 Ark. 220, 138 S. W. 2d 380, to support his contention. This case does not support appellant as to the date of the execution of the deed. That case involved only the question of delivery and the decree canceling the deed because of nondelivery was affirmed because not against the preponderance of the evidence. None of the provisions of the deed was involved. Here the date of the deed is also involved. In the recent case of *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253, coming from the same court and with the same counsel for appellant as here, we said: "Before we would be warranted in setting aside the solemn recitals in a deed, a written instrument signed and acknowledged, the *quantum* of testimony required must rise above a preponderance of the testimony. To do this the evidence must be clear, cogent and convincing. A mere preponderance is not sufficient." The date of a deed is one of its "solemn recitals." It might be, frequently is, and is here the most important recital. See, also, *Foster* v. *Dierks Lumber & Coal Co.,* 175 Ark. 73, 298 S. W. 495; *Bevens* v. *Brown,* 196 Ark. 1177, 120 S. W. 2d 574.

So we conclude that the clear and convincing evidence rule applies not only to the date a deed bears, but to all other of its recitals, and before a court of equity would be justified in canceling a deed because of any of its recitals, the evidence must be clear, satisfactory and convincing.

With this rule in view, we are unable to say the court erred in its decree. Some doubt was expressed by the court and there are some facts and circumstances not necessary to detail, that throw some doubt on the date and delivery of the deed. On the other hand, there is the testimony of the lawyer scrivener and the lawyer notary that the deed was drawn and acknowledged on the date

recited. On the question of delivery, there is the positive testimony of Hoyette Henderson and his mother to support the court's finding. While we, too, have some doubt about it, we are unwilling to overturn the decree on the weight and sufficiency of the evidence.

Affirmed.

TEASLEY *v.* THOMPSON.

4-6871 165 S. W. 2d 940

Opinion delivered November 23, 1942.

Zal B. Harrison, G. W. Barham and *J. Graham Sudbury,* for appellant.

Percy A. Wright, for appellee.

HOLT, J. Grace Thompson, appellee, was the mother of Inez Nelson Cabe, wife of Jim Cabe. Inez Cabe died June 6, 1940, in the home of her mother in Luxora, Arkansas.

September 9, 1940, Grace Thompson sued appellants, undertakers, alleging in her complaint, that appellants, by false representations, had secured the body of her deceased daughter for burial and had unlawfully retained possession for a period of seven days, over appellee's protest; that during this time the body deteriorated and was mutilated while in appellant's possession, and that she was deprived of the opportunity to give her daughter's body a Christian burial, and there was a prayer for damages. Appellants answered with a general denial and specifically pleaded as a defense an earlier suit filed by appellee as being *res judicata* of the issues in the present suit. Appellants also filed a cross-complaint in which they sought judgment for $40 for services alleged to have been rendered in removing the body from appellee's home and preparing it for burial. A jury trial resulted in a verdict for appellee in the amount of $140 and for appellants on their cross-complaint in the amount of $40. This appeal is from the judgment awarded appellee. There is no appeal from the judgment on the cross-complaint.

For a reversal, appellants contend, first, that appellee, Grace Thompson, was not the proper party to bring the suit; second, that the issues here were decided in

an earlier suit between the same parties and that their plea of *res judicata* should have been sustained, and, third, that there was error in giving and in refusing to give certain instructions.

Appellants' first contention that appellee was not the proper party to bring the suit can not be sustained for two reasons.

(1) The facts are that appellants did not raise this point either by demurrer or in their answer. During the trial of the cause, after the testimony of the parties had been concluded and while the court was instructing the jury, appellants for the first time questioned appellee's authority to bring the suit.

The rule is well settled that the question of defect of parties must be raised either by special plea or in the answer, and that it is too late to attempt to raise this question at the end of the trial, as in the instant case. In *Tipton* v. *Phillips,* 176 Ark. 308, 4 S. W. 2d 507, this court said: "The question of defect of parties was not raised by the appellant in its answer, nor by special plea for that purpose. A defense of defect of parties should be raised by answer or by special plea to that effect at the beginning and not at the end of a lawsuit." Section 1411, Pope's Digest, provides: "The defendant may demur to the complaint where it appears on its face that the plaintiff has not legal capacity to sue," and § 1414 contains this provision: "When any of the matters enumerated in § 1189 (§ 1411, Pope) do not appear upon the face of the complaint, the objections may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

We are also of the opinion that appellee, on the facts presented, was the proper party to bring the suit. While it appears that appellee's daughter, Inez Nelson Cabe, was married at the time of her death, she had spent the greater part of the last year of her life in the

home of her mother. During her last illness she was in her mother's home and was administered to and provided for by her mother. During all of her illness, which resulted in her death, her husband manifested not the slightest interest in his wife's welfare, made no inquiry or provisions for her, did not visit her and in fact there was no evidence in this record that he even attended the funeral. Under these circumstances we think it clear that the husband, as surviving spouse, waived any rights to custody, burial and other legal disposition of his wife's body, that he may have had. The general rule as to the rights of the surviving spouse is stated in American Jurisprudence, vol. 15, p. 834, § 9, in this language: "It is generally conceded that on the death of a husband or a wife, the primary and paramount right to possession of the body and to control the burial or other legal disposition thereof is in the surviving spouse, . . . The right of a surviving spouse to control the burial is dependent on the peculiar circumstances of each case, and may be waived by consent or otherwise," and in footnote 11, in support of the text, the author says: "Where the wife is not living with her husband at the time of his death or neglects or refuses to assume the trust incident to her right, a waiver of that right is implied and the right and duty immediately descends to the next of kin present and acting. In the case of a dead body needing burial, the right of the spouse must be promptly asserted, or the right to possession of the body for the purposes of interment will be held to have been waived in favor of the next of kin. *Southern L. & Health Ins. Co.* v. *Morgan,* 21 Ala. App. 5, 105 So. 161 (writ of certiorari denied in 213 Ala. 413, 105 So. 168) citing R. C. L." In the opinion in the Morgan case it is said: "From a reading of all the decisions from the American courts, it seems to be the law: (1) A dead body is not property in the common commercial sense of that term, and subject strictly to the laws of descent and distribution; (2) that the person having charge of a dead body for burial is in the exercise of a sacred trust for all who may, from family ties or friendship, have an interest in the remains; (3) that the right of possession for burial is a

legal right coupled with certain duties which the court will protect and that an unlawful interference with these rights is a basis for suit for damages; (4) that, in case of a husband and wife, the right of possession is in the surviving spouse, provided the husband and wife were living together at the time of the demise; (5) that the absence of the spouse, or his or her failure or refusal to act, has the effect of transferring the right of custody and duty of trusteeship to the next of kin in succession. (1) (2) (3) (4), *supra,* are, we think, supported by the weight of authority in the adjudicated cases. (5) is based upon the traditions, customs, and the necessities incident to a proper respect for the dead and the case of *Wright* v. *Hollywood Cem. Corp.,* 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621. . . . The dead man had been living with his father as a member of the family for some months before his death. Though he was sick and died, his wife never came or communicated or showed any interest in him. It therefore seems certain that they were not living together, and, if not legally separated, the facts would disclose a waiver of any rights as to the custody of the body which she may have had."

(2) Appellants' contention that an action brought by appellee prior to the institution of the present suit is *res judicata* of the issues here, we think is untenable. On this point the record reflects that on June 12, 1940, prior to the institution of the instant suit on September 9, 1940, appellee filed in the circuit court for the Chickasawba district of Mississippi county a "petition for injunction" against appellants, asking that they be enjoined from further interference with appellee's right to the custody of the body of her deceased daughter for the purpose of preservation and burial. No summons was issued on this petition. No response or answer was filed by appellants. No issues were joined. No testimony was heard, but on the same day the petition was filed the court made the following order: "Order of injunction. To the Teasley & Cobb Undertaking Co.: You are hereby enjoined from any and all further interference in the right of the plaintiff herein to the custody of the body of the plaintiff's deceased daughter and from any and all

further interference in the proper Christian burial of the same. Witness my hand and seal of this court this the 12th day of June, 1940. Neil Killough, Judge." This order was placed in the hands of the sheriff and served on appellants and the body of appellee's deceased daughter was turned over to appellee in compliance with the order. No further proceedings were had until the filing of the present suit almost three months later.

From the record, therefore, it is clear that the issues joined in the present suit were not raised in the injunction proceedings, *supra,* and no issues were tried in that action. In fact appellants were not even in court in the injunction proceedings since they were never summoned and did not appear.

Before appellants may successfully sustain the defense, that the former injunctive proceedings between the parties here were *res judicata* of this action, it is essential that they show that the parties and the issues in both actions were the same. Clearly, appellants have failed to make this showing.

(3) Finally, appellants argue that the trial court erred in refusing a certain instruction requested by appellants and in giving another at the request of appellee. We think it can serve no useful purpose to set out these instructions here. It suffices to say that after a careful examination of them it is our opinion that no error appears in this connection.

Finding no error, the judgment is affirmed.

BROTHERHOOD OF RAILROAD TRAINMEN *v.* DRAKE.

4-6863 165 S. W. 2d 947

Opinion delivered November 23, 1942.

E. W. Brockman, Mike Danaher and *Palmer Danaher*, for appellant.

Bridges, Bridges & Young and *Henry W. Gregory, Jr.*, for appellee.

McHaney, J. Appellee is the named beneficiary in a health and accident policy issued by appellants to her husband, Mack E. Drake. The policy was for $2,000 and insured him against loss of life, limb, sight or time resulting from purely accidental means and against loss of time from disease. One of its provisions was: "If the member shall, through accidental means, sustain bodily injuries as described in the insuring clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the member from the date of the accident or within ten days therefrom and result in any of the following specific losses within ninety days from the date of such accident, the brotherhood will pay the following amounts, to-wit:

"For loss of Life—The principal sum, and in addition, the monthly benefit for the period between date of accident and date of death."

Another provision of the policy, relating to notice is: "(4) Written notice of injury or of sickness on which

claim may be based must be given to the brotherhood within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. . . . (5) Such notice given by or on behalf of the member or beneficiary, as the case may be, to the brotherhood at its home office in Cleveland, Ohio, or to any authorized representative of the brotherhood, with particulars sufficient to identify the member, shall be deemed to be notice to the Brotherhood. Failure to give notice within the time provided in this certificate shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

Based on said policy, appellee brought this action to recover the principal sum and alleged that on January 15, 1941, her husband, the said Mack E. Drake, while performing his duties as a conductor for the St. Louis-Southwestern Railroad Company, was struck by moving freight cars, through purely accidental means, which, independently and exclusively of disease and all other causes, immediately, continuously and wholly disabled him within the meaning of part one of the policy from the date of the accident, or within ten days therefrom, and resulted in his death on February 14, 1941.

She prayed judgment for $2,000 on account of the death of insured, $80 as monthly benefit from date of accident to death, and $100 additional death benefit by reason of part three of the policy, or a total of $2,180. The answer was a general denial, but by amendment, it admitted appellee was entitled to receive $13.33 as compensation for loss of time due to illness, which amount was tendered.

Trial resulted in a verdict and judgment for $2,100 against appellant, from which is this appeal.

Under the undisputed facts presented by this record, appellee was confronted by two insurmountable obstacles the existence of either of which prevented a recovery by her, and entitled appellants to an instructed verdict in their favor. One is the failure to give the written notice

of the alleged accidental injury suffered by deceased within the time required by the policy. The other is that deceased was not disabled as defined in the clause above quoted "from the date of the accident nor within ten days therefrom."

As to the first proposition, it is claimed that Mr. Drake was struck and injured by moving cars on the night of January 15, 1941, at about 1:30 a. m. No one saw the accident, but we assume for the purpose of this opinion, that the evidence as to his having received an accidental injury at that time was sufficient to take the question to the jury. But it is undisputed that shortly thereafter he left on his run as conductor of a freight train and performed all his duties as such to the satisfaction of his employer, and that he continued to make all his runs and to perform all his duties until February 3, his last run being completed on February 2. One of the brakemen of the last run Drake made, G. B. Fountain, testified that he was able on that trip, from Pine Bluff to Jonesboro and return, to perform all his duties as conductor in the regular and usual manner, looking after the placing or setting out of cars. The railroad records showed that from January 15 to February 2, 1941, he made ten round trips out on the road, working eighteen days. On February 7, 1941, he mailed a card to appellants postmarked that date, intended as a claim for disability in which he gave his name, address and lodge number. In answer to the question "Was disability due to accident?" he answered "No." The questions following, calling for "date of accident" and "nature of injury," were left blank. All other questions on the card were left blank and unanswered, including one relating to whether disability was due to illness, except the questions, "When did you quit work?" the answer being, "2 months 2 date 7:30 a. m." and some others, not material here.

The policy requires notice of accident to be given within twenty days after the accident and none was given within that time. It is further provided that: "Failure to give notice within the time provided . . . shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that

notice was given as soon as was reasonably possible." We do not think this clause helps appellee for two reasons: (1) that he worked for 18 days continuously from the date of the alleged accident, during which time he could have given the notice, and (2) he did actually give notice of disability not due to accident and must have been because of illness, although he failed to say so, as the policy covered only disability for accident and for illness. In said notice he very definitely stated that his disability was not due to accident; therefore, it must have been for illness. So, appellee wholly failed to show that it was not reasonably possible to give such notice and that same was given as soon as was reasonably possible. In *Business Men's Assurance Co.* v. *Selvidge,* 187 Ark. 1040, 63 S. W. 2d 640, we said: "It is well settled that stipulations as to giving notice in policies of this character are reasonable and valid, and that where a written notice is required an oral notice is not sufficient. Also, that these provisions are for the purpose of giving opportunity for an early investigation of claim and injury."

As to the second proposition, the policy provides, as above quoted, that if the member shall suffer bodily injuries through accident, "which shall . . . immediately, continuously and wholly disable the member from the date of the accident or within ten days therefrom and result in any of the following specific losses, etc." Again assuming an accidental injury which he himself denied in writing, it is perfectly obvious and undisputed that Mr. Drake was neither immediately, continuously nor wholly disabled "from the date of the accident nor within ten days therefrom," and, therefore, if his death on February 14 was the result of the alleged accident, it was not covered by the clear and unambiguous language of the policy. He was not disabled, as provided, either from the date of the accident nor within ten days thereof, but, on the contrary, as stated above, he went out right away on his run and worked every day from January 15 to February 2, both inclusive. It is difficult to understand how a man can be totally and permanently disabled, and yet perform all the material and substantial duties of his work. In this respect, this case differs from *Mut.*

Ben. Health & Acc. Assoc. v. *Bird,* 185 Ark. 445, 47 S. W. 2d 812, and other cases cited and relied on by appellee.

For either or both reasons, the learned trial court should have directed a verdict for appellant. Not having done so, the judgment is reversed and, as the case appears to have been fully developed, it will be dismissed, except that since appellant admitted it owed appellee $13.33, judgment for this amount will be awarded here.

JACOBS *v.* KNOX

4-6872 166 S. W. 2d 7

Opinion delivered November 30, 1942.

Wade Kitchens, for appellant.

Jack Machen, for appellee.

GRIFFIN SMITH, C. J. May 20, 1937, there was foreclosure of a mortgage executed in 1919 by Brooks Jacobs and his wife, Lilian.[1] The decree recites that default occurred October 1, 1933, and thereafter only $21.41 was paid, leaving a balance of $1,838.22. It was also contended that taxes were not paid after 1932, and that the land bank had expended $192.53 to protect its interests. Sale June 28, 1937, was to John G. Knox.[2]

There is testimony that Knox, after bidding the property in for $2,530 on Saturday, told the clerk of the chancery court he had the money and was ready to close the transaction. The clerk suggested that he return.

When Knox endeavored the following Monday to consummate his bid, he was met by a federal conciliator's intervention, filed by C. M. Martin, attorney for the Jacobs heirs. The chancery court thereupon ordered all proceedings stayed.[3] While jurisdiction of the state court was in suspense, pine timber on the 252 acres included in the mortgage was sold for $1,000, the amount being applied on the land bank's debt.

May 27, 1941, without notice to Knox, the commissioner's sale of 1937 was set aside. Knox intervened July 5, 1941, in consequence of which chancery court vacated its decree of May 27.

Bankruptcy proceedings were dismissed November 10, 1941, whereupon certified copy of the federal court order was filed in chancery court. Knox immediately left with the clerk the personal check of a third party. The Clerk testified he considered the check an equiva-

1—The mortgage was to secure $1,500 borrowed of St. Louis Federal Land Bank with interest at 5½ per cent. The obligation was amortized, semi-annual payments being $48.75, except the last payment, which was $48.70, due October 1, 1953.

2—These amounts were increased through interest charges, taxes, etc., that accumulated between filing of the complaint and rendition of the decree, in consequence of which judgment was for $2,044.25. Although the decree mentions notes drawing interest at 5½% per annum, and 8% after maturity, the judgment bears interest at five per cent. No explanation of this apparent discrepancy is made. However, it is unimportant in view of the fact that the decree from which this appeal comes is affirmed.

3—Action by the conciliator for Columbia County was under authority of the Frazier-Lemke Act.

lent of money, in view of the known responsibility and integrity of its maker, Joe K. Mahony.

November 29, 1941, the court heard argument on the question of confirming or vacating the sale of 1937. The decree recites that Knox was purchaser at a reasonable price; that no other person made a substantial bid, and found that the deed should be approved.

This appeal is from the order of confirmation.[4]

In dismissing the intervention filed with the conciliator, the federal court was of opinion that the administrator of the estate of Brooks Jacobs was not authorized under the Frazier-Lemke Act, or any other statute, to place the Jacobs estate in bankruptcy.

There was no appeal from the holding that the entire proceeding, which resulted in delaying confirmation of the sale more than four years, was illegal (perhaps "unlegal" would be a better word) for want of jurisdiction.

4—Contentions made on behalf of the heirs were: (1) Knox had failed to give bond to secure his bid. (2) The price, $2,530, was "insignificant, unfair, and unreasonable for the reason that the land, at the time, was worth $4,500 to $5,000." (3) Deposit by Knox of the check of a third person was not a compliance with the court order of 1937. (4) Timber was sold without Knox' consent, the amount having been paid to Federal Land Bank, and the debt balance did not at the time exceptions were filed exceed $1,750. (5) The lands in 1937 were worth $4,500 without considering minerals. Oil and gas leases "on the north and adjoining said lands" have brought from $10 to $25 per acre; west and adjoining the lands oil and gas leases have brought $25 per acre. Royalties are worth $15 per acre, and were of that value when Knox made his purchase. (6) Royalties in section ten, immediately north of the lands, are worth $15 per acre, "and much royalty in section ten has been sold for $15." (7) Seven large oil fields were discovered in Columbia county before and after the sale to Knox. The land had considerable mineral value as distinguished from the fee, and the foreclosure sale was made during a period of depression. (8) The Brooks heirs were "scattered," and it had been difficult to communicate with them and arrange to pay the Federal Land Bank debt. Petitioners had not had time to seek buyers who would offer a reasonable price for the land. Some of the appellants (petitioners below) had "arranged" for a buyer who would pay $350 more than the sum bid by Knox. (9) Confirmation would place Knox in position to sue for value of the timber, now alleged to be worth four times the amount it sold for. (10) When the federal court caused the land to be appraised in 1938 and its value was fixed at $4,400, consideration was not given to the worth of minerals. [Two of the appraisers testified the appraisement was made in February 1940.]

The result is that a valid bid was made by Knox in 1937. He was willing to pay, but could not do so because the clerk thought Martin's petition on behalf of the heirs superseded state processes, and in consequence confirmation was defeated, and possession was withheld from the purchaser because of what was later found to be a mistaken belief upon the part of heirs that certain legal rights were available to them.

The sale was confirmed by a chancellor who has since died. His record on the bench is an enviable one. He was trusted, respected, beloved, honored—even revered—by those who knew him. Much testimony appears to have been given orally rather than by depositions. The Chancellor was familiar with transactions from initial steps in 1937 until the decree of confirmation was rendered in 1941. He had heard hundreds of cases involving land and mineral values in Columbia county. Based upon a record which does not show that the Jacobs tract sold for a sum inadequate in 1937, Judge Walker Smith thought substantial justice would be done by permitting the Knox bid to stand.

The question is, Did the court abuse its discretion? Our answer is that it did not. The transcript does not contain all of the record incident to Federal Land Bank's foreclosure procedure. According to the decree, minor heirs were represented by a guardian *ad litem,* while defense was made for them by an attorney *ad litem.* Heirs *sui juris* did not defend. It must be presumed, therefore, that the defense made for minors was because of legal necessity, the logical inference being that none of the defendants thought there was substantial equity in the property.

In *Martin* v. *Kelley et al.,* 190 Ark. 863, 81 S. W. 2d 933, it was held that in considering exceptions to confirmation in circumstances somewhat similar to those presented by the instant case, the pertinent inquiry should be whether, if the property should be resold within a reasonable time, it would bring a price substantially higher than the amount offered at the former sale; or, Is there

a prospective bidder who at resale will make a substantially higher offer?

While counsel for appellants stated, and no doubt honestly believed, that a better bid could be obtained, there is no testimony to this effect. But even if such testimony had been offered we would be unwilling to say the chancellor abused his discretion. Certainly there is no showing that the price proffered in 1937 was not reasonable. Following that offer the defendants for fifty-three months hindered Knox in his bid. If it be argued that they had a right to take advantage of the Frazier-Lemke Act, answer is that the federal court held the Act gave them no such right.

Affirmed.

ROLFE *v.* HUGHES.

4-6874 166 S. W. 2d 6

Opinion delivered November 30, 1942.

Mann & McCulloch and *Marvin B. Norfleet,* for appellant.

Fred A. Isgrig, for appellee.

HUMPHREYS, J. Appellees herein were plaintiffs below in an ejectment suit brought by them in the circuit court of St. Francis county against Will Carbage alleging that they were the owners and entitled to the possession, under the will of E. C. Hughes, deceased, of the following described land in St. Francis county, Arkansas, to-wit:

"Southeast quarter of section 32 and the south half of the southwest quarter of section 33, township 4 north, range 4 east, containing 240 acres, more or less." A copy of the will was attached to the complaint.

They alleged in their complaint that Will Carbage was in the unlawful possession of the land and had been since March 23, 1941, and in addition to the prayer for the recovery of the land they prayed for damages for the rental value thereof from March 23, 1941, until final disposition of the cause.

Will Carbage, the defendant in the ejectment suit was the tenant of the appellants and filed no answer.

Appellants intervened in the case and caused themselves to be made parties defendant. In their intervention they denied that appellees were the owners of said land under the will of E. C. Hughes, deceased, but on the contrary alleged that they were the owners of the land under the will of E. C. Hughes, deceased, through *mesne* conveyances from Lorena Utley (Hughes-Taylor) who took the title to said property in fee simple absolute under the will of E. C. Hughes, deceased, and in 1904 conveyed same to J. B. Terry in their chain of title.

Appellees filed an answer to the intervention of appellants and denied each and every material allegation contained therein.

Appellants and appellees waived the right of trial by jury and agreed that the cause might be tried before the circuit court sitting as judge and jury.

In accordance with the agreement, the court heard the case upon the complaint and exhibits thereto, the intervention and exhibits thereto, the testimony adduced by the respective parties and the exhibits thereto, from which he found that E. C. Hughes departed this life on September 13, 1897, and at the time of his death was the owner of the fee simple title and entitled to the possession of the land described in the complaint and under his last will and testament it was devised by E. C. Hughes to Lorena Utley (Hughes-Taylor) for the term of her natural life only, with remainder therein at her death to

her brothers and sisters in equal shares; that because of said devise in said last will and testament, the said Lorena Utley (Hughes-Taylor) having departed this life, appellees are the owners of said land in fee simple and are entitled to possession thereof.

Based upon these findings the court ordered and adjudged that appellees are entitled to the possession as owners in fee simple of the land described in the complaint and that the costs of the action be adjudged against the interveners (appellants herein) and further ordered that the interveners (appellants herein) pay the appellees the sum of $356.25 rent for the year 1941 and the sum of $34.81 for the 1940 taxes.

A motion for a new trial was filed and overruled and thereafter an appeal was duly prosecuted to this court.

Both appellants and appellees state that the sole issue presented by the record in the case for determination by this court is whether Lorena Utley (Hughes-Taylor) acquired fee simple title or merely a life estate under said last will and testament of E. C. Hughes, deceased. The will appears in the record and that portion thereof before us for construction is as follows: "The balance of my personal property and all my real estate, consisting of the Linden Farm, Jones place, the Casteel place, all in St. Francis county, Arkansas, I give to Lorena Utley during her life, and at her death to be equally divided between her brothers and sisters, I mean her legal heirs."

The exact clause of the will involved in this case was construed by this court in *Taylor* v. *Manley*, 151 Ark. 635, 237 S. W. 464, to the effect that the testator intended for Lorena Utley (Hughes-Taylor) to have a life estate in the real estate, and in the event of her death that the estate should go to her brothers and sisters, who, both at the time of the execution of the will and at the time of the testator's death when the will took effect, were the next of kin or legal heirs of Lorena Utley (Hughes-Taylor). This court said that the clause in the will, to-wit: "I give to Lorena Utley during her life and at her death to be equally divided between her brothers and sisters, I

mean her legal heirs, has the same meaning as if it had been written as follows: 'I give (the estate named) to Lorena Utley during her life, at her death to her brothers and sisters, who are her legal heirs to be equally divided between them.' In other words, the term 'legal heirs' was intended to describe her brothers and sisters at the time of the execution of the will. It was the evident purpose of the testator, we believe, to provide for those who were in being at the time of the will and not for those who were then unborn."

After a very thorough consideration and analysis of the identical clause in the will of E. C. Hughes, deceased, which is involved in the instant case, we are convinced that the construction given by this court in the case of *Taylor* v. *Manley, supra,* should be adhered to under the doctrine of *stare decisis.*

The judgment, therefore, is affirmed.

THOMAS BROS. LUMBER COMPANY *v.* HILL.

4-6919 166 S. W. 2d 3

Opinion delivered November 30, 1942.

Fred A. Isgrig and *Carl E. Langston,* for appellant.

G. W. Lookadoo, for appellee.

McHaney, J. Appellant, Thomas Bros. Lumber Co. is a partnership, composed of several brothers, and is engaged, in that firm name, in the operation of a saw mill and lumber yard at Curtis, Clark county, Arkansas. They employed one Johnie Bean, who owned a portable saw mill, to cut logs off their land and saw same into lumber for $10 per M. delivered. Bean hired and fired his own employees, but Thomas Bros. kept his pay roll and paid his men. The only control Thomas Bros. exercised over Bean was to designate the dimensions of the lumber cut from their logs. We assume that Bean was an independent contractor. On January 8, 1941, while Bean was cutting logs and sawing them into lumber for Thomas Bros., appellee, sawyer for Bean, fell into the saw and his right hand was severely injured, suffering the loss of three fingers and a part of his hand. On April 7, 1941, he filed a claim for compensation with the Workmen's Compensation Commission, in which he stated that his employer was Thomas Bros. and that appellant, Commercial Standard Insurance Co., was the insurance carrier. A policy of insurance was issued by appellant, Commercial Standard, to Thomas Bros. on December 5, 1940, and it defended the claim on the ground that its policy covered Thomas Bros. only and not Johnie Bean and his employees, one of which was appellee Hill; that Bean was an independent contractor of Thomas Bros.; and that neither the company nor its authorized agents intended to cover contractors or subcontractors of Thomas Bros. On the other hand appellee insisted that the policy covers him, irrespective of whether Johnie Bean was an independent contractor or an employee of Thomas Bros. at the time he was injured; and that it was the intention of all the parties—Thomas Bros., Johnie Bean and A. B. Banks Insurance Agency, general agents of Commercial Standard, as also the local agent or broker, Charlie East—when the policy was written on Thomas Bros. to cover the operations of Johnie Bean. Charlie East and Lawrence Banks of the A. B. Banks

Agency so testified, as did Johnie Bean and Ira Thomas, one of the partners. Bean testified that Mr. Thomas promised to look after his insurance coverage shortly before December 5, 1940, and that he started paying a premium on his insurance at that time, or about that date. Ira Thomas testified he told East to cover Johnie Bean's operations, and that they kept a copy of the payroll of Bean's Mill. East said that he was instructed by Thomas Bros. to procure Workmen's Compensation Insurance to cover them, Johnie Bean and Tom Marshall, another operator for Thomas Bros.; that he brokered the insurance through A. B. Banks Company of Fordyce and instructed them to cover Thomas Bros., Bean and Marshall and all their operations; that an initial payment on the premium of $512.50 was made and this amount was the deposit on insurance to cover all three insureds. They gave a binder on the 5th of December which covered all three and the policy was issued later. Lawrence Banks testified that: "At the time Thomas Bros.' policy was written Mr. East told me that a Mr. Bean and a Mr. Marshall were working for Thomas on a contract basis and would they come under Thomas Brothers' policy—I told him that they would."

A mass of testimony was given before the Commission and it made a finding that the policy covered Bean's employees and made an award to appellee, the amount of which is not here in question. An appeal was taken to the Clark circuit court where the judgment and award of the Commission were affirmed. This appeal followed.

For a reversal of this judgment, appellant insurance carrier (and it is the only real appellant) first says that since appellee was the employee of Bean, an independent contractor of Thomas Bros. who was not specifically named in the policy of insurance, and was not an employee of Thomas Bros., it is not liable to appellee. Section 6 of the Workmen's Compensation Law, Act 319 of 1939, p. 777, is quoted and it is stated that this section was borrowed from the New York Act with the construction theretofore placed on it by the appellate court of that state and certain cases are cited to the effect that

the insurance carrier for a contractor cannot be held for an injury to an employee of a subcontractor unless the carrier has specifically covered the subcontractor's employees in its policy. *Passarelli* v. *Columbia E. & C. Co.*, 270 N. Y. 68, 200 N. E. 583, and *Monello* v. *Klein*, 216 App. Div. 105, 214 N. Y. S. 486. Conceding this contention to be correct, we do not think it applicable here for this reason: Shortly after the policy was written, A. B. Banks & Co. sent to Charlie East for Thomas Bros. to execute the following agreement: "In consideration of the issuance of Workmen's Compensation coverage on our operations we understand that the policy covers all employees including the employees of any contractor or sub-contractor that we engage who has not provided Workmen's Compensation coverage of his operations.

"We agree to fully comply with § 3 of the Arkansas Workmen's Compensation Endorsement No. 347 attached to our policy.

"It is further agreed that in the event certificates of coverage are furnished, we shall require that such certificates will provide that we will be given fifteen days' notice of cancellation in the event of termination of such coverage." This agreement was executed by Thos. Bros., the six of them signing. The one executed shortly after December 5, 1940, was lost or misplaced by Banks, so he sent them another dated March 5, 1941, which was likewise executed. We think this instrument, no matter when actually executed by Thomas Bros., relates back to the effective date of the binder or policy and therefore covered "the employees of any contractor," one of which was Johnie Bean, just as completely and effectively as if he had been specifically mentioned therein.

The only other contention for a reversal of the judgment is that the Commission undertook to reform the policy issued to Thomas Bros. to "specifically cover" the appellee and, in doing so exceeded its powers, and the circuit court erred, therefore, in affirming the decision of the Commission. It is insisted with much persuasive force that reformation of written instruments is a matter for the exclusive exercise of equity jurisdiction, and that the Workmen's Compensation Law does

not confer any such authority on the Commission. While we are prepared to quite agree with appellant's argument in this regard, we think it inappropriate here. The Commission did not undertake to reform the policy, or if it did, it was unnecessary to the decision made by it. The writing executed by Thomas Bros. as above set out had the effect of reforming the policy as originally issued so as to cover the employees of contractors and subcontractors. This writing was executed in conformity with the original intent and purpose of all the parties and had the effect of extending coverage for Bean's employees, including appellee, from December 5, 1940. It is said that appellant has not collected premiums based on Bean's payroll. It either has or had the opportunity to so figure its premiums, since Thomas Bros. kept Bean's payroll. The $512.50 deposit made on the estimated premium to become due, a portion of which was paid by Bean, was for the purpose of covering all employees of Thomas Bros., Bean and Marshall, and Bean says he began paying on his *pro rata* share thereof at that time. After the injury to appellee, appellant issued to Bean an individual policy and it is argued this is indicative of the contention that he was not covered in the policy issued to Thomas Bros. On the contrary, we understand that Bean quit cutting for Thomas Bros. and, if so, would not be covered by its policy.

Affirmed.

JOHNSON, ADMINISTRATOR *v.* MURPHY.

4-6875 166 S. W. 2d 9

Opinion delivered November 30, 1942.

Means Wilkinson and *Geo. W. Johnson,* for appellant.

D. W. Bryan, for appellee.

GREENHAW, J. Appellant prosecutes this appeal from a judgment of the Sebastian probate court, Greenwood District, allowing the claim of appellee against the estate of Mrs. Matilda Richards in the sum of $478.25, for merchandise, after appellant as administrator of said estate had disallowed the claim.

The claim was filed February 28, 1941. The account upon which the claim was based started prior to August 1, 1921, at which time the balance due thereon was $506.03. The last sale to the deceased under this account was in 1933. The account showed numerous payments, with nothing paid after 1936 except in 1938. It is obvious that it was barred by the statute of limitation if the three small payments listed as credits in May, August and September, 1938, were not made. No one testified concerning these payments or credit entries except the claimant, appellee. Appellee was permitted to testify over the objections of appellant that the 1938 payments were made by the deceased and he entered the credits on his books; that the account was correct and the deceased knew what her account was, as he told her the amount of her balance, and that she saw the account.

Appellant contends that this testimony by appellee was incompetent as violative of § 5154 of Pope's Digest which reads as follows: "In civil action, no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party

shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."

He further contends that the mere fact that the alleged 1938 payments were entered on the account and appear as credits is insufficient, standing alone, to prove that these payments were in fact made by the deceased. We concur in both contentions.

In the case of *Slagle* v. *Box,* 124 Ark. 43, 186 S. W. 299, this court, in discussing credit indorsements on a note otherwise barred, said: "When payments are relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence in addition to the endorsement that the payment was in fact made. *Simpson* v. *Brown-Desnoyers Shoe Co.,* 70 Ark. 598, 70 S. W. 305; *Brown* v. *Hutchings,* 14 Ark. 83."

In *Kory* v. *East Arkansas Lumber Co.,* 181 Ark. 478, 26 S. W. 2d 896, this court said: "On the question of limitation, it might be said that with the exception of the notations on the note in question there is nothing to show that any payment has been made thereon. There is no evidence showing by whom the notations were made, or, indeed, if any payment had been made at all. No witness testified that any payments had been made, and in view of the appellant's testimony, we do not think the indorsement alone would be sufficient to establish the alleged payments. *Slagle* v. *Box,* 124 Ark. 43, 186 S. W. 299; *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, 59 A. L. R. 899."

Since there was no evidence that the alleged 1938 payments were in fact made except the testimony of appellee, which was incompetent, these credits stand unexplained, and under the above cases the mere indorsement on the account is insufficient to establish the alleged payments. The case of *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, is in point on both contentions, and is controlling here. That case involved the effect of indorsement of payments on a note, as well as both

competent and incompetent testimony concerning the alleged payments. It was held that Spangler, the payee and owner of the note, whose status there was in effect the same as that of appellee here, was precluded by § 4144 of Crawford & Moses' Digest, now § 5154 of Pope's Digest, above quoted, from testifying about the payments and credits. Among other things it was there said:

"Objection was made to the testimony of appellee to the effect that payments on the note were made in 1918 and in 1923, but the court overruled the objection tentatively, upon the statement of appellee's counsel that, if the testimony was not finally shown to be competent, it could be excluded and not considered by the court. The case was tried by the court without a jury. Counsel for appellee asserts that it was his understanding, at the time this testimony was offered, that other testimony would show the payments had been sent to appellee by Johnson, but, when the testimony failed to establish that fact, it was conceded that appellee had given incompetent testimony, in that he had testified to transactions with the ward of the defendant guardian, and that thereafter the court was not asked to, and did not, consider this incompetent testimony, and that this testimony was not considered by the court in the findings of fact made, but that the findings which were made were based upon testimony which was competent, to-wit, the testimony of Davis and Rhodes. . . .

"It is conceded that most of the testimony given by appellee was incompetent, as being in violation of the statute quoted above, but it is insisted that this testimony was not considered by the court, and that there was sufficient competent testimony to show a payment on the note by Johnson within five years of the date of the institution of this suit. . . .

"The competency of the testimony of the witnesses Davis and Rhodes is not questioned, and their testimony, if credited, as was done by the court, shows a payment on the note within five years of the date of the institution of the suit, and at a time when the maker of the note was sane.

"Now, if the payment credited as having been made in 1918 could be said to have been shown to have been made by competent testimony, then the note was not barred by the statute of limitations when the last payment was made in 1923. It was evidently the opinion of the trial court, as reflected by the findings of fact, that the indorsement of the 1918 payment arrested the running of the statute of limitations and formed a new period from which the statute ran. It has been said, however, that 'where payments are relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence, in addition to the indorsement, that the payment was in fact made.' *Slagle* v. *Box,* 124 Ark. 43, 186 S. W. 299; *Simpson* v. *Brown-Desnoyers Shoe Co.,* 70 Ark. 598, 70 S. W. 305, *Brown* v. *Hutchings,* 14 Ark. 83. As there was no other testimony that the payment indorsed in 1918 had been made except the indorsement itself and the incompetent testimony of Spangler, it must be held that the note was, in fact, barred by the statute of limitations when the payment was made in 1923. . . ."

In the comparatively recent case of *Graves* v. *Bowles,* 190 Ark. 579, 79 S. W. 2d 995, this court, in reversing the judgment of the circuit court allowing the claim, said: "The appellee testified in this case. He was not called by the adverse party, and most of his testimony was incompetent, and we feel impelled to say that the court in permitting this testimony to be introduced, suffered himself to be influenced thereby. The testimony, as to transactions with the deceased, is violative of § 4144, Crawford & Moses' Digest, and the cases there cited."

We, therefore, hold that as there was no evidence that the 1938 payments indorsed on the account had been made except indorsements themselves and the incompetent testimony of appellee, the account was barred by the statute of limitations when the claim was filed. Furthermore, the testimony of appellee as to transactions with the deceased was in violation of § 5154 of Pope's Digest.

Since this cause appears to have been fully developed, the judgment is reversed and the cause dismissed.

CADDO QUICKSILVER CORPORATION *v.* BARBER.

4-6898 166 S. W. 2d 1

Opinion delivered November 30, 1942.

J. H. Lookadoo, for appellant.

G. W. Lookadoo, for appellee.

SMITH, J. This is an appeal from the judgment of the Clark circuit court affirming an award of compensation to appellee to compensate an injury sustained by him while employed in a quicksilver mine operated by appellant. The injury was occasioned by a fall of sixty feet of a bucket in which appellee was being lowered into the mine. His leg was crushed, and an operation was required, the amputation being at a point about six or eight inches below the knee joint.

On September 18, 1941, the following award was made:

"Award

"Respondent will provide claimant with necessary medical attention to affect the healing of his injury and during such period of healing will pay claimant compensation at the rate of $13.36 per week. Claimant is ordered to co-operate in every respect with the respondent and its physicians in an effort to effect a healing of this injury.

"A fee in the amount of $50 is approved for claimant's attorney.

"Respondent will pay the costs. It is so ordered."

This award was made upon the following "Conclusions of Law" made by the Commission:

"Conclusions of Law

"In view of the medical evidence, we are of the opinion that the healing period has not ended and for that reason we do not consider it proper to enter a finding as to the permanent partial disability to the remaining portion of the right leg until the stump has healed. Indeed, it may be necessary to amputate additional portions of the leg, causing the case to fall within a different specific injury classification. This Commission will not enter an award for a specific injury until the healing period has terminated.

"We conclude that it is to the parties' best interests in this matter to order additional treatment so as to effect the earliest possible termination of the healing period and to hold in abeyance, pending the termination of the healing period, any opinion as to a specific injury.

"There is no evidence before this Commission to support claimant's contention that he sustained a permanent injury to his back and nervous system. We conclude, therefore, that any injury he might have suffered to his back and nervous system was of a temporary nature and is no longer present.

"The testimony is to the effect that claimant was working under a contract of hire for 35 cents per hour, 40 hours per week, and 52 1-2 cents per hour, 12 1-2 hours per week at the time of the injury. Accordingly, we conclude that claimant's weekly wage for the purpose of determining compensation is $20.56."

It is first insisted that an appeal was not perfected from this award within the time and in the manner provided and required by law, and that the right of appeal was not restored subsequently by the award made by the Commission on December 16, 1941.

This insistence is sufficiently answered by saying that the first award was temporary and provisional, and was not final nor intended to be so. The award which was final was made in December, 1941, and the appeal to the circuit court was prosecuted within the time and in the manner provided for and required by law, and the

right of appeal from the final award was not lost by the failure to appeal from the temporary and provisional award.

The final award of the Commission from which is this appeal required respondent, the employer, to pay appellee, the injured servant, compensation at the rate of $13.36 per week for 157 1-2 weeks, beginning December 16, 1941. This award was made upon the following "Findings of Fact" and "Conclusions of Law":

"Findings of Fact

"1.

"That the parties to this cause are employee and employer, respectively, within the meaning of the Arkansas Workmen's Compensation Law.

"2.

"That claimant sustained an accidental injury arising out of and in the course of employment on February 2, 1941, which resulted in permanent loss of use of 90 per centum of his right leg.

"Upon the above findings of fact, the Commission bases the following

"Conclusions of Law

"The medical evidence is to the effect that claimant's right leg was amputated at a point about 6 or 8 inches below the knee joint; that the stump has healed; that there is the usual amount of atrophy of the muscles below the knee joint and in the thigh of the leg; that the patella is severed and the upper and lower segments thereof are separated by 3 or 4 inches; that the condition of the patella interferes with the use of the artificial limb furnished claimant by the employer; and, that claimant's loss of use of the leg is from 85 to 90 per centum. Section 13 (c) (21) of the Workmen's Compensation Act provides that compensation for permanent partial loss or loss of use of a member shall be for the proportionate loss or loss of use of the member, and inasmuch as the

claimant has suffered a disabling injury to the knee as well as the loss of the lower leg, which was amputated between the knee and the ankle, we are of the opinion this provision of the Act is applicable for the purpose of evaluating the claim. On the basis of the medical evidence before the Commission as to the condition of the remaining portion of claimant's leg and our personal observation of claimant, we think that he has suffered a loss of 90 per centum of the use of the right leg, and so hold.

"Section 13 (c) (2) fixes the value of the loss of a leg at 175 weeks' compensation, 90 per centum of which is 157 1-2 weeks' compensation."

Reversal of the judgment of the Circuit Court affirming the award by the Commission is asked upon the following grounds:

"First: That there was no evidence to sustain the Commission in holding that according to the proof the appellee was entitled to $13.36 per week.

"Second: That there was no evidence or law to sustain the Commission in holding that the appellee was entitled to pay 157 1-2 weeks after the healing period.

"Third: That the appellee is in error in its contention that there was a final award made on the 18th day of September, 1941."

What has just been said disposes of appellant's third contention, which we decide in its favor. The decision of the other propositions involves questions of fact.

This case, like the recent case of *Mack Coal Co.* v. *Hill, ante,* p. 407, 162 S. W. 2d 906, arose out of an injury to an employee who was employed in a mine, the injury in each case being sustained in the course of that employment. The case construed our Workmen's Compensation Law (Act 319 of the Acts of 1939, p. 777,) as related to miners engaged in that employment; and we find it unnecessary to review the law of that subject as there stated.

Appellee was injured February 2, 1941, and had at that time been employed by appellant company for a period of six months. His normal pay was 35 cents per

hour for a 40-hour week, and under his contract he was paid time-and-a-half for any labor in excess of those hours. As appears to be quite common in this service, the employment was somewhat intermittent; but this *Mack* case, *supra,* announced the rule to be followed notwithstanding that fact, and we are unable to say that the rule there announced was not applied by the Commission and by the Circuit Court on appeal in the instant case. In any event, there is substantial testimony to support the award and the judgment of the Circuit Court.

We have less uncertainty as to the second assignment of error. As appears from the conclusions of law announced by the Commission upon which the first award was made, recited above, the Commission was in doubt whether "it may be necessary to amputate additional portions of the leg, causing the case to fall within a different specific injury classification." The amputation was below the knee, but appellee requests a second amputation above the knee, this for the reason that his "knee cap has been busted up," and he can bear no weight on the knee cap, which was split in two.

The medical examiner for the Commission reported: "*Present Condition*—The knee joint is not straight, the artificial leg sticks backward, cannot stand weight on leg, end of stump not healed, cannot walk without crutches. Fracture of patella makes it very painful when he tries to walk on the artificial leg. He complains of backache and that he is in a very nervous condition since this accident."

The Commission made no award and allowed no compensation for appellee's nervous condition.

An X-ray expert made the following report: "The distal end of the femur and the upper ends of the bones of the leg are included. There has been an amputation of the leg in the upper third of the leg. There also has been a fracture across the middle of the patella and the fragments are separated for one and three-fourths inches. There is, of course, nonunion of this injury. There is considerable demineralization of the bones of the knee and leg as a result of the injury and of the disuse."

This report, as we understand it, means, in the vernacular, that appellee has practically lost the use of this leg, and the surgeon who performed the operation and a doctor who has attended appellee since the amputation placed the loss at from 85 to 90 per cent of the use of the leg. The Commission fixed the loss at 90 per cent and computed the compensation on that basis. This computation of 90 per cent of the 175 weeks for which the statute provides compensation is 157 1-2 weeks, and compensation was ordered paid for that time. We are unable to say that this finding is unsupported by substantial testimony, and upon a consideration of the whole case, it appears that the judgment should be affirmed, and it is so ordered.

ARKANSAS BAKING COMPANY *v.* AARON.

4-6876 166 S. W. 2d 14

Opinion delivered November 30, 1942.

A. F. House and *Rowell, Rowell & Dickey,* for appellant.

Linwood L. Brickhouse, for appellee.

GRIFFIN SMITH, C. J. Appellee asked $5,000 to compensate damages and $150 as reimbursement for medical expenses because, as she says, illness resulted from eating a contaminated food made by appellant. The original complaint alleged that a mouse was baked in a cake, and that parts of the rodent, including skin, tail, and a jawbone segment with what appeared to be intact teeth, were found after a portion of the cake had been served and while the process of mastication was under way. A sister and niece were also affected, according to their testimony and the testimony of appellee. The complaint was amended by substitution of the word "hairy animal" for mouse. Judgment was for $400.

On the factual issue—that is, whether the cake, when sold by appellant, was tainted because of the foreign visitation—a jury question was made. Also, in view of the evidence, it was appropriate for the finders of facts to appraise the extent of injury and adjudge remuneration.

Objections, general and specific, were made to Instruction No. 3, requested by appellee, which declared the law to be ". . . that a manufacturer of cakes, such as the one in evidence, . . . is required to use such care in the manufacture and preparation . . . as will render them safe for human consumption." [1]

[1] In Mrs. Aaron's brief it is said: "Naturally appellee's attorney did have an instruction prepared correctly defining the degree of care required by appellant, *to accompany his* Instruction No. 3, but without any explanation from the record except merely the statement that appellant's instruction fully covered the question of the degree of care required [of] appellant, counsel for appellee did not submit his instruction. Had he done so, and had it been a duplicate of appellant's instruction upon the same subject, the court would then have refused appellant's instruction upon the grounds that the jury had already been fully instructed regarding the degree of care which appellant was required to use."

Instruction No. 3, given at appellant's request, is copied in the margin.[2] It is a correct statement. Each instruction is numbered three.

Frequently, in the briefs, there is reference to "plaintiff's instructions," and "defendant's instructions." These terms are used for identification. All instructions are the court's. Litigants do not give instructions; but, as counsel for appellant and counsel for appellee so appropriately recognize in the argument, instructions, considered as a whole, constitute the court's declaration of law applicable to the issues involved.

In a recent case considered on appeal, the trial court had given more than fifty instructions requested by counsel for one of the litigants, in addition to a large number offered by the opposing side. A multiplicity of instructions inevitably proves confusing to the jury, even if the court, after having heard argument by those learned in law, and after citation to authorities, is able to harmonize them by a refusal, a deletion, or an interlineation. A so-called Chinese puzzle has no mysteries that conflicting and confounding instructions do not challenge.

Reid's "Branson Instructions to Juries," Vol. 1, Third Edition, says "An instruction is an exposition of the principles of the law applicable to the case in its entirety, or to some branch or phase of the case, which it is the duty of the jury to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proved."[3]

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[2] ". . . one who eats cake is not entitled to recover damages simply because illness results therefrom. In order to recover damages the injured party must show that there was negligence on the part of the defendant in manufacturing the cake. Negligence is the failure to exercise that degree of care which a reasonably prudent person would exercise under similar conditions. If you find from the evidence that the defendant was not guilty of negligence as herein defined, then your verdict should be for the defendant."

[3] Chief Justice Fansler of the Supreme Court of Indiana said: "Courts are not required to follow the language of approved instructions, and may use any language that will correctly express the principles involved, but the numerous decisions of this court, dealing with erroneous instructions, furnishes ample evidence of the difficulties which may be involved in experimenting with new and untried phrases, and indicates the wisdom of adhering to approved instructions." *Beneks* v. *State*, 208 Ind. 317, 196 N. E. 73.

The vice argued against the instruction which told the jury that a manufacturer of cake was required to use such care as would render the commodity safe for human consumption is that it converts the baker into an insurer, irrespective of other considerations. While impliedly conceding that the instruction, standing alone, is open to the objection urged, appellee insists if error occurred it was cured when Instruction No. 3 (printed as the second footnote) told the jury that in order for Mrs. Aaron to receive compensation it was necessary that she show there was negligence in the manufacturing process.

In *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112, there is a declaration that "It is generally impossible to state all the law of a case in one instruction. If the various instructions given in a case separately present every phase of the law, as a harmonious whole, there is no error in a particular instruction failing to carry qualifications which are explained in others." But in *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, 124 S. W. 1048, it was said: ". . . Instructions, when taken together, should not be so conflicting as to confuse or mislead the jury, not giving them a certain guide to follow in making their verdict."

The defending baking company objected to Instruction No. 3 (requested by plaintiff) ". . . for the reason that it is not a proper declaration of the degree of care which is required of one manufacturing cakes." It was then said that in support of the instruction counsel for plaintiff relied upon *Anheuser-Busch, Inc.,* v. *Southard,* 191 Ark. 107, 84 S. W. 2d 89. In that case appellee's requested instruction No. 1 was given,[4] but in addition Instruction No. 6 was that manufacturers were only required to use ordinary care.

[4] The instruction was: ". . . it is the duty of the manufacturer of beverages to be offered for sale to the public to use such care in the manufacture, preparation, and bottling of such beverages as will render them safe for human consumption. . . . If such manufacturers negligently permit foreign substances to be bottled in such beverages, and a purchaser is injured by drinking a bottle of such beverage containing such foreign substance, and on account of such foreign substance, the manufacturer would be liable to such purchaser for such negligence."

The Southard opinion holds that Instruction No. 6 cured the error urged against Instruction No. 1, which would have made the manufacturer an insurer. It will be observed, however, that Instruction No. 1, in the sentence which told the jury that the manufacturer's duty was to produce a beverage safe for human consumption, stated that if the manufacturer *negligently* permitted deleterious foreign substances to contaminate the product to the injury of a consumer, liability would attach. In fact, "negligently" was followed in the same sentence with the statement that the manufacturer would be liable to the purchaser "for *such* negligence."

The instant case is distinguishable from *Anheuser-Busch* v. *Southard* in that Instruction No. 3 offered by Mrs. Aaron makes no mention of negligence. It asserts in a completed sentence without modification of any kind that appellant was required to use such care as would render the cake safe for human consumption. Under the express language the bakery was required to actually produce a wholesome commodity, whereas the law merely adjudges liability if the manufacturer failed to use ordinary care to prevent the consequences appellee complains of.

Of course all instructions are to be read together where that is possible. As we said in effect in *Russ* v. *Strickland,* 144 Ark. 642, 220 S. W. 451, verbal defects and inaccuracies will be disregarded where the instructions as a whole clearly present the issues; and while it is true that the two instructions numbered three, if read as a single direction, would correctly declare the law, yet they were given as separate pronouncements, each available to jurors who would not necessarily read into Instruction No. 3 given at plaintiff's request the language embraced in Instruction No. 3 given at the defendant's insistence. Read separately they are inconsistent and contradictory.

The rule stated in *Darling* v. *Dent,* 82 Ark. 76, 100 S. W. 747, is that prejudice results where the court gives conflicting instructions, and this is particularly true if the conflict is of a nature which may have misled the

jury, although, as was said in *Bain* v. *Ft. Smith Light & Traction Co.*, 116 Ark. 125, 172 S. W. 843, L. R. A. 1915D, 1021, instructions should not be considered as in conflict where they can be harmonized; nor can there be conflict between an instruction giving a general rule and an instruction giving an exception thereto. *Bush* v. *Brewer*, 136 Ark. 246, 206 S. W. 322.

The true rule seems to be that instructions, when taken together, should not be so conflicting as to confuse or mislead, *not giving the jury a certain guide to follow in reaching a verdict. Garrison Co.* v. *Lawson*, 171 Ark. 1122, 287 S. W. 396.

It is impossible to know, in a given case, what consideration jurors gave to one instruction as distinguished from another. We only consider whether (in the light of experience and the psychology and conduct of mankind in the average) separate instructions, one being erroneous and the other correct, probably resulted in a verdict against the party who complains of the mistake.

In the case at bar we cannot say the jury did not believe the law to be that the baking company was a guarantor of the wholesomeness of its product. Hence, the judgment must be reversed and the cause remanded for a new trial.

LION OIL REFINING COMPANY *v.* MCCAIN, COMMISSIONER OF LABOR

4-7003 166 S. W. 2d 249

Opinion delivered December 7, 1942.

Davis & Allen and *Knox, Keith & O'Connor,* for appellant.

Luke Arnett, for appellee.

House, Moses & Holmes, amici curiae.

GRIFFIN SMITH, C. J. The question is whether $11,979.74 paid by appellant January 28, 1942, under compulsion of Act 391 of 1941 shall be treated by the commissioner of labor as contributions exacted for the fourth quarter of 1941; or, expressed differently, What did the general assembly mean when in section seven of the Act it reduced to one percent the amount an employer should contribute if for all years through 1941 total payments to the compensation fund, after benefits had been paid, equaled or exceeded ten per cent of the employer's annual pay-roll?

Appellant's five-year pay-roll was $8,009,068.91, the average being $1,601,813.78. Through 1939, 1940, and 1941, the pay-roll was $4,917,513.41, averaging $1,639,171.14.

Contributions were $203,256.45, against which benefits of $38,492.54 were charged. Net contributions, therefore, were $164,763.91.

Annual pay-roll is defined as the total of wages payable by an employer, regardless of the time of payment, for employment during a calendar year. "Average annual pay-roll" is the mean of an employer's labor pay-

ments for the three or five preceding calendar years, "whichever average is highest."

Section seven makes contributions payable "for each *calendar year.*" The commissioner is directed to prescribe rules regulating payment of contributions where details are not covered by the Act. The statute makes a levy of one and one-eighth percent of pay-rolls for 1937, and "with respect to employment after December 31, 1937, 2.7 percent" shall be paid.

"Future rates" are embraced within a provision which requires the commissioner to maintain in the unemployment compensation division of the department of labor a separate account for each employer. To this account must be credited "all the contributions paid on his own behalf for each calendar year." Benefits payable to an eligible person are charged against the employer's account "in his base period." There is this mandate:

"The commissioner shall, for the twelve months beginning April 1, 1942, and for each twelve-month period thereafter, classify employers in accordance with their actual experience in the payment of contributions on their own behalf and with respect to benefits charged against their accounts, with a view to fixing such contribution rates as will reflect such experience. . . ."

A limitation is that no employer's rate shall be less than 2.7% unless there shall have been three years throughout which an employe could have received benefits, if eligible.

The status justifying a reduction in contributions is expressed in this language:

"Each employer's rate for the twelve months commencing April 1 of any twelve-month period shall be determined on the basis of his record *up to the end of the previous calendar year.* If, at the end of such calendar year, the total of all his contributions paid on his own behalf and credited to his account for all previous years exceeds the total benefits charged to his account for all such years, his contribution rate shall be (a) two percent, if such excess equals or exceeds seven and one-half but is less than ten percent of his average annual pay-

roll; (b) one percent, if such excess equals or exceeds ten percent of his average annual pay-roll."

Appellant's net contributions of $164,763.91 for 1939, 1940, and through 1941 were ten and five one-hundredths percent of the three-year average pay-roll, which, as heretofore stated, was $1,639,171.14. Benefits for 1941 were included in the total of $38,492.54.

But, says appellee, in order for the excess of contributions over benefits to be ten percent of the three-year average pay-roll, it was necessary to include appellant's payment of $11,579.74 covering the last quarter of 1941, and due December 31; hence, delay having occurred, and the remittance not having been received until January 28, the two percent rate must apply.

This construction is out of harmony with the Act's design to encourage employers who meet all requirements by conducting business in a way to *promote* social security. It inevitably follows that when an employer's pay-roll account as reflected on the commissioner's books shows a minimum of benefits and a consistently increasing credit balance, the plan to *prevent* unemployment has been facilitated and there is harmony with the direction that beginning with April 1, 1942, employers shall be classified "in accordance with . . . actual experience in the payment of contributions."

This construction is harmonious with the definition that "annual pay-roll" contemplates the total of wages payable ("regardless of the time of payment") for employment during a calendar year. It conforms to the Act's provision affecting prior payments, that "No employer's rate for the period of twelve months commencing April 1 of any twelve-month period shall be less than 2.7 per cent, unless the total assets of the fund, *excluding contributions not yet paid at the end of the previous calendar year,* exceed the total benefits paid from the fund within the last preceding calendar year."

The commissioner, during the past five years, has supplied employers with a "Statement of Contribution Account." Such statement embraced contributions for the calendar year it covered, although actual payment

was not made until January 31 of the succeeding year. The statement sent appellant covering 1941 included contributions chargeable against fourth quarter pay-rolls for 1941.

Act 391 requires the commissioner, not later than the last day of February of each year, to supply the governor with a report covering administration "during the preceding calendar year." It is requisite that a balance sheet be appended. Conforming to the law's requirement, the commissioner transmitted his report to the governor January 31, 1942. The "trial balance" for the state as a whole shows contributions of $15,998,075.21. Other assets brought the total to $16,650,325.69. With the report was the following:

"This statement was prepared as of January 31, 1942, in order that contributions for the fourth quarter of 1941 could be included." Appellant's remittance of $11,979.74 had been received, and was treated as a part of the fund for determining an employer's contribution and benefit experiences.

For the quarter beginning April 1, 1942, appellant's remittance to the commissioner was $4,660.29, based upon one percent of its three-months pay-roll. A deficiency assessment of $4,660.29 was made, on the theory that appellant's January 28 payment could not be considered in determining whether the unimpaired balance was equal to or in excess of ten percent of requisite pay-roll averages.

While the commissioner is to be commended for requiring judicial determination of a matter he regarded as questionable, it is our view appellant brought itself within the law's provision for a lower rate, and that the deficiency assessment cannot be sustained.

It follows that the court erred in sustaining appellee's demurrer. The judgment is reversed and the cause is remanded with directions to overrule the demurrer and to enter an order quashing the deficiency assessment.

DUCLOS *v.* TURNER

4-6883 166 S. W. 2d 251

Opinion delivered December 7, 1942.

Neill Reed, for appellant.

George W. Barham, for appellee.

SMITH, J. This is a suit by appellant Duclos to enforce the specific performance of a contract to sell him a farm in Mississippi county. The contract was executed upon a form prescribed by the Federal Department of Agriculture, designated as F. S. A.-LE-188B. It appears to be, in substance, the same form of contract involved in the case of *Killingsworth* v. *Tatum,* 203 Ark. 354, 157 S. W. 2d 30, and its purpose was to enable persons who met the Government's requirements to borrow money from the Government with which to purchase farm lands to be used as a home by the purchaser.

The relevant portions of the contract are as follows. In consideration of $1, in hand paid, the owner of the land proposed to be purchased "agrees to sell and convey to A. C. Duclos or such other person as may be designated in his stead by the Regional Director of the Farm Security Administration of the United States Department of Agriculture for the region in which the land hereinafter described is located (hereinafter called the 'Buyer'), and hereby grants to the said Buyer the exclusive and irrevocable option and right to purchase, under the conditions hereinafter provided, the following described lands, (a description of which follows) . . ."

It was agreed that an unencumbered title should be conveyed, and that "This option is given to enable the buyer to obtain a loan from the United States acting by and through the Secretary of Agriculture (hereinafter called the 'Government'), pursuant to Title 1 of the Bankhead-Jones Farm Tenant Act (7 U.S.C.A., § 1000 *et seq.*), for the purchase of said lands. The purchase price of said lands is the sum of $15,137 for the tract as a whole."

The seller agreed to furnish a title insurance policy in favor of the Government in the amount of the pur-

chase price of the land, and to furnish an abstract of title and continuations thereof were required. The seller agrees that all taxes or other liens shall be satisfied, including expenses incident to execution of deed. If the title insurance policy is not furnished within a reasonable time, the buyer is given the right to procure the insurance and to deduct the cost thereof from the purchase price. The seller agrees to convey to buyer by a general warranty deed a valid unencumbered, indefeasible fee simple title.

It was further provided that taxes and all general or special assessments "for the year in which the closing of title takes place, shall be prorated as of the date of the closing of title, it being expressly agreed that for the purpose of such proration the tax year shall be deemed to be the calendar year. . . Taxes on property due in 1941 will be paid by the party receiving rents from the 1941 crop. Buyer is to receive the rents if the vendor is paid before July 1. If payment is not made before July 1, then vendor will receive rents and pay buyer 3% interest on the option price from date payment is made until January 1. . . . This option may be exercised by the Buyer by mailing or telegraphing a notice of acceptance of the offer herein to Mrs. Tera F. Turner in the city of Blytheville, RFD No. 2, State of Arkansas, at any time while the offer herein shall remain in force.

"The offer herein shall be irrevocable for a period of 4½ months from date hereof, and shall remain in force thereafer until terminated by the Seller, . . . , at any time after the expiration of such period by the giving of ten days' written notice to the Buyer of such termination."

This writing was signed by Mrs. Turner, and was dated January 14, 1941, and following her signature there was written an acknowledgment of the payment to her of the sum of $1; but Mrs. Turner denied that this was paid her.

The complaint praying the specific performance of this contract was dismissed as being without equity, and this appeal is from that decree.

The chancellor prepared a written opinion upon rendering this decree, which recited the reasons therefor. The court distinguished the contract here sued on from the one involved in the case of *Killingsworth* v. *Tatum, supra,* the distinction being that the opinion in that case recited that the option there involved was executed for a valuable consideration, whereas the consideration here is merely nominal. Upon this view the court below held that "such a contract may be revoked by the maker at any time before acceptance by giving the vendee in the contract notice of revocation." This holding was made upon the authority of the opinion in the case of *Hogan* v. *Richardson,* 166 Ark. 381, 266 S. W. 299, in which case it was sought to enforce an option to purchase an interest in certain oil and mineral lands under a contract which recited the consideration to be the sum of $1 in hand paid. It was there held (to quote a headnote) that "An option for the sale of land for a nominal consideration may be withdrawn at any time before acceptance, on notice to the vendee, but, where a valuable consideration is paid for an option, it cannot be withdrawn by the vendor before expiration of the time specified therein."

The contract here sought to be enforced recites that it was executed upon a consideration of $1 in hand paid, and if there were no other consideration the rule above quoted would apply. We think, however, that it appears from the recitals of the contract, above quoted, that there were other considerations moving the parties to the contract. Duclos assumed the obligation recited, which suffices to constitute a valid consideration.

It was known to the parties to this contract that Mrs. Turner had given a mortgage on the land to an insurance company, to be repaid over a period of years, and that she proposed to discharge this indebtedness with a part of the purchase money she was to receive; but the insurance company declined to accept prepayment of this debt for the full amount thereof with accrued interest.

It is undisputed that Mrs. Turner advised Duclos and the FSA Director that she could not sell the land unless an arrangement could be made to pay off this

mortgage indebtedness; and it is also undisputed that she advised them that if the mortgage indebtedness could not be discharged nothing further would be done in the matter.

It developed that the FSA Director had assumed an obligation on the part of the Government to make a loan which he was not authorized to make, as he was not authorized to make a loan of more than $5,400 to any one person. Duclos sought to obviate this difficulty by an arrangement for two other persons possessing the qualifications required by the Government to borrow money for this purpose; this arrangement was that each of the three persons should buy a one-third interest.

There was, therefore, a binding contract to convey between Mrs. Turner and Duclos, but it appears that they had entered into a contract impossible of performance on the part of Duclos. It was impossible of performance for the reason that the whole matter was contingent and dependent upon Duclos borrowing from the Government the sum of $15,137 to pay "for the tract of land as a whole." The sale of the entire tract of land was contemplated, and not divisible parts of it. Duclos admitted that he had no means of his own with which to buy the land, and that his ability to comply depended entirely upon making a loan from the Government, and this the Government could not and would not do, because no loan for this purpose could be made in excess of $5,400.

Now, it is true that Duclos produced two other persons who desired to join him in this purchase who were eligible under the Government regulations to borrow the maximum sum of $5,400 each, and that he and those other two could borrow a sum in excess of the amount Mrs. Turner agreed to take. But because Duclos had a valid contract, based upon a sufficient consideration, to buy the land, it does not follow that Mrs. Turner was required to divide this land and sell it in parts. She had no contractual relation with Duclos' associates, and had received no consideration of any kind from them, or either of them. One of the parties who had been invited by Duclos to join in the purchase of the land testified that he and Duclos

called on Mrs. Turner and advised her of their arrangement; but he admitted that she declined to proceed under that arrangement.

Now, the option contract does provide that Mrs. Turner "offers and agrees to sell and convey to A. C. Duclos or such other person as may be designated in his stead by the Regional Director of the Farm Security Administration of the United States Department of Agriculture." But if this provision can be said to be valid as contemplating that the substituted purchaser would assume the same obligations imposed upon Duclos, yet, if this be assumed, as much as can be said of this provision of the contract is that it authorizes the substitution of another purchaser for Duclos who would pay the lump sum of $15,137 for the property; and no one proposes to do this.

It is easily conceivable that, if permitted, Duclos would consummate the purchase for himself of a third of this farm, and that one or the other of his associates might also purchase another third, whereas the other party might not consummate his purchase, in which event Mrs. Turner would have sold, not all of her farm, as she contracted to do, but only a part thereof.

The opinion of the court contains a finding, which the testimony not only supports, but which appears to be undisputed, "that the purported acceptance (the written acceptance) was not delivered to the defendant until June 10, 1941, which was more than 4½ months after the execution of the contract. It is contended that under the terms of the contract it was to continue in force until written notice was given plaintiff of its revocation. The contract contains such a condition, but I can not conceive that the condition is of greater force or effect than the offer contained in the option."

The opinion in the case of *Bracy* v. *Miller,* 169 Ark. 1115, 278 S. W. 41, reviews the question of mutuality of obligation as a condition upon which the right to enforce specific performance depends, and the rule is stated that there must be mutuality both as to the obligation and the remedy before this relief will be awarded; and it was

specifically held in the case of *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184, 131 S. W. 460, (to quote a headnote) that "A contract which leaves it entirely optional with one of the parties as to whether or not he will perform his promise is not binding upon the other."

Here, not within 4½ months, nor at all, at any time, has either of Duclos' associates obligated himself to do anything, and Mrs. Turner has no right which she could enforce against either of them. It must, therefore, follow that they have no right against Mrs. Turner which Duclos can enforce for their benefit.

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

BONNER *v.* BONNER

4-6843 166 S. W. 2d 254

Opinion delivered December 7, 1942.

Coy M. Nixon and *Rowell, Rowell & Dickey,* for appellant.

E. W. Brockman, for appellee.

HUMPHREYS, J. On July 30, 1941, appellee brought suit for divorce in the chancery court of Jefferson county against appellant on the ground that he had threatened her with personal violence and imposed upon her many indignities which rendered her condition in life intolerable and prayed for temporary and permanent alimony, an interest in his personal property and real estate, reasonable attorneys' fee and court costs. It was alleged in her complaint that appellant had a large sum of money on deposit in the National Bank of Commerce and the Simmons National Bank of Pine Bluff, Arkansas, and prayed that same be impounded and that said banks be enjoined from honoring checks drawn against the deposits until the property rights between appellant and appellee be determined by the court.

On the date the complaint was filed, an impounding order was issued directing the banks to hold the deposits intact until further order of the court.

On the 2nd day of August, 1941, the trial court entered an order releasing $800 of the amount on deposit in the Simmons National Bank belonging to appellant in order that he might continue to operate his theatre in Pine Bluff. On the same date this order was made the court allowed appellee temporary alimony in the sum of $50 per month until final hearing of the case and allowed her attorney an initial fee of $100.

On September 8, 1941, appellant filed an answer denying the material allegations of the complaint, and a cross-complaint for a divorce alleging that appellee constantly quarreled at him, abused him and habitually offered indignities to him which rendered his condition in life intolerable. He also alleged that two days before their marriage they entered into an antenuptial written contract concerning the property of each as follows:

"Antenuptial Agreement and Property Settlement
"Know All Men By These Presents:

"That this agreement made and entered into this day and date by and between V. E. Bonner and Myrtle Gray, both of Pine Bluff, Arkansas, witnesseth:

"That Whereas, a marriage is intended to be solemnized between the parties hereto, and in view of the fact that after their marriage in the absence of any agreement to the contrary, their legal relations and powers as regards property may, by reason of some change in their domicile, or otherwise, be other than those of their present domicile, or other than those which they desire to have apply to their relations, powers and capacities; and in view of the fact each of the contracting parties owns certain real estate at this time, and in view of the further fact it is agreed that the said V. E. Bonner has approximately five thousand dollars ($5,000).

"No, (now), therefore, each of the parties hereto hereby agrees, covenants and declares it to be his and her desire that during their marriage, each of them shall be and continue completely independent of the other with reference to the enjoyment and disposal of any property, real or personal, which either of them might own at

the time of the marriage aforesaid; that is to say, the said V. E. Bonner is to retain control over and be the absolute owner of any or all property belonging to him at the time of the marriage herein contemplated, and the said Myrtle Gray is to retain control over and be the absolute owner of any or all property belonging to her at the time of said marriage, and in the same manner as if the said proposed marriage had never been celebrated.

"And the parties hereto expressly agree and covenant to and with each other, that upon the death of either, the survivor shall not have and will not assert any claim, interest, estate or title, under the laws of the state, because of such survivorship, in or to the property, real, personal or mixed, owned by the other contracting party at the time of the solemnization of the marriage herein contemplated; and such survivor hereby relinquishes to their heirs, administrators, executors and assigns of such deceased party, any and all of his or her claim, distributive share, interest, estate or title that he or she would otherwise have as the surviving husband or wife in the property of the other, it being understood and agreed between the parties that this stipulation is to apply only to the property owned by either of them at the time of the marriage herein contemplated; and each agrees, upon demand, to make, execute and deliver to the heirs, administrators, executors and assigns of such deceased party any and all acquittances, assignments, deeds, instruments and receipts that may be necessary to carry out and make effective his or her agreement herein contained.

"It is further understood and mutually agreed by and between the parties hereto that after the proposed marriage is solemnized, as herein contemplated, if they or either of them is successful in the accumulation of any property, real, personal or mixed, then in that event, such after-acquired property is and shall be the joint property of the parties hereto, and each of them shall own the same, share and share alike, and shall be entitled to the enjoyment and use of the same.

"To the full and proper performance of all the foregoing agreements, covenants and stipulations, the parties here respectively bind themselves, their heirs, executors, administrators and assigns.

"In witness whereof, the parties hereto have hereunto set their hands and seals this 5th day of August, 1940.

"V. E. Bonner,
"Mrs. Myrtle Gray."

This contract was acknowledged by each before Julian Crawford, a Notary Public.

Appellant prayed for an absolute divorce.

On October 15, 1941, appellee filed an answer to the cross-complaint denying the material allegations therein and pleaded that the antenuptial agreement was contrary to public policy and void and that a postnuptial deed executed by appellant to her when read in connection with the antenuptial agreement amounted to a fraud practiced upon her and prayed for a cancellation of the antenuptial agreement and the postnuptial deed and also prayed that she be granted an interest in appellant's real and personal property according to the statutes of the State of Arkansas.

Thereafter, appellant filed an amendment to his cross complaint alleging that appellee frequently indulged in clandestine meetings with one Gould Ratliff, and with another man or men whose names are unknown to appellant.

Appellee filed an answer to the amendment denying that she had clandestinely met Ratliff or other men.

The cause was submitted to the trial court upon the pleadings and testimony produced by the respective parties which resulted in findings orally announced after the testimony had been closed and a decree was rendered November 3, 1941, denying each a divorce on the ground that the evidence showed that both were at fault and to blame and denied the relief prayed for by appellee, asking for a divorce from appellant, and also denied the

relief prayed for by appellant in his cross-complaint and dismissed the complaint and cross-complaint for want of equity; also, canceled the antenuptial agreement on the ground that it was contrary to public policy because it was entered into by the parties in contemplation of a divorce and was not made solely in contemplation of death and, also, that the postnuptial deed contained restrictions that amounted to a fraud practiced upon appellee by appellant; also allowed $50 per month as permanent alimony and an additional attorney's fee of $300 and dissolved the temporary injunction issued against the National Bank of Commerce and the Simmons National Bank.

Both parties excepted to the findings and decree of the court and each prayed and was granted an appeal to the Supreme Court.

The record reflects that appellant at the time of his marriage with appellee was 63 years old, had lost his first wife through death, by whom he had several children, and had lived with his second wife for 28 years, from whom he obtained a divorce.

At the time of the marriage appellee was 35 years of age, had living children and had been twice divorced.

Both were intelligent and both had had much matrimonial experience and should have known how to treat each other and how to conduct themselves in order to live a tranquil and harmonious married life. Neither of them seems to have learned much by past matrimonial experiences. Each offered the other indignities during their short married life of about a year, which they should not have done. For example, on one occasion appellee's son came in with a friend about 10 o'clock at night and awakened appellant, and in retaliation appellant got up, turned the radio on and ran it most of the night to keep them awake. Appellant checked the amount of gasoline appellee used in going from place to place in order to ascertain whether she had told him the truth as to where she had been. He was penurious in his allowances to her to purchase clothing, etc. On the other hand, at times she abused and even cursed him, but she claimed

that on those occasions he had greatly provoked her. He demanded that she inform him at all times where she had been or where she was going, and she admits that when she was being pressed along these lines she had told him that she had been across the way to a house that was not entirely reputable, but she said she did this in order to tease him, and he really knew she had not been to the place she stated she had gone. The evidence reflects that they had many quarrels during their short married life, and there is evidence tending to show that he not only threatened her but did strike or push her down a stairway. She went to a physician for treatment, but did not inform the physician what had caused the bruises on her body and the injury to her elbow. We do not attach much importance to his charge that she had indudged in clandestine meetings with Ratliff and another man for the reason that both the men denied that she had met them on any occasion and both claimed they only had a casual acquaintanceship with her. Appellant did not think enough of this to make the charge in his original cross-complaint against her to that effect. He did not make the charge until he filed amendment to his cross-complaint to her suit.

Many witnesess testified in the case concerning their married life, and the testimony is voluminous and very conflicting. After a careful reading and analysis of the evidence, we have concluded that the finding of the chancellor to the effect that both were to blame is not contrary to the weight of the evidence. Where married people are equally to blame for separation, neither is entitled to a divorce from the other.

We think, however, that the finding of the chancellor that the antenuptial agreement was made in contemplation of a divorce and not solely in contemplation of death is contrary to a preponderance of the evidence. By reference to the contract itself it will be seen that they "expressly agree and covenant to and with each other, that upon the death of either, the survivor shall not have and will not assert any claim, interest, estate or title, under the laws of the state, because of such survivorship,

in or to the property, real, personal or mixed, owned by the other contracting party at the time of the solemnization of the marriage herein contemplated . . ." The contract further provides that "survivor hereby relinquishes to the heirs, administrators, executors and assigns of such deceased party, and any and all of his or her claim, distributive share, interest, estate or title that he or she would otherwise have as the surviving husband or wife in the property of the other." It will also be observed that the contract winds up with this statement: "To the full and proper performance of all the foregoing agreements, covenants and stipulations, the parties hereto respectively bind themselves, their heirs, executors, administrators and assigns."

It is true that appellant testified that he wanted to protect himself in his property rights in case a divorce should grow out of the marriage contract, but he testified at another time that he told appellee that he wanted her to sign the contract in order to show his children by his first wife that appellee was not marrying him to get his property, but was marrying him for love.

It is admitted by appellee that the contract was read to her and that she read it over carefully two days before she married appellant and that she understood it. There is nothing in the contract itself that indicates it was drawn up and executed in contemplation that a divorce would result after the marriage. We think it was clearly made in good faith and that the marriage was the sole consideration of the contract, and that it should continue in force until death of either party.

In the case of *Comstock* v. *Comstock,* 146 Ark. 266, 225 S. W. 621, this court, among other things, said: "Marriage was a sufficient consideration for the antenuptial contract. Where such contracts are freely entered into and are not unjust or inequitable, and there is no fraud, they should be liberally construed to effectuate the intention of the parties and should be looked upon with favor and enforced accordingly. . . . Without going into detail, we are convinced, from the face of the contract and the evidence adduced, that, when the per-

sonal status of the parties, their ages, their respective families, and their separate properties are considered, the antenuptial agreement was a just and reasonable one."

In *Schouler on Marriage, Divorce and Separation,* Vol. 1, § 498, it is said by the author that: "There is no rule of law nor principle of public policy which prevents husband and wife from thus fixing, by an agreement before marriage, the rights which they shall have in each other's property, and relinquishing the interests which they would otherwise acquire therein by virtue of the marriage. Thus, they may relinquish their distributive shares in each other's estates, or the wife may bar her dower or the husband his curtesy. The husband may agree that his wife may retain all her own property to her sole and separate use, and he may settle his own property on her. And the devolution of the property of either or both may be regulated. These objects the law does not regard as contrary to public policy."

The contract in the instant case was entered into after an inspection of the property owned by each, and we think the record reflects without doubt that it was entered into by the parties in good faith and without fraud being practiced by either upon the other. The contract was not void as being contrary to public policy and should have been upheld by the trial court.

The contract contains the following provision: "It is further understood and mutually agreed by and between the parties hereto that after the proposed marriage is solemnized, as herein contemplated, if they or either of them is successful in the accumulation of any property, real, personal or mixed, then in that event, such after-acquired property is and shall be the joint property of the parties hereto, and each of them shall own the same, share and share alike, and shall be entitled to the enjoyment and use of the same."

The undisputed evidence reflects that after their marriage appellant accumulated during the time they were married $824.12, and under the terms of the contract

appellee would be entitled to $412.06. She should have judgment for that amount.

Appellant contends that in view of the terms of the contract the court should not have allowed appellee permanent alimony. We cannot agree with appellant in this respect notwithstanding the terms of the antenuptial agreement. It was and is the duty of appellant to support his wife according to the station in which they live. This duty would not rest upon him if he were entitled to a divorce, but it does rest upon him as long as they are married unless she had abandoned him without just cause. He is as much to blame as she for the separation, and it is his bounden duty to support her as long as the bonds of matrimony exist between them. The amount of permanent alimony allowed appellee is reasonable. Appellant makes no point that the attorney's fee allowed was excessive.

Relative to the postnuptial deed which appellant executed to appellee, we see no justification in the record for canceling same. It is true that it contains a restriction to the effect that appellant shall retain possession of the property and collect the rents therefrom during his lifetime, but that restriction should not void the deed. Appellant had a perfect right to give her the property and place restrictions in the deed if he desired to do so. It was his privilege to convey to her outright or upon conditions.

The decree of the chancery court is affirmed insofar as it denied a divorce to either party and as to the amount of permanent alimony and attorney's fee.

The decree is reversed insofar as it canceled the antenuptial agreement and the postnuptial deed and the cause is remanded with directions to declare both the antenuptial contract and the postnuptial deed valid and binding instruments and to enter judgment for appellee for one-half of the amount appellant has earned since the marriage.

Greenhaw, J. (dissenting). I think the preponderance of the evidence shows that appellee's conduct was such that appellant was entitled to a divorce on his cross-complaint, and I, therefore, dissent.

HARDIN, COMMISSIONER OF REVENUES *v.* CASSINELLI.

4-6890 166 S. W. 2d 258

Opinion delivered December 7, 1942.

Elsijane Trimble, for appellant.

Glenn G. Zimmerman, E. B. Dillon and *Philip McNemer,* for appellee.

GREENHAW, J. This is an appeal by the Commissioner of Revenues from a judgment of the Pulaski Circuit Court, Second Division, rendered on April 9, 1942, directing said Commissioner to issue a liquor permit to appellee, permitting him to sell liquor at 106 West Markham Street in the city of Little Rock.

In his petition for mandamus appellee alleged that on December 11, 1941, he filed the proper petition for a permit to sell liquor at that address, which is in a concentrated trade area and within a territory in which there is no law or regulation in effect prohibiting the issuance of the liquor license upon his application. He further alleged that he was qualified in every respect to engage in the liquor business and had tendered the proper sum of money for a permit; that his application was denied on January 30, 1942, and "that the action of the Commissioner in refusing the application is arbitrary, discriminatory, without legal authority and in clear abuse of his discretion."

Appellant filed a response, stating his reasons for denying the permit, and alleged that § 1 (a), art. III of Act 108 of the Acts of 1935, now § 14106 of Pope's Digest, authorized him to exercise his discretion in determining whether public convenience and advantage will be promoted by issuing or refusing to issue permits for the sale of liquor, and that he was further given discretion in determining the number of permits to be granted, the location thereof and the person or persons to whom such permits should be issued.

Section 14106 of Pope's Digest, herein referred to, reads as follows:

"It is hereby declared to be the public policy of the State that the number of permits in this State to dispense vinous, (except wines) spiritous or malt liquor shall be restricted, and the Commissioner of Revenues is hereby empowered to determine whether public convenience and advantage will be promoted by issuing such permits, by increasing or decreasing the number thereof; and in order to further carry out the policy hereinbefore declared the number of permits so issued shall be restricted. The Commissioner of Revenues is further given the discretion to determine the number of permits to be granted in each county of this State or within the corporate limits of any municipality of this State to determine the location thereof, and the person or persons to whom they shall be issued.

"The Commissioner of Revenues in exercising this discretionary power shall give due regard to the ordinances and regulations of the municipalities of this state."

Appellant further alleged that under Subsection (c), § 3 of art. III of Act 108 of 1935, now § 14104 of Pope's Digest, he was authorized to adopt rules and regulations not inconsistent with the provisions of said act. Section 14104 of Pope's Digest, among other things, provides as follows:

"The Commissioner of Revenues shall have the following powers, functions and duties: . . .

"Subsection (c). To adopt rules and regulations for the supervision and control of the manufacture and sale of vinous, (except wines) spiritous or malt liquors throughout the state not inconsistent with law."

He further alleged on December 8, 1941, he, as Commissioner of Revenues, promulgated Supplemental Regulation No. 23, superseding any and all other regulations theretofore promulgated pertaining to the issuance of permits and licenses to retail liquor dealers, §§ 2 and 4 of which read as follows:

"2. No new permit shall be issued for the sale of liquor at any premises located within one hundred yards of other premises where the sale of liquor is permitted, except where the Commissioner of Revenes determines that by reason of the concentration of trade within a particular area no unlawful practices are likely to result by reason of the competition within a lesser area.

"4. No new permits shall be issued for the sale of liquor at any premises where the premises for which the permit is requested is located within an area or vicinity wherein the Commissioner of Revenues has determined that the number of premises within such area or vicinity at which the sale of liquor is permitted is sufficient to meet the demand and convenience of the public, and where it is determined by the Commissioner of Revenues that the issuance of a permit for the sale of liquor at additional premises would make the sale of liquor within

such area or vicinity unprofitable to all the dealers within such area and would thereby tend to encourage unlawful sales of liquor within such area or vicinity."

The response further stated that the application of the petitioner for a permit to engage in the retail sale of liquor at 106 West Markham Street was denied for the reason that the premises at which request was made for permission to sell liquor were located within 100 yards of other premises where the sale of liquor was permitted, and under the provisions of § 2 of Supplemental Regulation No. 23 the permit could not be issued under such circumstances except where the Commissioner of Revenues determined that the public convenience and advantage would be promoted by reason of the issuance of such permit within such area because of concentration of liquor trade therein and the lack of sufficient liquor stores to supply the demand therein; that he had determined that no such facts existed within such area so as to permit him to make an exception from the rule prohibiting the issuance of permits for the sale of liquor from any premises located within 100 yards of other premises where the sale of liquor was permitted; that the premises at which retail sales of liquor were to be made by the petitioner if his application had been granted, in addition to being located within 100 yards of two other liquor stores, are within an area and vicinity wherein are located nine other liquor stores within a distance of a block or a block and a half of the premises where the petitioner intended to sell liquor under the permit he was seeking, and that the application was denied for such reason, which was in accordance with the provisions of § 4 of Supplemental Regulation No. 23.

It was further alleged that appellee sought to control the discretion granted to the Commissioner of Revenues by Act 108 of the Acts of 1935, and that such discretion was not subject to control by the courts.

The circuit court sustained the petition for a writ of mandamus and ordered a permit issued to petitioner herein, from which judgment the Commissioner of Revenues has appealed.

The evidence did not show and it was not contended that appellee was not a fit and proper person to obtain a liquor permit. Only three witnesses testified, and their testimony is not lengthy. The evidence showed that there were nine liquor stores operating within a block and a half of the premises where appellee sought to establish a liquor store, and this is a concentrated trade area. There were two liquor stores operating on West Markham Street between Main and Louisiana streets, in which area appellee sought a permit to establish a liquor store. These stores are on opposite sides of the street and considerably less than 100 yards from the proposed location of appellee. There are two liquor stores on Main Street between Markham and Second, one being on the west and the other being on the east side thereof, less than 100 yards from the proposed location of appellee. Five other liquor stores are operating within a block and a half of the proposed location of appellee.

There was no evidence showing or tending to show that the nine liquor stores located within the area and within a block and a half of the proposed location of appellee were insufficient to meet the demand and convenience of the public, or that any customers or prospective customers were inconvenienced by having to wait in line in order to purchase liquor. The supervisor of the Beverage Division of the Department of Revenues among other things testified: "We thought there were sufficient stores in that area to take care of the needs. . . ."

Appellee contends, however, that the action of appellant in granting a liquor permit to Mrs. Victor Smith on December 13, 1941, on her application which was filed the same day to operate a liquor store in the same general area was evidence that the Commissioner's action in refusing his application for a permit filed two days prior thereto was arbitrary, discretionary and an abuse of discretion.

We are unable to agree with this contention. The Beverage Supervisor testified that Mrs. Smith's husband had filed a number of applications for a liquor

permit prior to the time of appellee's application, and he thought, but was not sure, that she had previously filed an application for a liquor permit. Moreover, her application for a permit was to sell liquor at 114 East Markham Street. At that time there was only one liquor store in operation in the first block east of Main Street on East Markham, and it was on the south side of the street, whereas the location under the Smith permit was on the north side of East Markham Street and east of the bus station.

After the Smith permit had been issued there were six liquor stores within less than a block of the intersection of Main and Markham streets; two on Main, two on East Markham and two on West Markham. The proposed location of appellee was less than a half block from the intersection of Main and Markham streets.

Act 108 of 1935, designated as "The Arkansas Alcoholic Control Act," vested in the Commissioner of Revenues discretion in the issuance and denial of permits to sell liquor and authorized him to adopt rules and regulations for the supervision and control of the sale of liquor not inconsistent with law. It is not contended that Supplemental Regulation No. 23 is either contrary to law or unreasonable and arbitrary. In the case of *Democrat Prtg. & Litho. Co.* v. *Parker, Auditor,* 192 Ark. 989, 96 S. W. 2d 16, this court said:

"The law is well settled here as well as elsewhere that the discretion or discretionary powers of an executive officer of the state will not be controlled by mandamus. *Street Imp. Dist. No. 74* v. *Refunding Board of Arkansas,* 192 Ark. 892, 95 S. W. 2d 639; *Refunding Board of Arkansas* v. *National Refining Co.,* 191 Ark. 1080, 89 S. W. 2d 917. But the rule is equally as well settled, and we have always held, that mandamus is the appropriate remedy to compel an executive State official to perform a ministerial act. *Moore, Auditor,* v. *Alexander,* 85 Ark. 171, 107 S. W. 395; *Jobe, Auditor,* v. *Caldwell,* 93 Ark. 503, 125 S. W. 423; *Jobe* v. *Caldwell,* 99 Ark. 20, 136 S. W. 966; *Jobe, Auditor,* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A 351; *Cotham* v. *Coff-*

man, Auditor, 111 Ark. 108, 163 S. W. 1183; *Hodges, Secretary of State,* v. *Lawyer's Co-operative Co.,* 111 Ark. 571, 164 S. W. 294; *Ellison* v. *Oliver, Auditor,* 147 Ark. 252, 227 S. W. 586; *Hopper, Secretary of State,* v. *Fagan,* 151 Ark. 428, 236 S. W. 820. . . .

"Discretion, as used in respect to executive State officials, means not only discretion on questions of fact, but on mixed questions of law and fact. Whether such official decides the question right or wrong is immaterial. Having the power to decide at all carries with it the duty to decide as he perceives the law and the facts to be, and the courts have no power to review his determination on mandamus. We have heretofore, in effect, so decided. See *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742. The conclusion reached in the Pitcock case, *supra,* finds support in *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 23 S. Ct. 698, 47 L. Ed. 1074. See, also, *Branaman* v. *Harris,* 189 Fed. 461."

See, also, *Street Improvement District No. 74, Browning et al., Comm'rs.* v. *Refunding Board of Arkansas,* 192 Ark. 892, 95 S. W. 2d. 639; *Refunding Board of Arkansas* v. *National Refining Co.,* 191 Ark. 1080, 89 S. W. 2d. 917.

The action of the Commissioner of Revenues in refusing to grant a permit to appellee for the retail sale of liquor was a discretionary act under power specifically vested in him by law. We are unable to say that the action of the Commissioner in declining to grant the permit, under the evidence in this case, was arbitrary, discriminatory, without legal authority or an abuse of discretion as urged by appellee. Hence the court erred in sustaining the petition for a writ of mandamus and ordering the issuance of a permit to appellee.

The judgment is, therefore, reversed, and as the cause appears to have been fully developed it is dismissed.

SOUTHEAST ARKANSAS FREIGHT LINES, INC., *v.* ARKANSAS CORPORATION COMMISSION

4-6885 166 S. W. 2d 262

Opinion delivered December 7, 1942.

John S. Mosby, for appellant.

T. E. Wood, Jack Holt, Attorney General, and *Clyde E. Pettit,* Assistant Attorney General, for appellee.

HOLT, J. This is an appeal by six motor carriers from a judgment of the Pulaski county circuit court affirming an order of the Arkansas Corporation Commission fixing, prescribing and publishing certain rates applicable to truckload movements by common motor carrier truck lines, of specific commodities, over irregular routes, in Arkansas, intrastate, and from the additional order of the Circuit Court.

The order of the Commission, which was made November 22, 1941, included this finding: "No evidence of probative value was introduced in the record by carrier witnesses upon which this Commission could conclude that operating conditions applicable to motor carriers in Arkansas differ with those applicable to similar carriers in Missouri . . ." and that the Commission "concludes upon the record that it is justified in ordering effective for application on intrastate traffic between points in Arkansas via all motor common carriers the scale of class rates prescribed by the Missouri Public Service Commission in its Case No. 8397 decided March 5, 1935, including supplemental orders therein, effective as on the date hereof, the Missouri rates referred to being those in effect on the date hereof," with an order in accordance therewith, and providing further that the order shall remain in effect for a test period of six months from December 1, 1941, during which period the motor common carriers herein involved shall keep complete records specifically applicable to the traffic referred to, and submit reports to the Commission at the end of each month after the effective date of the rates.

On appeal the Circuit Court affirmed the order of the Commission and in addition adjudged that "This order shall remain in effect for a test period of six months from May 1, 1942, during which period the motor common carriers herein involved shall keep complete records specifically applicable to the traffic herein referred to, such records to include commodities, weight, origin, destination, and revenue, and the costs allocated specifically to the character of traffic involved; these records to be kept in such form as may be submitted to the Commis-

sion in appropriate report as early as possible after the end of each month after the effective date of the rates."

Appellants' assignments for reversal here may be summed up as follows: (1) they contend that the Corporation Commission was without power on its own motion to initiate and prescribe the rates in question here, applicable to truckload movements by common carrier truck lines, and in any event it could not establish these rates without at the same time establishing minimum rates for contract carriers; and (2) that the Commission's order fixing the rates was arbitrary and without sufficient evidence to support it, is invalid, and that the judgment of the Circuit Court should be reversed.

It is conceded that the rates in question here affect only truckload movements over common carrier truck lines in Arkansas; that the Commission made no order affecting contract carriers when the present order was made, and that there was no order in effect at the time in general affecting truckload movements of common carrier truck lines.

1.

We proceed now to the consideration of appellant's first assignment.

Since the adoption of the Constitution of 1874, it has clearly been the State's policy to regulate transportation agencies. Section 1 of art. 17 provides that "all railroads, canals and turnpikes shall be public highways" and § 3 provides: "all individuals, associations, and corporations shall have equal right to have persons and property transported over railroads, canals, and turnpikes, and no undue, or unreasonable discrimination shall be made in charges for, or in facilities for transportation of freight." Amendment No. 2 to the constitution, adopted January 13, 1899, provides: "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroads, canals and turnpike companies for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures, and

shall provide for the creation of such authority as shall be necessary to carry into effect the powers hereby conferred."

Following these constitutional mandates, the Legislature of 1921 passed Act 124, § 6 of which (Pope's Dig., § 2005), provides: "The Commission (now Corporation Commission) shall have the power, after reasonable notice, and after full and complete hearing, to enforce, originate, and establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules, for all public service corporations, companies, and utilities, and all rules and regulations with reference thereto, and orders directing the performance of any duties devolving on said company, utility, common carrier, or public service corporation under the terms of this Act."

The General Assembly of 1929 enacted Act 62, called the "Motor Vehicle Act," and § 4 thereof (§ 2026, Pope's Digest) contains this provision: "The Commission (now Corporation Commission) is hereby vested with power and authority to supervise and regulate every motor vehicle carrier doing business in the state to fix or approve the rates, fares, charges, also classification, rules and regulations for every motor vehicle carrier."

The Legislature of 1941 pased Act 367, § 17, par. (a) of which provides: "Whenever an applicable tariff has not already been prescribed by the Commission, every common carrier by motor vehicle shall file with the Commission, etc." and paragraph (d) of this same section provides: "No common carrier by motor vehicle, unless otherwise provided by this Act, shall engage in the transportation of passengers or property, unless the rates, fares, and charges upon which the same are transported by said carrier have been prescribed, or filed and published in accordance with the provisions of this Act."

The above legislative enactments were in full force and effect when the Commission's order in question here was made. We find nothing in Act 367 of 1941 in conflict with previous enactments, *supra,* of the Legislature which we think clearly authorized the Corporation Com-

mission to originate, establish and promulgate the rates in question here. Act 367 must be construed as cumulative of the provisions of former acts when the act contains no specific repealing clause. We think it was the clear intention of the lawmakers in the progress of its legislative enactments to give to the Corporation Commission just such power as it has exercised here, and that the Commission has such power. To hold otherwise, it seems to us, would materially tie the hands of the Commission and seriously affect its usefulness.

Appellant's contention that the Commission was required to establish minimum rates affecting contract carriers at the same time it fixed, established and put into effect the rates affecting truckload movements by common carrier truck lines is untenable for the reason that we find nothing in Act 367 of 1941 or any other legislation on the subject requiring it to do so. While it might have done so, it was not required to do so.

2.

Was the order of the Corporation Commission arbitrary and without evidence to support it? We do not think it was. The record before us reflects that on May 21, 1941, the Arkansas Corporation Commission on its own initiative gave notice for hearing "In Re: Rates of Common Carriers of Specific Commodities over Irregular Routes" and stated it would consider the propriety of requiring all carriers of specific commodities over irregular routes to file a uniform tariff. The hearing was to be had June 6, 1941. At the hearing on June 6 the matter was continued to July 8, 1941. Under date of June 17, 1941, the Commission issued an additional notice broadening the scope of the case and styling it "In Re: Rates of Common Carriers of Special Commodities over Irregular Routes and Establishment of Truck Load Rates for all Common Carriers by Motor Vehicle." The notice states that the question and propriety of the Commission establishing and publishing truck load rates to apply to all commodities in Arkansas by motor carrier vehicles would be considered at a

hearing July 8. There was also this statement in the notice: "By reason of the fact that common carriers by motor of property in Arkansas do not file annual reports, the Commission is unable to ascertain at this time the cost of service as a whole and inasmuch as it appears that the Public Service Commission of the State of Missouri has conducted a very intensive investigation as to cost of operation of motor carriers of property in Missouri, and the Arkansas Corporation Commission concluding that the cost in Missouri closely approximates the cost of service in Arkansas, and realizing that rates should be based upon the cost of service, plus an amount to take care of taxes and return on investment in property used and useful in performing the service, concludes that the formula adopted by the Public Service Commission of the State of Missouri, for the prescription of truck load rates in that state, should be used as a guide in prescribing truck load rates in this state, now gives notice that this method of prescribing truck load rates for common carriers of property by motor vehicle in Arkansas will be considered at the hearing now set for Tuesday, July 8, 1941."

June 20 the Commission gave notice of a continuance of the hearing until July 21, 1941, and in this notice it informed all motor carriers of its intention to consider for adoption the formula adopted by the Public Service Commission of the State of Missouri for the construction of truck load rates on all commodities, and called upon all interested parties to submit exhibits and data as to the level of the rates to be fixed on any exempted commodities. At this hearing, for the convenience of all interested parties, the Commission distributed in the form of an exhibit "the reflection of what the rates are in Missouri when the formula is applied."

At this hearing a joint committee composed of J. C. Murray, C. C. Delms, T. E. Wood and Homer J. Conley for the shippers, and A. E. O'Hara, Jack Otterson, Loren Pendergraft, J. M. Williams, Robert Black and Roscoe Staggs for the truckers was appointed for the purpose of studying the matter of the rates under consideration

and to report back to the Commission. Subsequently, the committee, which was composed of men of high standing and wide information on the rate question involved, adopted and presented to the Commission the following resolution: "Resolved, that truckload rates should be made available on all commodities (subject to exceptions) for intrastate application via common carrier truck lines on Arkansas intrastate traffic. Resolved further: That the Commission be respectfully requested to re-assign this case to a date not earlier than November 1, 1941, at which time it will receive evidence upon which to reach conclusions upon the matter outlined in its notice of June 17, 1941, in these proceedings. Resolved further: That as a result of such hearing the Commission prescribe truckload rates on intrastate truckload traffic generally, except upon such commodities which in its opinion should be exempted."

Pursuant to this resolution the Commission gave notice to all interested parties that the matter would be continued to November 3, 1941, and that at that time the Commission would consider the propriety of ordering a scale of truck load rates to apply intrastate in Arkansas to all motor common carriers, whether said carriers held certificates to transport specific commodities over irregular routes, or all commodities over regular routes. The notice further stated that in the opinion of the Commission truck load rates should be made available on all commodities for intrastate application via common carrier truck lines in Arkansas.

The Commission also again suggested the adoption of the scale of rates promulgated by the Missouri Public Service Commission previously set out in the June 17 notice, and gave notice that all interested parties might present to the Commission evidence and argument for or against the proposed rates, and that the proceeding was continued for the purpose of giving all interested parties further opportunity to present evidence and argument as to the level of the truck load rates and the formula to be adopted in prescribing said rates to apply to motor carrier movements in truck load quantities in the State of Arkansas.

At the final hearing on November 3, appellants offered one witness. We think it unnecessary to attempt to abstract the testimony of this witness. It suffices to say, after carefully reviewing it, that we think the Commission and the Circuit Court on appeal were justified in finding that its effect falls far short of showing that the rates fixed and established by the Commission were not just, reasonable and non-discriminatory as affecting appellants, carriers by motor vehicle in truck load quantities. The Circuit Court on appeal heard the cause *de novo,* on the record presented (§ 2019, Pope's Digest) before the Commission, and we can not say that its action in affirming the order of the Commission is against the preponderance of the testimony.

It must be borne in mind that the public interest is the primary consideration of the Commission in fixing and establishing just, reasonable and non-discriminatory rates. In fixing these rates, great latitude must be accorded the Commission, and as was said by the court in *Texas & N. O. R. Co.* v. *United States,* 10 Fed. Supp. 198: "A court must at the outset indulge the recognized presumption of the law, that public officers will not only do their duty, but that they will perform such duty faithfully. This presumption must be indulged in the absence of proof to the contrary."

In the instant case there was before the Commission, and the court on appeal, the Missouri rates in effect in that state at the time the Commission made the order. The Missouri rates, though originating in 1935, had been adjusted and revised to suit 1941 conditions in that state. There was also before the Commission the resolution of the joint committee, *supra,* composed of men with wide experience and broad knowledge in establishing rates such as we have here, and it appears that this committee, after a thorough investigation, recommended to the Commission "that truck load rates should be made available on all commodities (subject to exceptions) for intrastate application via common carrier truck lines in Arkansas for intrastate traffic." It appears that the members of this committee were present at the final hearing, but were not questioned by appellants.

There was also before the Commission the annual report of each of the appellants filed with the Commission in 1941, covering 1940 activities. There was also evidence before the Commission as to truck load revenues by motors at the rates and minimum rates published; a comparison of revenue by car load by rails with the per truck load revenue by motors; earnings by motors at the rates and minimum weights published, a comparison of per car mile earnings and per ton mile earnings, the rail with the per truck mile earnings and per ton mile earnings by motors.

It is apparent from the record presented that the Commission extended to appellants the opportunity to gather and introduce evidence and exhibited a spirit of fairness and thorough cooperation to the end that just, reasonable and non-confiscatory rates might be established. A period of more than six months had elapsed, from the initial notice, till the final hearing, and in the Commission's order, it will be noted that the rates established were to continue over a trial period of six months, at the end of which time the opportunity would be afforded for readjustments. So, on the whole, we think there was ample evidence before the Commission, on which to base its findings and order.

The principles announced in the recent case of *Potashnick Truck Service, Inc.,* v. *Missouri & Arkansas Transportation Company,* 203 Ark. 506, 157 S. W. 2d 512, apply here. In that case this court said: "We said in the case of *Missouri Pacific Railroad Company* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644, that the statute under which this proceeding was had required this court upon appeal to it, to hear the matter *de novo,* and to render such judgment upon the appeal as appeared to be warranted, and required by the testimony. And so we do, but we cannot ignore the fact appearing in the record before us that a protracted hearing was held, both before the Commission and in the circuit court on appeal, and while the burden was upon petitioner to make the affirmative showing that the public convenience and necessity required the issuance of the permit, that find-

ing has been made, and should now be affirmed unless it appears to be contrary to a preponderance of the testimony. We hear chancery appeals *de novo,* but when we have done so, we affirm the findings of the chancellor on questions of fact unless his findings appear to be contrary to a preponderance of the evidence.''

As has been noted, the Circuit Court on appeal by its judgment affirmed the Commission's order in every respect except that it continued the trial, or experimental period, during which the rates were to be in effect, for a period of six months beyond May 1, 1942. We think this action of the court clearly within its discretion and was proper in the circumstances here.

Finding no error, the judgment is affirmed.

LEDWIDGE *v.* LEDWIDGE

4-6884 166 S. W. 2d 267

Opinion delivered December 7, 1942.

Leo P. McLaughlin and *Jay M. Rowland,* for appellant.

H. H. McKenzie and *McRae & Tompkins,* for appellee.

McHaney, J. Appellant and appellee were married April 3, 1938. They thereafter lived together as husband and wife in Hot Springs, Arkansas, until September 21, 1940, when appellee left appellant, and has continued from that time to live separate and apart from him without cohabitation. On October 27, 1941, appellant brought this action for divorce against her on the ground of willful desertion without reasonable cause for the space of one year as provided by the second subdivision of § 4381 of Pope's Digest. After an order allowing her suit money and counsel fees, she answered, admitting the marriage and separation, alleged that she had reasonable cause to leave appellant, and prayed an allowance for alimony.

Trial resulted in a decree dismissing appellant's complaint for want of equity, and, on the cross-complaint of appellee, he was ordered to pay into the registry of the court $40 per month, $20 on 1st and 15th of each month, beginning May 1, 1942, for her support and maintenance. This appeal is from that decree.

It is undisputed that appellee deserted appellant on September 21, 1940, and has lived separate and apart from him from that time to the present, although he has several times importuned her to return and live with him and, on the date of her departure, he begged her not to leave him and told her she was making a great mistake in doing so. Desertion alone for one year is not a ground for divorce, but such desertion "without reasonable cause" is. Section 4381, Pope's Digest. What constitutes "reasonable cause" becomes a pertinent inquiry. In *Rie* v. *Rie,* 34 Ark. 37, it was held that a "reasonable cause which, within the divorce statutes, will justify one of the married parties in abandoning the other must be such

conduct as could be made the foundation of a judicial proceeding for divorce." This language was quoted in *Craig* v. *Craig,* 90 Ark. 40, 117 S. W. 765, and, following the quotation, the late Judge Frauenthal, speaking for the court, said: "There is no corroborative evidence that shows that plaintiff had such a reasonable cause as above defined, to leave the defendant." In the famous case of *Warfield* v. *Warfield,* 97 Ark. 125, 133 S. W. 606, where the husband deserted the wife, she sued him for divorce on the ground of desertion. He answered admitting the separation, but alleged that he had reasonable cause therefor by reason of the adultery of his wife. The late Judge Wood for the court said: "To justify appellant (the husband) in his desertion of appellee, which he admits, it devolved upon him to prove that appellee had been guilty of adultery. The evidence he adduces for that purpose is entirely insufficient." Therefore, before the court would be justified in denying a decree of divorce on the ground of desertion, the spouse who seeks to justify his or her desertion, on the ground of reasonable cause, must prove a ground of divorce which would justify the court in granting him or her a decree of divorce on a cross-complaint.

Applying this well settled rule to the facts here presented, we are of the opinion that appellee wholly failed to prove reasonable cause for her admitted desertion of appellant, and that had she filed a cross-complaint against him, (which she did not) praying a divorce on the ground set out in the last clause of the fifth subdivision of said § 4381, which provides, "—or shall offer such indignities to the person of the other as shall render his or her condition intolerable," which is the only statutory ground to which her testimony is directed, the court would not have been justified in granting her a divorce on the record here presented.

Appellee testified to a number of unpleasant incidents occurring during their married life, before separation, such as his spilling the shoe polish in the bathroom, his throwing the car keys at her on one occasion, his scolding her for asking for the car, a relaxation of

interest on his part, and a number of other unpleasant occurrences arising in discussions of his family and hers, including his relations with her little girl by a former marriage, and his reference to her as a "damned brat." Assuming without deciding that some or all of these incidents would have constituted a ground of divorce, if they had been alleged, there is absolutely no corroboration of her testimony concerning them, and so they cannot be said to be established. A ground of divorce cannot be established on the uncorroborated testimony of one of the parties. We do not set out her testimony in detail further, as no useful purpose could be served by so doing. There was no corroboration. The only witness who testified for appellee was her mother and she frankly stated that she never heard them have an argument or a cross word either in her home or in theirs.

In *Rose* v. *Rose,* 90 Ark. 16, 117 S. W. 752, it was held, to quote a headnote: "Where the evidence establishes that a wife voluntarily abandoned her husband without just cause, and so remained for the statutory period, it was error to refuse him a divorce." In the body of the opinion in said case, the court used language which we think very appropriate to this case, under similar facts as follows: "We do not think that there is sufficient evidence to sustain a finding that appellant was guilty of misconduct which justified desertion by appellee or which precludes him from obtaining a divorce on account of such desertion. The preponderance of the evidence shows that appellant was not unkind to his wife, and gave her no just cause for leaving him. Though he was probably not wholly free from fault, we can discover nothing in his conduct, judged by the evidence, calculated to render his wife's condition intolerable or to drive her from him."

A number of love letters written to each other by the parties after their separation are set out in the record. In several of them appellee suggested that he should get a divorce from her and that she would not oppose it, nor ask for support. These letters indicate the parties are still in love with each other. Perhaps they can yet get together.

It is our conclusion that the learned trial court erred in refusing to grant appellant a divorce on his complaint and in awarding alimony to appellee. The decree will be reversed and the cause remanded with directions to enter a decree of divorce in his favor, but without alimony to her.

KRUTZ *v.* FAUGHT.

4-6911 166 S. W. 2d 655

Opinion delivered December 14, 1942.

Frank C. Douglas, for appellant.

HOLT, J. This litigation grew out of a dispute over the boundary line between two tracts of land. Appellants own one of these tracts, lot 11, containing approximately 35.88 acres, and the north 10.27 acres of lot 12, supplemental survey in the southwest quarter of section 2, township 15 north, range 11 east; and appellee, G. W. Faught, owns the other, which is the south part of lot 12 in the southwest quarter of said section, containing approximately 35.27 acres, all in Mississippi county, Arkansas.

Appellees have submitted no brief.

The present suit was filed by appellants against appellees April 16, 1940. They alleged in their complaint, among other things, that in order to establish the correct boundary line between the two tracts of land in question,

they and appellee, G. W. Faught, on March 19, 1940, entered into the following written agreement: "This agreement is by and between L. M. Krutz and George Faught, of Blytheville, Arkansas, as follows: In order to settle all questions about the fence line between the parties to this agreement, as to their respective lands in the southwest quarter of section two, township fifteen north, range eleven east, the said parties hereby agree to employ the present county surveyor to go upon said lands and establish the correct government division lines, set proper stakes, and such lines shall then be considered and accepted by the parties to this agreement as the true and correct division line between their lands. Such lines when established shall be accepted in lieu of any old fence rows or other points now considered by either party as part of the division lines. Either party when said survey is made may erect a fence on the line as thus established. Each party to this agreement is to be present or have a representative when the survey is made, and each party hereto agrees to pay one-half of the cost of such survey. Dated this 19th day of March, 1940. Signed: L. M. Krutz. Witness: Frank C. Douglas," and pursuant to this agreement the then county surveyor, Mr. Ott, went upon the lands, made a survey, and established the correct boundary line.

It is further alleged that appellee, Faught, refused to abide by the survey made in accordance with the terms of the agreement. Appellants prayed that appellee, Faught, "be restrained from molesting the plaintiffs (appellants here) and their agents and employees in the erection of a fence along the division line established by the county surveyor, Ott; that title to lot 11 aforesaid be quieted in the plaintiffs, etc."

Appellee, Lum Manley, disclaimed any interest in the suit, and he passes out of the case.

Appellee, G. W. Faught, filed answer denying the material allegations of the complaint, and in a cross-complaint alleged that he was the owner and entitled to possession of the land in dispute, comprising a small strip across the south end of the eastern boundary line between

him and appellants of approximately one acre in extent, and prayed for an order enjoining appellants from interfering with his occupancy of the land in question, etc.

August 23, 1940, the cause was submitted to the court on depositions previously taken by appellants. No testimony appears to have been offered by appellee, but on August 23 appellee requested the appointment of a surveyor and master. E. J. Heaton was appointed, but did not serve. February 24, 1941, H. C. Davidson, the then county surveyor, was appointed by the court "to survey out the line in dispute in this suit between the parties, and re-establish the government line running north and south between lots 11 and 12 in the southwest quarter of section 2, township 15 north, range 11 east. Said H. C. Davidson is also appointed as master and he may examine the parties to this suit and their witnesses and make report to this court of the contentions of both plaintiff and defendant herein, etc." In due course, Mr. Davidson made a survey and filed his report. Exceptions were filed to the report by appellants, which were overruled by the court, and on April 11, 1942, a decree was entered approving the survey as filed by the then county surveyor, H. C. Davidson, as establishing the boundary line. This appeal is from that decree.

As has been noted, the parties to this action on March 19, 1940, entered into a written agreement under the terms of which, among other things, they bound themselves "to employ the present county surveyor to go upon said lands and establish the correct government division lines, set proper stakes, and such lines shall then be considered and accepted by the parties to this agreement as the true and correct division line between their lands. Such lines when established shall be accepted in lieu of any old fence rows or other points now considered by either party as part of the division lines. Either party when said survey is made may erect a fence on the line as thus established."

Fraud being absent, we are clearly of the view, on the record here, that the parties to this written agreement are bound by its terms. While appellee, Faught,

one of the parties, refused to be bound by the agreement after the survey was made because he was dissatisfied with the result, under the law it was beyond his power to repudiate this survey and refuse to be bound by it without the consent of appellant, the other party to this agreement. We find nothing in the record abstracted here of any repudiation of this agreement on the part of appellant, Krutz.

It is the policy of the law to encourage the settlement of boundary disputes between landowners by agreement. This court, in *Miller* v. *Farmers Bank & Trust Company,* 104 Ark. 99, 148 S. W. 513, held (quoting from headnote 5): "It is the policy of the law to encourage agreements between adjacent landowners as to their boundaries, and to give effect thereto when shown to exist." In that case there was cited with approval the case of *Levy* v. *Maddox,* 81 Tex. 210, 16 S. W. 877, and it is there said: "This court has frequently passed on questions of boundary, and as has been frequently cited, 'these settlements of boundary are common, beneficial, approved, and encouraged by the courts, and ought not to be disturbed, though it was afterward shown that they had been erroneously settled. Convenience, policy, necessity, justice, all unite in favor of such an amicable settlement'." See, also, *McCombs* v. *Wall,* 66 Ark. 336, 50 S. W. 876.

Having reached the conclusion that the parties here are bound by their agreement, and the survey made in accordance with its terms, the decree must be, and is, reversed and the cause remanded with directions to establish as the correct boundary line, the line fixed and established by Mr. Ott's survey, and for other proceedings consistent with this opinion.

SANDERS *v.* OMOHUNDRO.

4-6905 166 S. W. 2d 657

Opinion delivered December 14, 1942.

[redacted]

House, Moses & Holmes, for appellant.

Carmichael & Hendricks, for appellee.

GRIFFIN SMITH, C. J. The appeal is from a decree directing W. B. Sanders to comply with his written contract of April 21, 1942, to purchase ninety-one feet of land fronting west on Pulaski street in Little Rock. Sanders says he is anxious to consummate the transaction, but that Mrs. L. S. Omohundro, who agreed to supply an abstract showing a marketable title, has defaulted in that Gladys Shader, who inherited the property from her father, and in whom title is conceded to have been good, was insane in 1939 when Mrs. Omohundro purchased from a so-called guardian.

Invalidity of the sale to Mrs. Omohundro is based upon the following grounds: (a) Action of Pulaski probate court in appointing a guardian was void, and (b) the proceedings may be collaterally attacked. (c) The guardian's attempt to sell was ineffectual because a commissioner appointed by the court, as distinguished from the guardian, made the sale, and (d) the lots were exchanged for other property; also, (e) the court's direction to sell and its order of confirmation were within the same term. (f) Confirmation was not complete. (g) An order, *nunc pro tunc,* whereby it was sought to cure a defective commitment of 1914, was void.

In January, 1914, David R. Clark, who termed himself "attending physician" at St. Joseph's Retreat, Dearborn, Mich., addressed a letter "To whom it may concern," certifying that Gladys Shader was mentally ill. It was the writer's opinion the patient was incapable of caring for her person or property. Appointment of a guardian, he said, was "necessary and essential."

February tenth of the year in which the Clark letter was written, Mrs. Eleanor F. Shader (Gladys' mother) petitioned Pulaski probate court for appointment as guardian, in consequence of which such designation was made in an order dated four days subsequent to the petition. Bond was executed.

May 10, 1935, complying with prayers of a petition for "clarification of the record" and an order, *nunc pro tunc,* the probate court entered its judgment finding that Gladys was then confined in St. Joseph's Retreat; that the institution was an asylum for the insane within the meaning of Act 77 of 1905, and that the patient's mental status was such that appointment of a guardian was imperative. Gladys was found to be a resident of Pulaski county.[1]

Essential difference between the judgment of 1914 and that of 1933 was that the prior judgment did not

[1] A recital is: "And it being further shown that [the finding presently made] was the judgment of the court made February 10, 1914, but by clerical misprision or oversight not so entered, it is entered now for then and with the same force and effect as if it had been entered in this form at the time."

show on its fact what is conceded to be a fact—that Gladys was a citizen of Pulaski county in 1914 and in 1935; also, the order of 1914 did not disclose the nature of the Dearborn institution.

Argument is that there was want of due process when in 1914 a judgment appointing a guardian was rendered without requiring that Gladys be brought into court. The same vice, it is said, appears in the order of 1935. Attention is directed to § 7546 of Pope's Digest, where it is provided that if anyone shall give information in writing to the probate court that a person in the county is of unsound mind, and shall pray that an inquiry be had the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before it, "and inquire into the facts by a jury, if the facts be doubtful."

Section 7553 of the Digest directs that if it be found by the jury that the person "so brought before the court" is of unsound mind, or incapable of managing his own affairs, a guardian shall be appointed.

Appellee, however, relies upon § 7554 of the Digest, which is § 1 of Act 77 of 1905, p. 198. The provision is that in respect of a person of unsound mind who is confined in an asylum for the insane within the state, "or in any institution or asylum for the insane outside of the state," the probate court of the county of which such insane person is a citizen shall have power to appoint a guardian ". . . without requiring the presence of such person before the court."[2]

Appellant's contention is that § 7554 is constitutional only in those cases where commitment has been by appropriate proceedings after due notice, and after the subject whose rights are being dealt with has been brought before the court.

In construing § 7546 of Pope's Digest (§ 5829 of Crawford & Moses' Digest), it has often been held that presence of the person alleged to be insane is a prerequisite to the jurisdiction, and an order appointing

[2] See Act 108, approved February 17, 1937.

a guardian must affirmatively show such fact. *Monks* v. *Duffle,* 163 Ark. 118, 259 S. W. 735.

Appellant cites *Hyde* v. *McNeely,* 193 Ark. 1139, 104 S. W. 2d 1068, where it was adjudged that the probate court of Desha county did not have jurisdiction to inquire into the sanity of a person who was not before the court. The decision, however, was in a case where the person alleged to be insane had not been committed to an institution, and § 5829 of Crawford & Moses' Digest was applicable, as in the Monks-Duffle case.

In *Payne* v. *Arkebauer,* 190 Ark. 614, 80 S. W. 2d 76, the holding was that an order adjudicating a person to be insane, such person not being before the court, was not void on its face for want of due process, even though made without notice. The reason was that the adjudication could be appealed from.

Chief Justice McCulloch, speaking for the court in *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S. W. 501, said that refusal of the probate court to inquire into the facts of insanity by a jury, if the facts be doubtful, and a finding without such inquiry, did not render the judgment void, although it was an abuse of discretion appearing on the face of the record, and such an abuse as would have invalidated the proceeding on appeal. "Jurisdiction," says the opinion, "is acquired by the filing of information with the court and the compulsory attendance of the accused before the court, and the proceedings which follow constitute the exercise of the jurisdiction thus acquired. The ordering of a jury is done in the exercise of that jurisdiction, and it does not defeat the jurisdiction of the court because there is an erroneous exercise of it in the proceeding. The error must, as before stated, be corrected by appeal."[3]

The second headnote to *Payne* v. *Arkebauer* as shown by the Arkansas Reports, assumes the decision

[3] The cause reached the Supreme Court on appeal from a judgment of the Lawrence circuit court where there was refusal to issue a writ of certiorari to bring up for review a judgment of the probate court declaring the appellant to be a person of unsound mind and appointing a guardian of his person and for his estate.

held that a person charged with insanity must be present when a guardian is appointed, "but need not be present in a proceeding for commitment to State Hospital for Nervous Diseases." In the opinion attention is called to § 5829 of Crawford & Moses' Digest, taken from the Revised Statutes, and to Act 19, approved Feb. 17, 1883, the latter providing for admission of insane persons to asylum. It was then said that each statute is complete in itself, ". . . and the Acts are for wholly different purposes." But in another paragraph there is this language: "As we have already stated, there are two separate statutes dealing with insane persons. One is the statute to which attention has been called in the Revised Statutes. In the proceedings under this statute it is necessary to have the party present in court, but this is a proceeding for the appointment of a guardian."

There is no reference to § 5837 of Crawford & Moses' Digest, (now Pope's § 7554) and since the question of appointing a guardian was not involved in the Payne-Arkebauer case, the comment could only relate to rights contended for or limitations invoked under § 5829 of Crawford & Moses' Digest."

In determining whether the judgment naming Mrs. Shader guardian was void, *Scott* v. *Stephenson,* 168 Ark. 763, 271 S. W. 714, is very much in point. After a decree had been rendered by the Drew chancery court finding that the appellant had failed to deliver to Guy Stephenson property valued at more than $14,000, the losing party moved to vacate because, as it was urged, the probate court was without jurisdiction to appoint Stephenson guardian. While the motion was pending the probate court made an adjudication to the affect that Ruth Harris was a person of unsound mind, and that she was then confined in a sanitorium in Ohio. Stephenson was reappointed guardian.

The appellant relied on *Monks* v. *Duffle, supra,* the holding there being, as we have heretofore shown, that the probate court is without jurisdiction to pass upon the sanity of an accused unless the party whose rights

are involved is before the court. While declining to pass upon the validity of Stephenson's appointment as guardian and the finding of insanity (this because the decree was upheld upon other grounds), there was this statement:

"Of course, the right to enforce the decree in the name of the guardian is affected by the question of the validity of his appointment, but the question of the enforcement of the decree is not involved in this appeal, and, besides that, it has become entirely moot, for the reason that, since the question was raised by a motion to vacate the decree below, there has been a valid adjudication of the insanity of Ruth Harris and another appointment as guardian." After quoting § 5837 of Crawford & Moses' Digest, (Pope's § 7554), the opinion continues:

"When the last order was made reappointing the guardian for Ruth Harris, she was, according to the undisputed proof, in an asylum or sanatorium for the care and treatment of insane persons outside of the state, and the presentation of a petition to the court conferred jurisdiction to hear and determine the question of insanity."[4]

While the opinion mentions that Ruth Harris was not confined in the insane asylum of this state, the statute expressly provides for proceedings where confinement is in *the* state asylum, . . ."or in any institution or asylum for the insane outside of the state." The reasonable construction to be placed upon *Scott* v. *Stephenson* is that when a petition is filed, the probate court acquires jurisdiction to appoint a guardian. Insanity is presumed from the fact of confinement in an asylum. The proceeding is not according to the common law. Due process is not lacking.

The order "now for then" found that Gladys Shader, on May 10, 1935, was a citizen of Pulaski county

[4] There was this additional statement: "If there was any fraud practiced upon the court or upon the insane person by causing her to be removed from the state, so that the court could acquire jurisdiction, that could be shown in a direct attack to set aside the judgment of the probate court or by an appeal in apt time from the order."

confined in a Michigan asylum for the insane. There was also appointment of a guardian. Whether the judgment was valid as a finding, *nunc pro tunc,* (and we think it was) is not controlling. The same guardian was appointed, and the former appointment was confirmed. If in fact the matters recited in the order were determined by the court in 1914, but through clerical misprision omitted from the recorded judgment, the prior adjudication was valid. There is nothing to dispute the finding except absence from the record of an affirmative recital. Action was similar to that pursued in the Scott-Stephenson case after motion to vacate the chancery decree had been made, but before it was passed upon. . . .

That a commissioner appointed by the court made the sale is immaterial. The order of confirmation shows that Mrs. Omohundro was purchaser ". . . for $5,000 par bonds of Lafayette Hotel Company and $400 in cash." Immediate payment was made. Proceeds were delivered to the guardian, who was directed to execute a deed, and this was done. The guardian does not complain that she was not permitted to make the sale. In truth, the arrangement seems to have been one of convenience, for the benefit of Mrs. Shader as guardian, who no doubt was not experienced in conducting public sales.

The transaction was not an exchange of property. Whether securities of the hotel company were of sufficient value to justify their acceptance was for the court to determine. The guardian did not complain; hence, a presumption arises that the sale was satisfactory. A statement in the order of confirmation that the bonds and $400 in cash "given in exchange were worth as much as the land" did not convert the sale into an exchange except to the extent that money and bonds having a determined value were exchanged for the title. In short, it was a form of payment approved by the court, accepted by the guardian, and presumptively the equivalent of money. *Robertson* v. *Cooper,* 154 Ark. 5, 241 S. W. 50, has no application.

While confirmation did not follow the statute in the strictest sense, this is a collateral attack, and mere irregularities or errors in procedure cannot be reached.

The decree is affirmed.

RIDDLE *v.* WILLIAMS.

4-6865 66 S. W. 2d 893

Opinion delivered November 16, 1942.

J. Brinkerhoff, for appellant.

Lamb & Barrett, for appellee.

GREENHAW, J. Appellee brought this suit in ejectment against appellant in the Poinsett circuit court to recover possession of lot 1, block 1 of Little River Addition to the town of Marked Tree. Appellant answered, setting up a number of defenses, and upon his motion the cause was transferred to the chancery court. The chancellor held that appellee's title was paramount, declined to allow appellant any sum for improvements or taxes, and ordered a writ of possession, from which decree appellant has appealed to this court.

The evidence showed that Maggie Williams, appellee's mother, owned the property in question and in March, 1928, executed a deed of trust to Charles M. Bryan, trustee for Wilson-Ward Company, covering this lot, together with 12 other lots in Marked Tree. The indebtedness was due November 15, 1928, and since no credits appear upon the mortgage record the lien became barred as to third parties after more than five years from the due date.

The lot in question was included in three improvement districts. Assessments for 1927 and 1928 due the St. Francis Levee District were not paid, nor was the assessment for 1930 due Drainage District No. 7. These districts foreclosed, and the property was sold by the commissioner pursuant to the decree and purchased by the respective districts. On January 9, 1934, appellant purchased this lot and obtained a deed thereto from the St. Francis Levee District, and on January 12, 1934, he purchased the lot and obtained a deed thereto from Drainage District No. 7.

In September, 1934, suit was filed to foreclose the deed of trust executed by Maggie Williams in favor of Wilson-Ward Company, and a decree thereon was taken in August, 1935. For some reason which was unexplained the property was not immediately sold, but was finally sold by the commissioner in July, 1939, almost four years after the decree had been entered, and the lot in question,

along with all other property included in the mortgage, was purchased by J. H. Crain, trustee for Wilson-Ward Company, and a deed was executed to Crain by the commissioner on September 6, 1939.

Appellant was not made a party to the foreclosure of the deed of trust, nor was a *lis pendens* filed. It is conceded that Crain acquired no title to lot 1 by reason of the foreclosure under the deed of trust, the lien having been cut off by foreclosure and sale to the improvement districts for the 1927 and 1928 levee district assessments and the 1930 drainage district assessment.

After appellant had acquired the lot in question from the levee and drainage districts in January, 1934, he attempted to exercise the right of ownership thereof, but was interfered with by appellee's mother, who apparently was still claiming an interest in the lot. In February, 1936, appellant effected a settlement with appellee's mother by which he conveyed to her two lots and she gave him a quitclaim deed to the lot in question. Appellant had conferred with an attorney, who advised him that by obtaining a quitclaim deed from Maggie Williams he would have no further worries as to the validity of his title.

Appellant paid all assessments due on this lot to all improvement districts, and also state and county taxes, for the years 1935, 1936, 1937, 1938, 1939 and 1940, and also levee and drainage district assessment for 1941. It appears, however, that the drainage district assessment for 1934 and the Ozark Trail Road Improvement District assessment for 1932 were not paid by appellant or anyone else, and these districts foreclosed their liens upon the lot for these assessments, the property was sold to the districts and the commissioner executed his deeds to the respective districts on December 7, 1936.

October 7, 1939, almost three years after Drainage District No. 7 and Ozark Trail Road Improvement District obtained title, the districts executed their respective deeds conveying the lot in question to J. H. Crain, trustee, who on December 7, 1939, conveyed all the property obtained at the foreclosure sale to appellee.

Appellant testified that he did not know that these assessments had not been paid; that he intended to pay all assessments due at the time he purchased the lot from the levee and drainage districts in January, 1934, and would have paid the drainage and road improvement assessments upon which decrees of foreclosure were entered had he known they had not been paid.

T. C. Brigance was secretary of Drainage District No. 7 and Ozark Trail Road Improvement District. At the time appellant purchased from the drainage district he executed and delivered to Brigance his check for $19.80. Brigance on his own motion changed the check, reducing it to $8.80, or $11 less than the amount for which it was originally executed. Appellant testified that he thought he was paying all assessments due on this lot, although nothing was said about the Ozark Trail Road Improvement District assessments. Brigance testified that the original amount of the check would have more than paid the 1934 drainage assessment and the assessments due Ozark Trail Road Improvement District. However, the tax books were not open for payment of the 1934 drainage assessments until in February, 1934, and the 1934 drainage assessments were payable to the county tax collector.

Some time prior to Christmas, 1936, appellant decided to erect a building on this lot, and his attorney advised him that the title was good and he had nothing to worry about. Accordingly, about Christmas, 1936, he began the erection of a substantial brick building with concrete floor upon the lot in question, and this improvement was completed about May, 1937, at a cost of nearly $6,000. It was also shown that the cost of the improvements and the taxes paid by appellant amounted to $6,136.

Appellant interposed a number of defenses to this suit, all of which have had our serious consideration. Under the evidence in this case we are unable to say that the finding and decree of the chancery court that appellee's title was paramount was against a preponderance of the evidence. This lot having been conveyed to

the drainage and road improvement districts by deeds of the commissioner in the foreclosure proceedings on December 7, 1936, the time of redemption had expired prior to the conveyance by these improvement districts to Crain, trustee, on October 7, 1939.

Appellant finally urges that in the event this court should hold that the title of appellee is paramount, appellant is entitled to the enhanced value of the property under the betterment act, and to the taxes paid by him. The betterment act, § 4658 of Pope's Digest, provides: "If any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvements made as aforesaid and the amount of all taxes which may have been paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant, or the person under whom or from whom he entered and holds, before the court rendering judgment in such proceedings shall cause possession to be delivered to such successful party."

The undisputed evidence in this case shows that at the time appellant constructed the improvement he believed himself to be the owner of the lot, and was in peaceable possession thereof under color of title. Not only had he obtained deeds from the levee and drainage districts in January, 1934, but he made a settlement with appellee's mother whereby she conveyed to him, in February, 1936, all of her right, title and interest in the lot in question. It will be observed that appellant lost the title to this property by reason of the foreclosure of the 1934 drainage assessment and the 1932 Ozark Trail Road Improvement District assessment, and the sale thereunder to these respective districts, to which deeds were executed by the commissioner on December 7, 1936.

However, the evidence is undisputed that appellant did not know of these foreclosure sales to the improvement districts and thereafter, and while he was still in peaceable possession of this lot, believing himself to be

the owner thereof, he made valuable improvements thereon at considerable expense. He testified, and it was undisputed, that in doing so he acted in good faith, stating: "In good faith I believed I owned the property, beyond a doubt, and would not have spent that much money if I had not."

It is also undisputed that an attorney advised him before the improvements were made that the deed from Maggie Williams cleared up the title. It is further undisputed that after purchasing this lot from the levee and drainage districts he paid all assessments due all improvement districts, as well as the state and county taxes due thereon for all subsequent years, except the drainage assessment for the year 1934 and the road improvement district assessment for 1932, and that he would have paid these had he known they had not been paid.

In the case of *Beard* v. *Dansby,* 48 Ark. 183, 2 S. W. 701, this court, among other things, said in considering the betterment act: "But the constructive notice of an adverse title, which the law implies from the registry of a deed, is not sufficient to preclude the occupant from recovering for improvements, if he, in fact, purchased in good faith and under the supposition that he was obtaining a good title in fee. Actual notice is the test—that is, either knowledge of an outstanding paramount title or of some circumstance from which the court or jury may fairly infer that he had cause to suspect the invalidity of his own title. Now, the mere fact that the defect in the title would have been disclosed upon an examination of the public records does not bring such knowledge home to him; for it is not inconsistent with his ignorance of the existence of such a deed, nor with an honest belief that his title is uncontested. . . . The only requirements of the act are, that the occupant should have had peaceable possession, at the time the improvements were made, under color of title and under the belief that he was the owner of the land. Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title. . . . Good faith, in its

moral sense, as contradistinguished from bad faith, and not in the technical sense in which it is applied to conveyances of title, as when we speak of a *bona fide* purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement that he must believe himself the true proprietor. It must be an honest belief, and an ignorance that any other person claims a better right to the land. . . . The betterment act does not proceed upon the idea of contract, or consent of the parties, or negligence of the owner in asserting his title. It is a rule for administering justice; and the principle of it is, that no one ought to be enriched at the expense of another."

The Beard case was reaffirmed in the case of *Shepherd* v. *Jernigan,* 51 Ark. 275, 10 S. W. 765, 14 Am. St. Rep. 50, where this court said: "If, however, the defendant has improved the land in good faith under the belief that he was the sole owner, he is entitled to pay for his improvements by the terms of the betterment act. Constructive notice of title, such as is implied from the registry of a deed, is not in itself sufficient to preclude an occupant from its benefits." See, also, *Bloom* v. *Strauss,* 70 Ark. 483, 69 S. W. 548; *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88; *Green* v. *Maddox,* 97 Ark. 397, 134 S. W. 931; *Crowell* v. *Seelbinder,* 185 Ark. 769, 49 S. W. 2d 389, 83 A. L. R. 788.

In the case of *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. 2d 1003, the first headnote reads as follows: "Under the betterment act of March 8, 1933 (Crawford & Moses' Dig., § 3703), one who, believing himself to be the owner and under color of title, has peaceably improved land which upon judicial investigation has been determined to belong to another, is entitled to recover the value of his improvements and the taxes paid."

This property was conveyed by the commissioner to the improvement districts on December 7, 1936, prior to the time appellant placed his improvements upon the lot. Appellant acted in good faith in erecting these improvements, when he was in peaceable possession under color of title, believing himself to be the owner of the

property. We think these facts clearly bring him within the purview of the betterment act, and that he is entitled to its benefits.

Having reached the conclusion that the chancery court erred in so much of its decree as denied to appellant the benefits of the betterment act, the decree is to this extent reversed, and the cause is remanded with directions to allow appellant the benefits provided therein.

GRIFFIN SMITH, C. J., (dissenting).

Evidence preponderates on the proposition that when appellant tendered his check to Brigance and it was reduced from $19.80 to $8.80, he knew 1934 assessments were not being paid. They were not then collectible by Brigance. For this reason, and others, appellant did not act with the good faith contemplated by the betterment statute. I therefore dissent.

PETTY *v.* METROPOLITAN LIFE INSURANCE COMPANY.

4-6873 166 S. W. 2d 1034

Opinion delivered November 23, 1942.

R. H. Wood and *H. B. Stubblefield,* for appellant.

Harry Cole Bates and *Moore, Burrow, Chowning & Hall,* for appellee.

GREENHAW, J. Appellant prosecutes this appeal from the judgment of the Izard circuit court in favor of appellee, in which that court found and held, upon the plea of appellee, that the decision of this court in the case of *Metropolitan Life Insurance Co.* v. *Petty,* 196 Ark. 1178, 118 S. W. 2d 248, decided June 20, 1938, involving the same parties, constituted *res judicata.* The first suit was filed in August, 1937, and the present suit in February, 1942.

On April 2, 1925, appellee issued to appellant a life insurance policy in the amount of $5,000, and a few days thereafter issued to him a supplementary contract, commonly called a total and permanent disability rider, providing for waiver of premiums and payment of monthly income, which was attached to said life insurance policy. The supplementary contract covered total and permanent disability "as the result of bodily injury or disease occurring and originating after the issuance of said policy."

In his first suit appellant alleged: : "He has suffered from a general weakened condition; is very nervous, tottery, physically run down and unable to perform any kind of manual labor, (and is) suffering from what the doctors who examined him call Parkinson's disease."

In the present suit he alleged: "That plaintiff, Charles C. Petty, is now and has been continuously during and since the month of January, 1938, suffering from nervousness, loss and defect in his speech, loss of use of his right side, including right arm and right leg; poor vision, shaking palsy, Parkinson's disease, and paralysis agitans; that plaintiff, Charles C. Petty, is prevented

thereby from engaging in any occupation and from performing any work for compensation or profit."

In the case of *Metropolitan Life Insurance Co.* v. *Petty, supra,* this court, in reversing the judgment for Petty and dismissing the cause, said: "We have quoted extensively from appellee's testimony because it shows beyond a reasonable doubt (1) that appellee was afflicted with a disease of the nervous system at the time he applied for insurance; (2) that the condition of which he now complains is a continuation of the malady existing in March, 1925, symptoms of which relate back to 1921; (3) that such symptoms were apparent to appellee while he was working for Chas. T. Abeles & Company, and (4) that appellee, in applying to the Veterans' Bureau for service connected disability compensation, regarded his affliction as one originating during the period of his army service."

In the above case the evidence was reviewed at length. The opinion does not appear in the Arkansas Reports, but will be found in the Southwestern Reporter.

In the instant case appellee sued for the monthly disability benefits for the months of October, November and December, 1941, and January and February, 1942, as well as for those other months which might accrue before trial. He also sought a waiver of all premiums, beginning at once thereafter, both upon the policy and the supplementary contract, together with 12 per cent. penalty and attorney's fees.

A jury was waived and the case was submitted to the court upon the pleadings, the policy involved, and a written stipulation of facts. No other evidence was introduced. The stipulation reads in part as follows:

"That plaintiff is now and has been continuously during and since the month of January, 1938, totally and permanently disabled as a result of Parkinson's disease and paralysis agitans with which he is afflicted and is prevented thereby from engaging in any occupation or performing any work for compensation or profit, which disability is permanent and which has caused plaintiff

to be almost helpless; that the fact that plaintiff is now and has been disabled as set forth hereinbefore has been known to defendant continuously during and since the month of January, 1938; that due proof of said disability has been furnished to defendant.

"The disability referred to above was caused by the same disease and ailments that were the basis for a suit which was filed on this policy and disability rider by plaintiff herein against this defendant in this court and was tried in this court on the 27th day of September, 1937, which suit resulted in a judgment for plaintiff, which judgment, on appeal by the defendant to the Supreme Court of Arkansas, was reversed and the cause dismissed on the ground that the disability of plaintiff upon which he relied for recovery was based upon and caused by a disease which occurred, originated and existed prior to the issuance of the policy; said decision of the Supreme Court was rendered on the 20th day of June, 1938, and is reported in 196 Ark. 1178, 118 S. W. 2d 248 and was docketed as Case No. A-5110.

"The disability alleged in the case at bar is the same disability which plaintiff was suffering when the previous suit hereinabove mentioned was filed and was the basis for said action; that this disability of plaintiff herein is now total and permanent as alleged by him, since the month of January, 1938, but the basis of said present disability and the cause of same is a disease (Parkinson's disease) which occurred, originated and existed prior to the date of the policy and disability rider sued upon herein as held by the Arkansas Supreme Court in said case."

It was also stipulated that appellant had paid all premiums due on the policy and rider for the years 1938, 1939, 1940 and 1941.

It will be observed that according to the agreed stipulation of facts the disability alleged as the basis of this suit was the same disability (Parkinson's disease) with which appellant was suffering when the previous suit was filed, and that it "occurred, originated and

existed prior to the date of the policy and disability rider sued upon herein, as held by the Arkansas Supreme Court in said case."

Appellant contends, however, that the doctrine of *res judicata* does not preclude recovery in the instant case for the reason that appellee concedes that appellant has been totally and permanently disabled since January, 1938, as a result of Parkinson's disease and paralysis agitans, and that with knowledge of these facts appellee has continued to receive the annual premium of $9 due on the disability rider contract for the years 1938, 1939, 1940 and 1941. It is appellant's contention that the action of appellee in accepting the premiums due on the supplementary contract with full knowledge of appellee's total and permanent disability, since January, 1938, constituted an estoppel or waiver which precluded it from contesting this suit and pleading *res judicata.*

Appellee contends that it had no alternative but to accept the disability premiums; that the contract, including the disability rider clause, was a continuing one, and it had no right to cancel the same and refuse to accept such premiums without appellee's consent. It further contends that under the terms of the policy and disability rider appellant was entitled to continuous protection against any bodily injury or disease not originating or occurring prior to the issuance of the policy, and that in consideration of the $9 premium he has paid annually since the first case was reversed and dismissed by this court in 1938, he has received such protection under the contract, and that it had a right to assume that appellant continued to pay his premiums because he desired such protection, and did not want his disability coverage canceled.

The case has had our careful consideration, and we think the circuit court was correct in sustaining the plea of *res judicata.* For a discussion of the law regarding *res judicata.* See *Meyer* v. *Eichenbaum, Trustee,* 202 Ark. 438, 150 S. W. 2d 958.

Even though appellant is precluded from recovering the benefits sought here, it is possible he might sustain

a bodily injury or contract a disease other than the disease with which he is now afflicted, which would, within the meaning of the policy, render him totally and permanently disabled, thereby entitling him to the benefits thereunder. We think, therefore, that in accepting the premiums for the years 1938-41 it was not appellee's intention to waive its defenses to a claim by appellant based upon Parkinson's disease, but to afford appellant coverage for any subsequent disability which he might incur.

Appellant further argues that the two-year incontestable period had expired since the trial in the other case and prior to the filing of the present suit. We are unable to agree with this contention. Under the incontestable clause of the policy, the right of the insurance company to contest all claims thereunder expired two years from the date of the policy "except as to provisions and conditions relating to benefits in the event of total and permanent disability . . . contained in any supplementary contract, attached to and made a part of this policy." The supplementary contract among other things provided for disability benefits, waiver of premiums, etc., in the event the insured became totally and permanently disabled as the result of bodily injury or disease "occurring and originating after the issuance of said policy." Therefore, the incontestable clause did not preclude appellee from contesting the present suit on the ground that the disability originated prior to the issuance of the policy.

Affirmed.

SHAW *v.* POWELL.

4-6867 166 S. W. 2d 884

Opinion delivered November 23, 1942.

R. W. Tucker, for appellant.

J. J. McCaleb, for appellee.

GRIFFIN SMITH, C. J. The suit as originally designed was to compel W. H. Powell to specifically perform a written contract, and to procure judgment on miscellaneous obligations of Cash and Carry Milling Company Powell is alleged to have agreed to pay. J. E. Whisnant was a joint plaintiff with Shaw, but later filed a stipulation releasing Powell.

Shaw was owner of two lots in Batesville upon which a feed mill was constructed and sold to Powell. The land and buildings were mortgaged to Batesville Federal Savings and Loan Association. Shaw's residence was included in the security. Copy of a writing dated January 10, 1941, recites sale of the land, ". . . more particularly described on a warranty deed attached to [a copy of the contract."] As part consideration moving to Shaw for sale of the real property and milling business, inclusive of machinery, etc., Powell agreed to pay the mortgage in monthly installments of $40, beginning with December, 1940. The balance was $2,318.81. Other recited indebtedness was: (a) Two notes held by Bell Lumber Company, one for $325, the other for $150, with stipulated interest. (b) Note to C. W. Pitts & Son for $385. (c) "A balance due on insurance [premium] on the property sold, $46.05." The contract states that deed to the real property would be deposited with loan papers held by Federal Savings, ". . . with the stipulation that said deed is to be delivered to [Powell] only when the loan to said association is fully paid, and also [when] the other notes enumerated [in the contract have been] paid in like manner."

July 7, 1941, Whisnant filed a statement that all amounts claimed from Powell had been "fully paid and discharged." There was a request that his suit be dismissed.

September 4, 1941, Powell moved for dismissal of Shaw's complaint insofar as it related to demand that the mortgage on Shaw's home be discharged at once. Receipts showing payment of all other items assumed in the written contract were exhibited to the court.

R. W. Tucker, who filed the complaint for Shaw and Whisnant, asked for summary judgment against Powell and Whisnant because Powell, according to Whisnant's declaration, had settled with Whisnant without consulting Whisnant's attorney, and without the attorney's knowledge.

Early in September, 1941, Shaw petitioned for appointment of a receiver on the ground that Powell was diverting assets, or was attempting to divert them. There was no allegation of insolvency. It does not appear that the court acted on the motion.

In the meantime (June, 1941) Fulton Bag & Cotton Mills, Inc., intervened, alleging that Shaw and Whisnant owed it $70.75, and that the sale of Cash and Carry Milling Company to Powell was consummated in disregard of the Bulk Sales Law. Pope's Digest, § 6067. Judgment against Shaw and Whisnant was asked. There was also a petition that Powell be made receiver as to property of the milling company coming into his hands, and that judgment be rendered against Powell.

September 15, 1941, Powell filed answer and cross complaint. It was alleged that in addition to the debts Powell assumed, as evidenced by the written contract, six items aggregating $545.19 were paid by him, although they were primary obligations of Shaw and Whisnant. Six other claims, aggregating $314.30, were outstanding. Total of the twelve items was $859.49. In their complaint Shaw and Whisnant listed twelve accounts amounting to $814.99 they alleged Powell assumed. It was also stated

that Shaw had been compelled to pay two of the twelve bills, one for $45, the other for $51.50.

It is admitted Shaw and Whisnant were partners. Whisnant rendered services in converting buildings into a milling status, and seemingly thereafter operated the business without interference from Shaw. Whisnant alleged in his complaint that Powell took over the unlisted debts of $814.99, and agreed to pay him $250. Powell testified he did not owe Whisnant anything and did not make a payment to him. Whisnant did not testify.

There is ample evidence in the bill of exceptions, which is incompletely abstracted, to show that Shaw was imposed upon by Whisnant.

Shaw's explanation of transactions preliminary to the contract with Powell was that he had information Powell was interested in buying the property. He (Shaw) prepared a list of "expenses" he had been out. He then went to Powell and told him that if reimbursed for this outlay, and if Powell would assume all obligations, the deal could be closed. Whisnant was not present. Shaw insists that when he went into Powell's office, Powell had a list of obligations he (Shaw) had prepared for Whisnant. The list, amounting to $1,172.59, was on Powell's desk. "I told Powell what I had told Whisnant: that if he (Powell) wanted to pay $1,172.59 in cash . . . and assume all the obligations, I would turn over my interest."

In consequence of this conversation, says Shaw, Powell later delivered his check for $1,000 and was given thirty days within which to pay the remainder. Shaw also testified that Powell told him he had three thousand bales of cotton, but did not want to sell it at once. It was Powell's opinion the commodities would advance; that he could sell to better advantage in thirty days, and he preferred to then pay the balance of $172.59. Powell is quoted as having said: "If anything happens [to prevent the sale] I will put up my real estate to take care of [your] real estate loan, clear it, and take care of all other indebtedness. . . . The following day he called me

and said, 'Let's go [to the Federal Savings office] and see if we can arrange a temporary agreement whereby I can pay you the thousand dollars and let the mortgage stand for thirty days on your land, and then I will take it up'."

The only evidence abstracted by appellant is an abridgment of what Shaw and Powell testified to; also a brief summation of the testimony of C. D. Metcalf, secretary-treasurer of the savings and loan association. The sale agreement between Shaw and Powell was drawn by Metcalf. In the abstract of Metcalf's testimony there is the statement that ". . . He (Metcalf) understood it was the expectation of Shaw and Powell that the mortgage would be paid in thirty days." Reference to the transcript, however, does not justify the conclusion. Metcalf was asked on direct examination if he knew what the intent was "relative to taking up this mortgage or deed of trust." He replied: "The understanding is covered by the printed or signed agreement." He was then questioned about his "understanding" of the arrangement, to which there was the response: "I wrote [the contract] and I think I understood it as it was written." He then stated that Powell had "taken care" of the payments; that he assumed them, and was meeting the obligation. Shaw, he said, was not relieved of liability. The question was asked, "Didn't you have an understanding that you would do that?" The answer was "No, sir." Metcalf then testified that Shaw and Powell may have had a private understanding between themselves, "but they didn't say anything to me about it." On cross examination Metcalf testified he thought it was the "expectation" of Shaw and Powell that the mortgage would be paid or transferred to other property, "but there was no agreement to that effect."

Shaw's complaint was dismissed for want of equity. On the cross action Powell secured judgment for $736. Tucker, as attorney for Whisnant, was allowed a fee of $50 because of the unauthorized settlement between Powell and Whisnant. In the decree of December 2, 1941, Powell was granted an appeal from the $50 judgment.

Shaw's appeal was granted by this court May 23, 1942. Pope's Digest, § 2741. Appellee's direct appeal was not perfected; nor did he cross appeal. He does not urge that allowance of the Tucker fee was improper.

Appellee's motion to dismiss for want of sufficient abstract (Rule Nine) could be sustained. However, we have preferred to examine the record to determine whether the decree is supported by a preponderance of the evidence—and it is.

Affirmed.

WILSON BROS. LUMBER COMPANY *v.* FURQUERON.

4-6878 166 S. W. 2d 1026

Opinion delivered November 30, 1942.

Barney & Quinn, for appellant.

Steel & Edwardes, for appellee.

SMITH, J. Appellants, who operate a lumber business in the city of Texarkana, Arkansas, sold lumber from time to time to a partnership composed of W. H. Furqueron and Bill Smith. Some, but not all, of these sales were made under a guaranty of payment made by Furqueron's sister, Nellie, but there was no continuing guaranty to pay for any or all lumber bought by Furqueron & Smith, as some sales were made to them without this guaranty. It had been the practice in all cases for Furqueron & Smith to sell the lumber purchased and to make settlements therefor out of the proceeds of the resale by Furqueron & Smith.

Such sales were made by appellants to Furqueron & Smith on May 8, 1940, of a bill of lumber amounting to $221.51, and two bills of lumber on May 10, 1940, one for $284.37 and the other for $228.89, making a total of $734.77.

It is not contended that these sales were made under any guaranty of payment by Miss Furqueron. After purchasing the lumber it was hauled in trucks by Furqueron & Smith into the State of Texas, where Smith absconded with a part of the lumber. Furqueron returned to Texarkana and reported that fact to appellants who prepared a paper writing which they requested Furqueron to have his (Furqueron's) sister to sign reading as follows:

"Wilson Bros. Lbr. Co.

"I guarantee the payment of the above amount within 7 days from date. Signed this the 17th day of May, 1940.

(Signed) "Nellie Furqueron."

This writing was attached to the invoice of the lumber.

Miss Furqueron testified that no one spoke to her about the matter except her brother, and he did not explain to her that Smith had absconded with a portion of the lumber, and that she would not have signed the paper had she been so advised.

Furqueron sold a portion of the lumber which Smith had not absconded with and paid appellants the proceeds

of that sale. He also returned to appellants a part of the lumber which he had not sold amounting to $144.59, and was given credit for both items.

Suit was brought for the face of the invoices, less the credits mentioned, against Furqueron and his sister. The balance sued for was $483.54. Furqueron filed an answer and a cross-complaint, which he later dismissed, and a verdict was directed against him by the court for the balance due, from which judgment there is no appeal by him.

The question of Miss Furqueron's liability was submitted to the jury, and a verdict was returned in her favor, and from the judgment thereon is this appeal.

The liability of Miss Furqueron, who defended upon the ground that there was no consideration for her guaranty, was submitted to the jury under instructions to which no objections were made and which are not now questioned, and reversal is asked upon the ground only that the verdict is contrary to the law and the evidence.

There appears in the opinion in the case of *First National Bank of Fort Smith* v. *Nadkimen,* 111 Ark. 223, 163 S. W. 785, Ann. Cas. 1916A, 968, a quotation from 20 Cyc., pp. 1413 and 1417, which declares the law applicable to the issues in this case reading as follows:

" 'It is essential to a valid contract of guaranty that there be a sufficient legal consideration. If there is not to be found in the contract either a benefit to the principal debtor, or to the guarantor on the one hand, or some detriment to the guarantee on the other, the contract will fail for want of a consideration. The mere naked promise in writing to pay the existing debt of another without any consideration therefor is void. . . . The guaranty of a pre-existing debt relates to a past consideration and therefore to be valid must be based upon a new and additional consideration. Such a consideration may be found in an agreement to extend the time of the payment of the debt, or to forbear suit thereon. And a promise to forbear generally without specifying any time is a sufficient consideration. But mere forbearance to sue the debtor,

without any agreement to that effect on the part of the creditor, is not a sufficient consideration for a guaranty of the debt.' "

The instructions of the court conformed to this declaration of the law.

For the reversal of the judgment it is insisted that there was a benefit flowing to Furqueron & Smith and that the indulgence granted them and the loss sustained by appellants constituted a valuable consideration sufficient to sustain the guaranty.

Appellee insists that there was no such testimony, but, if so, that it was disputed and that this question of fact has been concluded by the verdict of the jury.

In testing the sufficiency of the testimony to support the verdict in favor of the appellee we must, of course, give it the highest probative value of which it is susceptible, and it is to the following effect. The lumber had been sold and delivered nearly a week before appellee signed the guaranty. No extension of time for payment was asked, and none was given.

The complaint was amended to allege that the sentence, "I guarantee the payment of the above amount within 7 days from date," meant, and was intended to mean, that an extension of seven days was given in which to pay for the lumber, and that this was an indulgence given to the principal debtor, which constituted a sufficient consideration for the guaranty.

Both Furqueron and his sister testified that no extension of time was asked or given, and that ultimately Furqueron returned part of the lumber and was given credit for it.

The writing which appellee signed is not in conflict with this testimony, as it merely promises to pay the bill within seven days. But there must have been, of course, a consideration for this agreement before it will be enforced, as a mere agreement to pay an existing debt without a consideration for such an agreement is not enforceable, and whether there was such a considera-

tion was the question of fact submitted to the jury, and as there was substantial testimony to support the verdict the judgment pronounced thereon must be affirmed, and it is so ordered.

GRIFFIN SMITH, C. J., dissents.

FARRELL *v.* SANDERS.

4-6880 166 S. W. 2d 889

Opinion delivered November 30, 1942.

John F. Park, for appellant.

Isaac McClellan, for appellee.

HOLT, J. January 25, 1939, the State of Arkansas, proceeding under the authority of Act 119 of 1935, filed suit in the Grant chancery court to confirm its title to certain lands in Grant county. September 16, 1939, a decree, confirming the state's title to certain lands described in the complaint, was entered, and among these various tracts described in the complaint was the land involved here, "the west half of the northeast quarter of section 14, township three south, range 12 west, in Grant county, Arkansas."

March 21, 1939, appellee, J. L. Sanders, obtained a deed from the State of Arkansas to the land involved.

September 4, 1940, within the year following this confirmation decree, appellant, R. F. Farrell, intervened in the state's confirmation suit. He alleged ownership of the land in question, and that the purported tax sale to the state and the attempted conveyance by the state to appellee, Sanders, are void and of no effect on twenty-five different grounds. He further alleged that "your petitioner had no knowledge of the pendency of the suit of the *State of Arkansas* v. *Delinquent Lands in Grant county, Arkansas*, and has a meritorious defense to said suit; that he tenders into court and offers to pay to the said J. L. Sanders the sum of $29.79, paid by him to the state of Arkansas for said deed, together with penalty, interest and cost as required by law. Wherefore, intervener prays that the tax sale in Grant county, Arkansas, for the year 1935 as to the following described lands, to-wit: west half of the northeast quarter, section fourteen, township 3 south, range twelve west, Grant Co. be declared void and of no effect; that this cause be dismissed as to said lands for want of equity and that all of the right, title, interest and equity of the said J. L. Sanders and of the state of Arkansas, in and to said lands, or any part thereof, be divested out of them and vested in intervener, free and clear of all and any claims in or to said lands that have been, or might be, made by them, and for all other proper relief."

October 28, 1940, appellee filed motion to dismiss appellant's intervention on the ground that "intervener has not tendered to defendant taxes paid or pay for improvements as provided for by law, and did not file the affidavit showing this before filing suit."

December 20 following, the court, in the absence of appellant, sustained this motion. However, on April 22, 1941, the trial court, upon appellant's motion, set aside its order of dismissal, and reinstated appellant's intervention. April 28, 1941, appellee answered with a general denial and by way of cross-complaint asked for numerous items of improvements totaling $280.34, which

includes the sum of $81, paid the state for deed to the land in question.

May 14, 1941, appellant answered appellee's cross-complaint with a general denial and alleged that appellee was indebted to him for the use of the land and for certain timber sold from the property by appellee, and asked that a balance be struck between them.

May 16, 1941, appellee filed an amendment to his answer and cross-complaint, alleging additional improvements, and again questioned the action of the court in reinstating appellant's intervention, and in addition, pleaded the statute of limitation. On this same day, May 16, 1941, upon a hearing of the cause, appellee renewed his motion to dismiss appellant's intervention for failure to tender taxes and improvements and for failure to file affidavit of tender. The court thereupon took this motion under advisement and thereafter, on December 19, 1941, entered the following decree: "On this day is presented to the court the motion of the defendant, J. L. Sanders, to dismiss the intervention of R. F. Farrell, because of the failure to tender taxes and improvements and for failure to file affidavit of tender. And the court being well and sufficiently advised in the premises, finds that the state of Arkansas filed suit on the 25th day of January, 1939, in the Grant county chancery court to confirm title in certain lands in Grant county that had forfeited for nonpayment of taxes and sold to the state of Arkansas, and that on the 16th day of September, 1939, a decree was rendered quieting and confirming title in and to certain lands in Grant county in the state of Arkansas, and among said lands was the west half of the northeast quarter of section 14, township 3 south, range 12 west, the property involved in this action; that on the 4th day of September, 1940, and within a year after the entering of the confirmation decree confirming title to said lands in the state, the intervener herein, R. F. Farrell, filed his intervention in said suit setting up the invalidity of said tax sale upon which the confirmation decree was based and asked that he be allowed to redeem the land in controversy; J. L. Sanders, the purchaser of

said land from the state of Arkansas, was made a party defendant in said intervention, and filed a motion to dismiss said intervention because of the failure of the intervener to make a tender of taxes and improvements and for failure to file affidavit of tender; the court further finds that said motion of the defendant, J. L. Sanders, was sustained and said intervention dismissed by the court on the 20th day of December, 1940, but upon petition of the intervener, on April 22, 1941, said order of dismissal was set aside by the judgment in vacation and said intervention reinstated, and in the same term of court in which said dismissal order was entered; that said motion to dismiss for failure to tender taxes and improvements and failure to make affidavit of tender was renewed by the defendant, J. L. Sanders, on the 16th day of May, 1941, in open court, whereupon the court took said motion to dismiss under advisement and after due consideration of same finds that it is meritorious and should be sustained. It is, therefore, considered, ordered and decreed, that the motion of the defendant, J. L. Sanders, to dismiss the intervention of the intervener, R. F. Farrell, for failure to tender taxes and improvements, and for failure to make affidavit of tender, be, and the same is hereby sustained and the intervention herein is dismissed." From this decree is this appeal.

Appellee in his brief states the issue to be decided as follows: "This brings us down to the only question presented in this case. Does the failure to file an affidavit as required by § 4663 of Pope's Digest mean what it says? If so, then the court was right in granting said motion and dismissing said cause of action."

There is some controversy concerning the bill of exceptions and the time of the filing of a supplement thereto, which question we regard as unimportant for the reason that the alleged error in the decree of the court is apparent upon the face of the record and no bill of exceptions is required to present it.

Clearly, the motion to which appellant refers was his motion filed October 28, 1940, and is based upon the requirements of § 4663 of Pope's Digest which provides for

the tender for improvements, taxes and an affidavit of tender. Section 4663 has no application here. The intervention which appellant filed is not a possessory action such as is contemplated under § 4663, *supra,* but is an action to invalidate a tax sale and cancel the deed from the state of Arkansas to appellant. Appellant's intervention is brought under the provisions of § 6 of Act 119 of the Acts of 1935, (§ 8719, Pope's Digest), under the terms of which he was required to "tender to the clerk of the court the amount of taxes, penalty and costs for which the land was forfeited to the state, plus the amount which would have accrued as taxes thereon had the land remained on the tax books at the valuation at which it was assessed immediately prior to the forfeiture; provided, that there shall be credited on the amount due, any taxes that may have been paid on the land after it was forfeited to the state."

Appellant alleges in his intervention that the required tender was made. He was not required to file an affidavit of tender. In the recent case of *Reynolds* v. *Plants,* 196 Ark. 116, 116 S. W. 2d 350, this court, quoting from *Lea* v. *Lewis,* 189 Ark. 307, 72 S. W. 2d 525, said: "Since this is not a suit for recovery of land nor the possession thereof, the affidavit provided for in § 3708, Crawford & Moses' Digest (§ 4663, Pope's Digest) was not required, and the court erred in sustaining the demurrer and dismissing the complaint." In the case last cited, the court further said: "Of course, the original owner is required to tender and pay the taxes, but he is not required to file an affidavit of tender." By reference to § 4663, Pope's Digest, it will be seen that the section was intended to apply only in cases for the recovery of lands or for the possession thereof.

We think, therefore, on the record here, the trial court erred in dismissing appellant's intervention. However, appellee, the purchaser at the alleged void tax sale, would be entitled to recover for the value of improvements when appellant attempts to take possession of the land should the invalidity of the tax sale be first established. As was said in the *Plants* case, *supra,* "however, this does not mean that a purchaser at tax sale or one

whose title depends upon a void tax deed is not entitled to recover for taxes and the value of improvements, the tender of which is required in actions for the recovery of land or the possession thereof by the above section. For, in every instance, regardless of whether the tax sale is void and regardless of the purchaser's lack of belief in his title, he is entitled to recover such taxes and value of improvements as a condition upon which a writ of possession will issue."

Appellant, in his intervention, attacks the validity of the tax sale on twenty-five different grounds, some of which, if true, are sufficient to void the sale. Appellee, in addition to his motion to dismiss the intervention, filed an answer in which he denied generally the allegations set up in appellant's intervention, and alleged that he paid the state for the 80 acres involved here a total of $81 for his deed. In these circumstances, appellant was not required to tender to appellee the purchase price of the land. In the recent case of *Luebke* v. *Holtzendorff,* 203 Ark. 141, 162 S. W. 2d 899, this court said: "It was the sale for the 1933 taxes which the State sought to confirm under Act 119, *supra,* and in the intervention appellee tendered the taxes for which the land sold and those which would have accrued thereon had the land remained on the tax books at the valuation at which it was assessed immediately prior to the forfeiture as required by § 6 of Act 119. * * * This is not a possessory action. Appellee is seeking to effect the redemption authorized by § 6 of Act 119, and to effect that purpose has made the tender which that Act required. * * * We dispose of the present litigation when we hold, as we do, that Stock's vendees have the right, under § 6 of Act 119, to defeat the confirmation of the 1933 tax sale by showing the invalidity of that sale and by making the tender which that Act requires, and which has been done. * * * The $120 paid the state by appellant for its deed had no relation to the taxes due thereon, and did not profess to have. It was an arbitrary price fixed by law for the sale of land which had forfeited to the state. The state sold only this title, and its vendee bought with knowledge of the fact that his deed might be attacked, as many of

such deeds have been, and that he would not acquire the title under its deed if it were shown, before the title had ripened through possession or otherwise, that the sale upon which the State's title was based was invalid. Being apprised of this fact, the General Assembly has made provision for this contingency. See Act. 226 of 1941, p. 552. . . . The Act 337 referred to in Act 226, just quoted, is an Act in which § 1 thereof provides that 'The Commissioner of State Lands is hereby authorized and empowered to make refunds of amounts received by the state for tax forfeited lands where title to such lands has failed'."

The decree is reversed and the cause remanded with directions for further proceedings consistent with this opinion.

PRALL *v.* PRALL.

4-6960 166 S. W. 2d 1028

Opinion delivered November 30, 1942.

E. F. McFaddin, for appellants.

G. P. Casey, James H. Pilkinton and *Steve Carrigan,* for appellees.

GREENHAW, J. This case involves the construction of the holographic will and codicil of Mrs. Effie LaDora Prall. At the time of the execution of this will the immediate family of Mrs. Prall consisted of her husband, B. George Prall, one daughter, Beatrice Arvilla Prall, and one son, George Virgil Prall. The will and codicil are as follows:

"I, Effie LaDora Prall do make and execute this my holographic will.

"I devise and bequeath all property of whatsoever kind, of which I may die possessed to be held in trust during the lifetime of my husband B. George Prall, first, the life time of Beatrice Arvilla Prall my daughter, second, and the lifetime of George Virgil Prall my son third. At his death to be divided equally among the heirs of my body, if none, equally among my blood kinsfolk.

"Beatrice Arvilla Prall to be Executrix without bond and to name Executrix or Executor with bond for George Virgil Prall.

"Codicil.

"I, Effie LaDora Prall do make the following codicil to my will executed by me at Hope, Arkansas, August 26, 1914.

"First: No property in this will can be used to pay debts of person to whom it is given.

"Second: No property in this will can be mortgaged by person to whom it is given.

"Third: The property in this will can be sold and reinvested in real estate if advisable, under the same conditions found in this will."

Effie LaDora Prall died in 1919, and her husband, B. George Prall died intestate in 1924. Her son, George Virgil Prall, died intestate in 1937, survived by his wife, Irene Thompson Prall, and two minor children, Mary Lou Prall and Bettie Ann Prall.

Beatrice Arvilla Prall qualified and served as executrix of the estate of her mother, which consisted principally of a 30-acre farm in Hempstead county. After discharging the duties devolving upon her as executrix, she acted or assumed to act as trustee, executing a receipt to herself as executrix, and filed her final account and settlement as executrix, and the administration was closed. After the death of her mother, she handled the 30-acre farm, giving to her father, during the remainder of his life, the rents and profits therefrom. After her father's death, she received the rents and profits until the death of her brother in 1937. Thereafter she gave the rents and profits to her brother's widow and children, who have received all rents and profits therefrom since that time.

Beatrice Arvilla Prall instituted this litigation in which she sought a construction of the will of her mother and a partition of the property which is now being rented. Her brother's widow and his two minor children were made defendants and a guardian *ad litem* appointed to represent the minors and did so. The cause was submitted to the chancery court and a decree entered in which the court found that the land was not susceptible of division in kind, and that it was for the best interests of all parties that the property be sold and the proceeds divided. The court further found and held that, under the will of Mrs. Effie LaDora Prall, the property herein involved went to Beatrice Arvilla Prall in trust during the lifetime of B. George Prall and during the lifetime of George Virgil Prall; that upon the death of George Virgil Prall the property vested absolutely in fee, one-half in Beatrice Arvilla Prall and one-half equally in the two

minor children of George Virgil Prall. The court further found and held that the defendant, Mrs. Irene Thompson Prall, had no interest of any kind in the property or the proceeds thereof.

All parties to this litigation have appealed, and are all designated as appellants and appellees.

A careful examination of this will and codicil convinces us that a trust was not created thereby. This will was written by the testatrix herself, and we think that what she meant by the use of the words "to be held in trust" was that her farm should be used for the benefit of her husband, her daughter and her son during the remainder of their lives. Our conclusion is that the instrument under consideration created three life estates: first in the husband, second in the daughter, and third in the son of the deceased, with remainder to the heirs of her body or her blood relatives.

The testatrix no doubt thought that her son would survive her husband and daughter, and provided that at his death her property should be divided equally among the heirs of her body, and if none, equally among her blood relatives. However, we think she intended that the remainder should vest only upon the death of the survivor of the three life tenants. Such we believe to have been her intention, and it is the duty of the court in construing a will to ascertain therefrom the intention of the testator and give effect thereto, is possible.

In the case of *Kelly* v. *Kelly,* 176 Ark. 548, 3 S. W. 2d 305, this court said: "The cardinal rule in construing a will is to ascertain and declare the intention of the testator. That intention is to be gained from reading the entire will and construing it so as to give effect to every clause and provision therein, if this can be done."

In *Pool, Trustee* v. *Cross County Bank,* 199 Ark. 144, 133 S. W. 2d 19, this court quoted with approval from a previous case as follows: "We must look to the will to determine the testator's intention, but in getting this view we should place ourselves where he stood, and should consider the facts which were before him in

deciding what he intended by the language which he employed."

In view of our construction of the will and codicil, Beatrice Arvilla Prall received only a life estate, and the widow of George Virgil Prall never acquired a dower interest in this real estate.

Under our construction of the will and codicil we think the court was in error in decreeing a partition of the land. The decree of the chancery court is, therefore, reversed and the cause is remanded with directions to enter a decree in conformity with this opinion.

NEW YORK LIFE INSURANCE COMPANY *v.* DANDRIDGE.

4-6879 166 S. W. 2d 1030

Opinion delivered December 7, 1942.

Ferdinand H. Pease and *Rose, Loughborough, Dobyns & House,* for appellant.

Arnett & Shaw, for appellee.

HUMPHREYS, J. This suit was brought by appellee in the circuit court of Logan county against appellant to recover $25 per month, total disability benefits, under a policy of insurance issued to her by appellant on October 18, 1927, alleging that she became totally disabled within the meaning of the disability clause in the policy on and after the month of October, 1940, and also alleging that under the terms of the policy she was entitled to recover the premium she paid appellant after she became disabled, a statutory penalty for failure to pay her, and a reasonable attorney's fee.

Appellant filed an answer denying liability under the disability clause in the policy.

On January 5, 1942, the court heard the case, sitting as a jury by agreement of the parties, upon the pleadings, depositions and testimony of witnesses in open court and took the case under advisement for consideration and on briefs.

On March 7, 1942, the court rendered judgment against appellant in accordance with his findings, which are as follows: "The plaintiff is entitled to judgment against the defendant for the sum of $350 for monthly indemnity for total disability from November, 1940, to December, 1941; that the plaintiff is entitled to judgment for $101, being the amount of premium paid during the period of disability; that the plaintiff is entitled to recover a penalty of $54.12, together with a reasonable attorney's fee, which is fixed by the court in the sum of $400."

Appellant excepted to the findings and judgment of the court, filed a motion for a new trial, which was overruled over its exceptions, prayed an appeal to the Supreme Court, which was granted, and was allowed 120 days in which to prepare, file and present its bill of exceptions.

The bill of exceptions contains the policy of insurance with stipulations that all premiums on same had been paid from the date of the policy to the date of the trial and the testimony of appellee and of two physicians testifying in her behalf.

Appellant introduced no testimony.

The sole questions involved on this appeal on the undisputed facts are: first, whether appellee was totally disabled on account of disease within the meaning of the total disability clause contained in the policy, and, second, whether the fee of $400 allowed as attorney's fee was unreasonable.

Total and permanent disability is defined in the policy of insurance as follows: "Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty."

The record reflects that appellee began teaching in 1923, after graduating, and taught continuously until 1929, when she married Mr. Dandridge. She then quit teaching until 1932 when her husband became ill and could not support her. She then had to return to teaching, and taught in Mississippi and at Paris, Arkansas, through the year 1935, at which time she had to give up her profession of teaching regularly on account of deafness, and thereafter until 1940 she taught occasionally as a substitute, but at that time she became so deaf she could not teach even as a substitute. She had been treated by physicians for deafness without benefit. During the period from 1935 until November, 1940, in addition to trying to teach as a substitute she attempted to assist her husband in the cleaning and pressing shop which he had established in Paris. She had to give up this work also on account of deafness because she could not take telephone orders and could not converse with patrons of the cleaning and pressing shop. On account of her deafness she became nervous and afflicted with insomnia and indigestion so that she could not perform all of the ordinary duties of housekeeping for herself and husband. She was confined to her bed a considerable part of the

time. She received no remuneration for the assistance she attempted to give her husband in the cleaning and pressing business and none for performing such household duties as she was able to perform.

Dr. Louis M. Henry, an eye, ear, nose and throat specialist in Ft. Smith, Arkansas, after qualifying as an expert or specialist, testified in substance as follows:

"On July 9, 1941, I examined Mrs. Dandridge with a view to determining her hearing loss. Each ear was examined separately for bone and air conduction. I used standard forks of different pitch. The results were compared with normal hearing under the same conditions. This is a standard and approved method used by ear specialists.

"I found a very definite hearing loss for both bone and air conduction in each ear. I found retracted ear drums that are characteristic of chronic tubal catarrh. I also found an indication of nerve deafness. Her hearing loss is such that I find that she is economically deaf. In my opinion, she is incapacitated from teaching school. Her condition is such that she is totally incapacitated from performing any work, following any occupation, or from engaging in any business for remuneration or profit in which work or business her hearing would be a factor. I should say her deafness had existed possibly four or five years prior to my examination. In my opinion, her condition is permanent."

Dr. Charles T. Chamberlain, who is the regular physician of appelee, testified as follows:

"I am a physician. I hold a medical degree. I have been connected with the Holt-Krock Clinic of Ft. Smith since 1935, in the capacity of internist.

"Mrs. Dandridge came to the Clinic in October, 1938, for treatment. She was complaining of progressive loss of hearing, complicated by an annoying ringing in her ears, nervousness, and indigestion. Since October, 1938, I have served in the capacity of Mrs. Dandridge's family physician, and have seen her at intervals of about once every month or six weeks.

"Repeated observations of Mrs. Dandridge during the interval from October, 1940, to the present time have failed to reveal any evidence of serious organic diseases other than the ear affection, which has led to progressive loss of hearing. This disability, in my opinion, contributed largely to the intensification of her nervousness, which, in turn, has been the cause of some of her other symptoms. In October, 1940, in my opinion, she was incapacitated from pursuing any gainful occupation. I conclude that the cause of her defect is catarrh of the Eustachian tube, complicated by auditory nerve involvement. She is economically deaf and incapacitated from pursuing any gainful occupation. The condition existed prior to October, 1940. The nervous and emotional instability manifests itself in terms of indigestion, insomnia and loss of appetite. The cause of the nervousness is secondary to the emotional strain to which the patient has been subjected as a result of her hearing defect. In my opinion, she is wholly incapacitated from performing any work, following any occupation, or engaging in any business for remuneration or profit. I consider the condition permanent."

It is quite certain from this testimony that on account of appellee's practically total deafness resulting in nervousness, insomnia and indigestion, she is disabled from doing any work, from following any occupation or engaging in any business for remuneration or profit; that she cannot follow the profession of teaching, for which she was peculiarly qualified, and cannot engage in any other business or work for remuneration or profit. She tried to work in the cleaning and pressing establishment operated by her husband, but completely failed to successfully perform the duties incident to that business. On account of her deafness, nervousness, insomnia and indigestion, it is quite apparent that she could not secure employment as a housekeeper for remuneration or profit. No one would want to employ in normal times a housekeeper who was so deaf she could not hear over a telephone or understand what she might be told to do. We think there is ample evidence of a substantial nature in

this record to sustain the findings of the court, sitting as a jury, to the effect that appellee is totally disabled from performing any work, from following any occupation or from engaging in any business for remuneration or profit. It is true that she is not helpless, but our court has said in many cases in construing disability clauses such as is contained in this policy that the insured does not have to be helpless in order to recover disability benefits.

In the case of *The Equitable Life Assurance Society* v. *Barton,* 192 Ark. 984, 96 S. W. 2d 480, this court said: "To be totally disabled within the meaning of an insurance policy insuring against such conditions, it is not necessary that the insured should be absolutely helpless; he is totally disabled when he is unable to perform the substantial and material acts of his own business or occupation in the usual and customary way."

This court said in the case of *New York Life Insurance Co.* v. *Weeks,* 201 Ark. 1160, 148 S. W. 2d 330, that: "The rule as to what constitutes total disability is well settled in this state, and in the case of the *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. 2d 600, the rule was stated as follows: 'Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from doing of all the substantial and material acts necessary to be done in the prosecution of his business. . . '."

It was also said by this court in the same case: "Of course, such a provision in a policy does not require that the insured shall be absolutely helpless or insane, but there must be such disability as renders him unable to perform all the substantial and material acts in the prosecution of a gainful occupation."

Certainly it can be said under the facts in this case that on account of appellee's deafness, insomnia, indi-

gestion and nervousness she cannot follow her profession of teaching at all, and she cannot do all of the substantial duties of housekeeping. We are convinced that under the facts in this case appellee could not perform all the substantial duties incident to any kind of work or employment she might undertake. In other words, we are convinced under the facts in this case that appellee's earning capacity is totally and permanently destroyed. This is the real test under a fair and reasonable construction of the total and permanent disability clause in the policy.

Appellant contends that the attorney's fee of $400 is unreasonable and excessive. This court said in the case of *Pacific Mutual Life Insurance Company* v. *Jordan,* 190 Ark. 941, 82 S. W. 2d 250, (quoting Syllabus 6) that: "In an action on a policy of disability insurance, to recover past-due installments of disability benefits, services of attorneys in establishing disability, as affecting future rights and liabilities under the contract, involved a substantial right which should be considered in fixing their fees."

It is true the recovery in this case was not very large, but the effect of the decision herein will establish total and permanent disability for a long period of time, which will be a very valuable asset for appellee when appellant pays her the total amount to which she will be entitled under the disability clause. The successful maintenance of the suit required on the part of appellee's attorneys an exhaustive search of the decisions of this and other courts of last resort. The fee allowed was not excessive, but is a fair and reasonable fee under all the circumstances surrounding the case.

No error appearing, the judgment is affirmed.

4-6831 166 S. W. 2d 1036

Opinion delivered December 7, 1942.

James T. Gooch and *Ross Mathis,* for appellant.

J. Ford Smith and *W. J. Dungan,* for appellees.

GRIFFIN SMITH, C. J. 1. Has a divorced man (who had an infant daughter when the decree was rendered in 1924) a homestead in lands devised to himself and others, subject to a life estate in the testator's wife, such remainderman having occupied the premises with his mother until she died in 1929?

2. Did the divorce, in consequence of which (a) the wife was given a third interest for life in her husband's undivided fourth interest in his father's estate; (subject

to rights of the remainderman's mother) and (b) was awarded custody of the daughter toward whose maintenance the father was directed to pay ten dollars monthly —did these facts, coupled with failure of the father to pay the maintenance judgment, or to account to his former wife for rents and profits from 1929 when the remainder vested, destroy the father's status as head of a family?

3. Did the chancellor err in finding that, although the remainderman resided on the undivided lands from 1929 until his interest was assigned in 1937; that he remarried at a time decidedly vague and did not establish a new domestic status on the property until lien of the judgment attached—was it error, in these circumstances, to hold that such judgment creditor's rights were prior to the so-called homestead it was claimed had been acquired with Wife No. 2?

4. Did the purchaser at the execution sale February 26, 1937, become a tenant in common?

5. Did the creditor's purchase from the state in 1938 for tax forfeitures of 1934 extinguish the rights of Wife No. 1?

These and other questions are presented by the appeal. A statement of essential facts appears in the margin.[1]

* * *

[1] Stith M. Jones died testate in 1907 survived by children, and by his wife, Blanche M. Jones, who elected to take under the will. His real estate was devised to the wife for life. Stith M. Jones, Jr., a son of the testator, received by voluntary assignment and acceptance the share to which he was entitled. Paul M. Jones, another son, died during the life of the testator's widow, leaving two children. Other than the land assigned to Stith, Junior, the remainder was held in common by those favored in the will.

Blanche M. Jones died in March or April, 1929. September 12, 1932, Vance M. Thompson and others in business with him procured judgments against Reece W. Jones, Blanche Joy Jones McFayden, and Egbert Jones for a large sum. Thompson and his associates conducted a mercantile business and supplied farmers. February 3, 1937, an execution based on the judgment, which was revived in 1936, was delivered to the sheriff, and levy was upon lands involved in this appeal. Reece W. Jones, Blanche Joy Jones McFayden and Egbert A. Jones were treated as owners of an undivided one-fourth each. At the sale conducted February 26, 1937, Thompson's bid of $18,000 was accepted. The sheriff's certificate of purchase was issued March 14, 1938.

With receipt of his deed, Thompson immediately sued in ejectment, naming Reece W. Jones as defendant and describing the lands he contended were being withheld from his possession.

September 12, 1938, Reece W. Jones answered Thompson's complaint. Ruby L. Jones filed an intervention and cross complaint, in which it was alleged that, after the death of Blanche M. Jones, estates in fee vested in the children and grandchildren. It was contended by the cross complaint and intervener that she married Reece W. Jones "in the month of July, 1932." They were, therefore, husband and wife when in September, 1932, Thompson procured his judgment. Further, it was alleged, the couple resided on the undivided lands. Their home was on the southwest quarter of the southeast quarter of section twenty-four and the west half of the northeast quarter of section twenty-five, township eight north, range three west. Other described lands of the estate were said to be contiguous.

Insistence is that the land in question constituted the homestead of Reece W. and Ruby L. Jones. There was a prayer for transfer to chancery.

As an exhibit to his amended complaint, Thompson attached the state's deed evidencing his purchase of the lands, forfeiture having been for 1934 taxes. The deed is dated January 10, 1938. Title in the state, the complaint averred, was confirmed May 9, 1938, under authority of Act 119 of 1935.

In the answer, cross complaint, and intervention of Reece W. and Ruby L. Jones, it was alleged that [January 17, 1924] Elizabeth Jones, on her cross complaint to the action of Reece W. Jones, procured a decree of divorce, the marriage having been solemnized July 7, 1921. The decree awarded Elizabeth an undivided one-third interest in lands described. There was a finding by the court that Reece W. Jones was owner of an undivided fourth interest in the property, subject to the life estate of his mother, Blanche M. Jones. The estate awarded Elizabeth was for life. Custody of an infant daughter, Juliette, was given to the mother. There was judgment against Reece for $10 per month for support of the child, with right of visitation by the father at reasonable times.

The pleadings in which mention was made of Jones' first marriage, emphasized failure of Elizabeth to take possession of any part of the land. In his brief Reece says of the former wife that "she is probably barred by the statute of limitations, but that question has never been settled by agreement, or by order, judgment, or decree of any court." Finally, Reece stated the fact to be that there was partition of lands owned by Stith M. Jones, Sr., and "lands described in the complaint were awarded by final decree to Reece W. Jones, and other heirs claim no interest." The final proceeding in the partition suit was in 1937.

In an amendment to their answer and cross complaint, Reece and Ruby alleged that, inasmuch as Thompson purchased through the land commissioner January 10, 1938, and the decree confirming the state's title was not rendered until May 9 of the same year, the state had no title to confirm because Thompson had acquired the outstanding interest. There was the further averment that Thompson claimed to have previously purchased part of the lands, ". . . and these two defendants claim their homestead as part of the same, so that the said Vance M. Thompson was a tenant in common with the two defendants and could not purchase their interest at a tax sale or as forfeited lands."

August 18, 1939, Elizabeth [Aubrey Jones White], on behalf of herself and as natural guardian and next friend of Juliette, intervened. The marriage of 1921 was referred to, as was also the divorce

Was Reece W. Jones the head of a family within that contemplation of law which would entitle him to claim homestead rights; or, if the right existed, was it waived? After Elizabeth divorced him, Reece lived on the property with his mother until she died in April, 1929. His undivided interest became vested. Certainly, during the life tenant's possession the homestead now contended for did not attach. *Smith* v. *Watkins,* 187 Ark. 852, 62 S. W. 2d 41. It was there said that "No particular tract of the 320 acres was owned by any of [the remaindermen] until the termination of the life estate, and a partition of the land among the nine heirs." *Brooks* v. *Goodwin,* 123 Ark. 607, 186 S. W. 67, was cited as authority for the proposition that " . . . occupancy must be accompan-

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and awards set out in the decree, as heretofore mentioned. Juliette, Elizabeth said, was born August 20, 1922, and was seventeen years of age when the intervention was filed. No part of the judgment for monthly payments of ten dollars had been discharged. It was further alleged that on September 13, 1937, the Woodruff chancery court, in a decree partitioning lands in which Blanche M. Jones formerly had a life estate, awarded Reece Jones the west half of the southwest quarter of section thirty, township eight north, range two west; southwest quarter of the southeast quarter of section twenty-four, township eight north, range three west; northwest quarter of the southeast quarter and the east half of the northeast quarter of the southwest quarter, and the west half of the northeast quarter of section twenty-five, township eight north, range three west.

Assignment was subject to the undivided third interest for life decreed to Elizabeth. The intervener (Elizabeth) also alleged that the tax sale to Thompson for 1934 forfeitures was void for the reasons mentioned in her former husband's answer. There was further contention that Reece had been in possession since 1929, collecting rents, and had failed to account. Six dollars per acre applicable to 120 acres in cultivation was a fair rental, she said; therefore $2,400 was due her, less taxes and reasonable allowances for repairs.

In answer to the cross complaint and other pleadings, Thompson denied that Reece and Ruby were married in July, 1932. The relationship of man and wife, he said, was not publicly assumed prior to March 7, 1933.

The chancellor's findings were that Thompson was entitled to possession of the land, subject to the undivided third interest for life awarded Elizabeth in 1924. The cross complaint of Reece and Ruby was dismissed for want of equity. Elizabeth's life estate was made subject to a lien in Thompson's favor for $296.16, covering taxes he had paid. Judgment in favor of Juliette was for $1,750. Commissioners were appointed to designate a third of the land on an equitable basis in favor of Elizabeth.

Reece W. and Ruby L. Jones appealed from that part of the decree finding in favor of Thompson. Thompson appealed from that part awarding Elizabeth a third interest for life. He also appealed from the court's action in allowing Elizabeth's attorney, J. Ford Smith, a fee of $300 and making it a lien on the land.

ied by a present claim of a right to occupy, and one cannot occupy an estate in remainder as a residence." This, it was held, was true because only the owner of a particular estate has the present right of occupancy "essential to impress the homestead character upon the land."

Elizabeth and Reece separated in April, 1922, although divorce was not decreed until 1924. Between 1922 and 1924 the daughter, Juliette, was born. Neither the mother nor child lived with Reece after 1922. In fact, the father testified he had not seen either since 1924.

It does not seem to have occurred to Reece when he answered Thompson's complaint that homestead should be claimed because of his status as a father. For some unexplained reason the daughter passed out of his life. A few payments were made on the monthly award of ten dollars intended for the child's benefit; but these stopped so many years ago that the accumulated delinquencies amounted to $1,750, for which judgment was given against Reece. He did not pay the former wife anything in satisfaction of the life interest she was given in the land. This, as is shown in the statement of facts appearing as a footnote, was claimed by Elizabeth to be $2,400.

It is true, therefore, that from April, 1929, until Ruby came to the farm, Reece was, to all outward appearances, a divorcee conducting his agricultural affairs as a single person, without weight of obligation insofar as the daughter was concerned. Neither had he, before June, 1933, confided to anyone that a second marriage had been consummated; and in the meantime Thompson's judgment became a lien unless Reece was head of a family, entitled to the property as a homestead, if the right had not been waived. And here, again, it is important to remember that the family status was predicated upon marriage to Ruby. The daughter was still forgotten.

Evidence regarding time of the second marriage is the testimony of Ruby and Reece that they went from Mississippi to St. Louis, where, Ruby says, the ceremony

was performed at the home of a Baptist minister. She and Reece remained in the city "several days." The wedding, Ruby testified, was on Sunday, July 2. Reece confirmed his wife's statement that they went to the home of a Baptist minister, but he did not remember the clergyman's name, nor what the house looked like, where it was, or in what building license was procured:— "I was directed: I just asked where to go, and was directed." He did not know where they stayed—at what hotel, and: —"I don't remember whether we left the same day, or the next."

Interrogatories answered by officials having exclusive custody of records of licenses issued in the City of St. Louis, and in the county, contradicted the claim of marriage in either jurisdiction. No license had been issued to Reece W. Jones or R. W. Jones to marry either Ruby L. Wright, or Ruby Lee Wright. A three-year period—1931, 1932, and 1933—was checked.

Returning to Arkansas, Reece says he went to his farm, and that Ruby joined her parents at their home south of McCrory. Question: "And you continued your residence that way until June, 1933?" Answer: "That is right."

Annie Wise, clerk for M. D. Thompson & Son (McCrory merchants) identified sales tickets representing purchases by Ruby, beginning June 23, 1933. It was also shown that the second of July in 1932 came on Saturday, and not on Sunday as Ruby had testified. D. M. Huff, as exhibits to his evidence, filed charge tickets showing that Reece was in the store July 2.

The Chancellor was justified in holding that a marriage consummated prior to the lien of Thompson's judgment had not been proved. Result is that the attempt to establish homestead rights failed unless the fact (incidentally developed) that Reece was a father entitled him to shift the ground of his claim and rely upon a strict construction of the law which would violate the principles of equity, and permit evasion of parental responsibility to prevail over the claims of a creditor, the justness of whose account is not questioned.

It is well established that as to a homestead there are no creditors. *White* v. *Turner,* 203 Ark. 95, 155 S. W. 2d 714. One who, as head of a family, has acquired a homestead, does not lose it by subsequent dissolution of the family if the claimant retains the property as a residence. *Baldwin* v. *Thomas,* 71 Ark. 206, 72 S. W. 53. In *Stanley* v. *Snyder,* 43 Ark. 429, it was held that when the association of persons which constitutes the family is broken up, whether by separation or the death of the members, "the right of homestead continues in the former head of the family, provided he still resides at his old home."

That a homestead acquired by a married person is not lost by his wife's divorce, though no family lives with the former husband, was held in *Butt* v. *Walker,* 177 Ark. 371, 6 S. W. 2d 301. [See cases collected under "Homestead," Arkansas Digest (West). §§ 154 *et seq.*]

But is is equally certain that the homestead may be abandoned, and whether abandonment has occurred is always a question of intention. *Gates* v. *Steele,* 48 Ark. 539, 4 S. W. 53. The exemption, it was said in *Barnhart* v. *Gorman,* 131 Ark. 116, 198 S. W. 880, is a personal one. It must be claimed by the party who seeks its benefits.

It is basic that if a court reaches the right conclusion by an erroneous reasoning, the judgment or decree will not be reversed because a wrong theory was followed, provided the cause was fully developed and the losing party was not misled.

In the instant case Reece Jones, knowing he was the father of a seventeen-year-old daughter; knowing that, unless the *status* should be waived he remained the head of a family within legal contemplation, though not in fact; fully cognizant of his right to test a claim to the homestead in question, yet conscious of having abdicated a position he had no intention of attempting to retrieve—in these circumstances he affirmatively declared himself the head of a family *because of a marriage he said was consummated July 2, 1932*: a marriage the chancellor, on ample evidence, found did not occur until

months later. No word of testimony communicates even a suggestion that if adjudged homestead rights Reece expected to discharge his obligation to the child—a daughter upon whose existence, coupled with what would be termed a strained quirk in construction, it is now sought to use, to amplify, and to dilate that which common sense must treat as a legal myth. It is a construction we cannot accept.

* * *

The final question is, Did Thompson's purchase from the state extinguish Elizabeth's interest?

Following the 1924 divorce decree, Elizabeth and the child lived in Little Rock, then moved to Ft. Smith. Elizabeth married and is now Mrs. White. It is argued that she neglected "to pay any attention" to the land interest assigned her. This is inferentially contradicted by an answer Reece gave to the question, "Has [your former wife] ever made demand upon you to share with her or to pay to her anything from these lands?" He replied: "Well, there have been several court actions on that and I don't recall. Several times something has been brought up."

It was then conceded that no rents or profits had been paid; nor, on the other hand, had Elizabeth contributed to taxes or expense of repairs.

It must be borne in mind that when the life tenant named in the will of Stith M. Jones died in 1929, values were depressed; and net income from farm properties was non-existent except in rarest instances. Elizabeth had no claim from 1924 until April, 1929. The life estate of the testator's wife intervened. Therefore income from the property must have been small for several years. That Elizabeth did not unduly harass Reece when values became normal should not be urged as laches.

It was not until July 12, 1937, that final orders were made in the suit which set aside to Reece the land he now claims as exempt. Thompson was a party to the proceedings. There was a finding that ". . . Elizabeth Aubrey Jones White is the owner of an undivided one-

third interest for life of the lands [now assigned Reece Jones], as provided for in a decree of this court [rendered in 1924"].

Thereafter (January 10, 1938) Thompson purchased the state's title; and still later (May 9, 1938) the lands were included in the confirmation decree. Act 119 of 1935. Whether title in the state was good, or whether the collector's sale was voidable, passed from consideration with confirmation if there was power to sell.

While confirmation was pending Reece asked that the cause asserted against him by Thompson be consolidated with the state's suit, and this was done September 12, 1938.

Elizabeth, in her answer and cross complaint to the suit (consolidated with the state's foreclosure action at her former husband's request) challenged validity of the tax sale. This occurred less than a year from May 9, 1938. But, it is argued, Elizabeth did not deny knowledge that confirmation had been decreed, or make the tender required by § 6 of Act 119.

Although it is insisted a tender was made and that allegations necessary to confer jurisdiction were in the answer and cross complaint filed by Reece to Thompson's suit, we think these disputations are beside the issue and that Thompson's purchase through the land commissioner should be treated as a redemption.

* * *

Thompson's purchase at the execution sale February 26, 1937, was subject to Elizabeth's interest. When the sheriff's deed was delivered March 14, 1938, it related back to the time of purchase. Four months after Thompson's bid was accepted, the partition decree was rendered; and, as has been said, Thompson was a party to that proceeding. He therefore became a tenant in common with Elizabeth, and Elizabeth had been a tenant in common with Reece. This seems to have been the view of the lower court, where judgment against Elizabeth was for $296.16. The judgment against Reece for $1,750 is not questioned; nor is the allowance of $300 to Elizabeth's

attorney a matter of controversy. Smith was employed by Elizabeth to look after her interests in the property, and not to seek partition; hence, § 10530 of Pope's Digest has no application. Neither is it contended that the chancellor's action in disallowing Elizabeth's claim for rents and profits was erroneous.

The decree is affirmed in all respects.

On rehearing Mr. Justice ROBINS concurs in the result, but not in all the declarations of law.

MCFADDIN, J., concurring. Three essentials must concur to initiate the homestead right: (1) Legal occupancy; (2) intention; and (3) constitutional law. Reese Jones' *legal occupancy* could not have antedated his mother's death, because during her life he was only a remainderman and could not acquire a homestead in the property. *Brooks* v. *Goodwin,* 123 Ark. 607, 186 S. W. 67. He was not the head of a family within the meaning of the Constitution at any time from his mother's death until after the Thompson judgment was obtained. As a divorced husband deprived of the custody of his minor child, he lacked the *constitutional status* to create a homestead.

HOLT, J., dissenting. The primary question presented here is: Did Reece W. Jones have the right to claim the 80 acres in question here as his homestead, on the death of his mother in 1929: I think he had this right. Article 9, § 3 of our Constitution provides: "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 thereof, except," etc., (the exceptions not being applicable to this case). The general rule in this state is that in determining who is the head of a family a liberal construction should be applied. In the recent case of *Yadon* v. *Yadon,* 202 Ark. 634, 151 S. W. 2d 969, this court said: "It is the settled policy of this court that our homestead laws are remedial and should be liberally construed to effectuate the beneficient purposes for which they were intended."

The undisputed facts here are that appellant, Jones, and his wife separated in 1922 and were divorced in 1924.

While the divorce suit was pending, the daughter, Juliette Jones, was born. Jones was living on this land with his mother at the time of the divorce and continued to reside thereon until he was evicted by this present suit. By the divorce decree appellant's wife was awarded the care and custody of their infant daughter, and appellant was ordered to pay $10 a month toward her maintenance. This order is still in effect. In these circumstances was appellant, Jones, the head of a family in the sense contemplated by the framers of the constitutional provision, *supra,* and under our general rule of liberal construction, such as would entitle him to the claim of homestead in the land in question? I think he was, and therefore clearly entitled to claim his homestead.

Although the custody of his minor child has been awarded to its mother and the child is not living with the father, Jones, the father, is not only morally bound, but it legally bound to support this child during its minority. It is undisputed that this child was a minor when appellant's mother died in 1929, when his homestead right attached, and was a minor when the present suit was filed. In these circumstances the general rule is stated in 26 American Jurisprudence, p. 127, § 205, under the general subject of "Homesteads," in this language: "Where property has been occupied by husband and wife in circumstances entitling the owner to claim the homestead exemption, the dissolution of the family as a consequence of divorce proceedings is held by some authorities not to terminate the right to set up the exemption as against the demands of creditors. The divorced husband is held not to lose the exemption if he remains liable for the support of children, and this is true where the custody of the children is awarded to the mother." In support of the text there is cited in footnote 13 an annotation in L. R. A. 1917C, p. 372. There the annotator says: "The court said that in *Hall* v. *Fields,* 81 Tex. 553, 17 S. W. 82, the object of the proceeding was to secure the use of the father's homestead to the minor children after his death, he having been divorced from their mother. The decree of divorce gave the custody of the minor children to the mother, and they actually lived with

her, yet the supreme court held that the divorced husband continued to be the head of a family, and was entitled to a homestead under the Constitution. Although the children did not live with him, they constituted a part of his family. It could not be that the children were entitled to the homestead unless the father was the head of a family at his death. . . . The case cited *(Hall* v. *Fields)* has not been questioned, and clearly settles the law to be that, although a man be divorced from his wife, and his children live separately and apart from him, his status as the head of a family is not lost. Therefore, his right to a homestead remains.'' The provision of the Texas Constitution on which the decision in *Hall* v. *Fields* is based is similar in effect to the corresponding provision, *supra,* in our own Constitution. This Texas case is squarely in point, is in accord with the general rule on the subject, and I think is in accord with the decisions of this court. In the instant case appellee did not obtain his judgment against appellant, Jones, until 1933, almost four years after appellant's mother had died in 1929, and appellant's undivided interest in his mother's land had attached. During all this time appellant was charged with the legal duty to support his infant daughter and was continuously living on the land as his homestead. In fact appellant, as has been indicated, had been living on this land continuously since 1921. It is well settled in this state that a homestead right may be acquired in undivided lands such as we have here. In *Robson* v. *Hough,* 56 Ark. 621, 20 S. W. 523, this court said: ''When real estate descends to several persons as tenants in common, one of whom is married and residing on the land with his family at the ancestor's death, intending to continue his residence on it when the descent is cast, the privilege of the homestead attaches to his interest in the land the instant the estate vests in him, and precludes his creditors from acquiring a judgment or execution lien upon the land, to be asserted as superior to the homestead right.''

It is my opinion, on the record before us, that appellant, Jones, is the head of a family and entitled to claim

his homestead. I, therefore, conclude that the cause should be reversed and remanded with directions.

Mr. Justice HUMPHREYS joins me in this dissent.

DOVER MERCANTILE COMPANY *v.* MYERS.

4-6888 167 S. W. 2d 491

Opinion delivered December 14, 1942.

J. F. Quillin and *Gordon B. Carlton,* for appellant.

M. M. Martin and *Hal L. Norwood,* for appellee.

GRIFFIN SMITH, C. J. The plaintiff, Dover Mercantile Company, is a corporation. S. M. Myers is the wife of D. E. Myers. The corporation sued in circuit court to quiet and confirm its title to 160 acres and two lots purchased at an execution sale, allegation being that the defendants claimed some interest in the property —an interest "not founded upon law."

The answer of S. M. Myers denied that the corporation had title, the facts being, she said, that the lands were her separate estate. As to the tract containing 160 acres, it, with other lands, was acquired in 1925 through purchase from Road Improvement District No. 1 of Polk County, the District having foreclosed for delinquent assessments. Also, in 1925, Mrs. J. A. Mullins conveyed to S. M. Myers two lots in Mena. The

mercantile company had procured judgment against D. E. Myers on his independent obligation. Levy under execution was upon the lots and acreage. There was a prayer that the cause be transferred to equity.

In a reply to Mrs. Myers' answer, the corporation admitted the acreage was acquired by the improvement district, but alleged that D. E. Myers was actual purchaser, he having procured a deed in his wife's name. It was claimed he had consistently assessed the property as his own, and in like manner he had paid taxes, except that on two occasions forfeiture was to the state, in consequence of which D. E. Myers redeemed in his own name before there had been certification to the commissioner at Little Rock.

As to the lots in Mena, it was alleged that prior to 1925 they were owned by Mrs. Mullins, and that D. E. Myers owned two acres near Hatfield. The Mena lots and the acreage near Hatfield were exchanged, title to the lots having been taken in the name of S. M. Myers. The deed was not placed of record until after the mercantile company levied. It was charged that alterations had been made whereby S. M. Myers was substituted for D. E. Myers as grantee. Following the levy, this deed was recorded. It was thereafter lost. Deed to the 160-acre tract was not recorded until the levy was made.

S. M. Myers did not testify. Except as to record entries, most of the evidence is statements made by D. E. Myers on direct and cross examination. In effect he admitted insolvency in 1922. This status was brought about because he improvidently indorsed notes for $16,000. Myers detailed efforts he had made to meet the obligations he was secondarily bound to discharge. He told of other judgments, some of which had been paid. His contention was that a bank failure and stock obligations resulted in financial ruin, although at points in his testimony there was the contention that substantial equities in property existed. This witness was called by appellant.

Appellees stress that while the deeds to Mrs. Myers were executed in 1925, appellant's judgment was not procured until 1930.

Myers' testimony is confused and is far from satisfactory as a guide upon which to predicate a decision. It is apparent that the chancellor had this view. But it is equally certain that the chancellor did not believe appellant had met the burden of proving the property in question was not purchased with the separate funds of Mrs. Myers. Here, too, the testimony is rather vague. It was contended that a large herd of cattle sold long before the present controversy arose was partly owned by Mrs. Myers, and that proceeds were invested for her. This may be true, or it may not. But in any event the chancellor had to decide whether fraud charges had been sustained. His determination is not contrary to a preponderance of the evidence when it is considered that one who alleges must establish the ground upon which relief is sought.

Affirmed.

BANK OF ATKINS *v.* GRIFFIN.

4-6909 166 S. W. 2d 1019

Opinion delivered December 14, 1942.

Hays & Wait, for appellant.

Caudle & White, for appellee.

HUMPHREYS, J. Appellant brought suit against appellees, E. P. Griffin and J. L. Griffin, to recover judgment on two promissory notes in the sum of $5,000 each, of date March 14, 1932, bearing interest at the rate of eight per cent. per annum from date until paid, upon which there was due $11,567.07, including principal and interest, and in addition to praying for a judgment against said appellees, sought to foreclose a mortgage of even date with the notes given to secure same upon an undivided three-ninths interest in 640 acres of land in Pope and Conway counties, alleging that said E. P. Griffin was the owner of an undivided one-ninth interest therein by inheritance from his father, Dr. J. L. Griffin, and was the owner of an additional one-ninth interest by conveyance of G. W. Griffin, his brother, which conveyance to him was by deed duly executed, acknowledged and delivered by said G. W. Griffin and Bessie Griffin, his wife, on March 10, 1919, which appears of record in the record of deeds of Pope county, Arkansas, in Record Book 3-F at page 516, also that J. L. Griffin was an owner of an undivided one-ninth interest by inheritance from his father, Dr. J. L. Griffin.

It was also alleged in the complaint that G. W. Griffin was in possession of a part of said land, cultivating same, but that as to whether he claims any interest in it, except as tenant, appellant is not advised, but that G. W. Griffin and Bessie Griffin, his wife, were made parties to the suit to the end that they may assert any interest or right that they or either of them may have or claim in the mortgaged premises.

The notes and mortgage were made exhibits to the complaint and all of appellees were served with summonses which were duly served on February 18, 1937.

On September 8, 1937, a decree was rendered against E. P. Griffin and J. L. Griffin by default for $11,567.07, with eight per cent. interest from February 11, 1937, until paid and declared same a lien on their interest in 640 acres of land described in the mortgage, finding that E. P. Griffin was the owner of an undivided one-ninth interest in said land by inheritance from his father, Dr. J. L. Griffin, and was the owner of an additional one-ninth interest by conveyance from his brother, G. W. Griffin, which conveyance to him was by deed duly executed, acknowledged and delivered by the said G. W. Griffin and Bessie Griffin, his wife, to appellee, E. P. Griffin, on March 10, 1919, and that, therefore, the said appellee, E. P. Griffin, is the owner of an undivided two-ninths interest in the above described land; and that J. L. Griffin is the owner of an undivided one-ninth interest in said land by inheritance from his father, Dr. J. L. Griffin. The decree provides that if said debt, interest and costs are not paid by December 31, 1937, the three-ninths undivided interest of E. P. Griffin and J. L. Griffin in said 640-acre tract be sold to satisfy the judgment, and appointed Hays Gibson, clerk, commissioner to carry out the decree.

A receiver was appointed by the court to take charge of the land and collect the rents during the pendency of the action.

A short time after the judgment and decree of foreclosure was rendered, G. W. Griffin and Bessie Griffin, his wife, filed a motion to set the decree aside for reasons unnecessary to state in this opinion. The motion was sustained and the decree was set aside and they were permitted to file an answer setting up their interest in said land and, in substance, pleading that the deed executed by them to E. P. Griffin on March 10, 1919, to an undivided one-ninth interest in said tract of land was intended to be and was a mortgage to secure loans not to exceed $3,500 to be advanced to them from time to time by E. P. Griffin, and that said mortgage was finally paid off in the year 1925, and that said E. P. Griffin should have conveyed their undivided one-ninth interest

back to them at the time they paid the indebtedness they owed him; that appellant, through its president, J. M. Barker, Sr., had full knowledge that the instrument was intended as a mortgage, having advised E. P. Griffin to take the deed from G. W. Griffin and wife to protect him for loans which he had and intended to make to them; that at the time appellant acquired its first mortgage from E. P. Griffin and J. L. Griffin in 1926 to their interest in the 640-acre tract of land, and also at the time it acquired its renewal mortgage in 1932, which is sought to be foreclosed, appellant, through its president, J. M. Barker, Sr., understood and agreed that neither mortgage covered the undivided one-ninth interest of G. W. Griffin in said tract of land and that said mortgage only covered the interest of E. P. Griffin to the one-ninth interest therein he had inherited from his father.

Appellant filed a response to the answer denying the material allegations therein.

The cause was submitted to the court on the 10th day of March, 1942, on the pleadings, exhibits thereto, and the testimony introduced by the respective parties and the exhibits thereto, resulting in findings and a decree that the deed from G. W. Griffin and Bessie Griffin to E. P. Griffin, dated March 10, 1919, was in fact a mortgage to the said E. P. Griffin, of which appellant, the Bank of Atkins, had notice, and that the sums due by G. W. Griffin to appellee, E. P. Griffin, were fully paid prior to the execution of appellant's mortgage, and that said deed referred to in appellant's complaint, now appearing of record in the recorder's office in Pope county, Arkansas, in Deed Record 3-F at page 516, should be canceled, set aside and held for naught as a cloud upon the title of G. W. Griffin and Bessie Griffin, and dismissed the complaint for want of equity as to the one-ninth interest of G. W. Griffin and Bessie Griffin, and adjudged that the said G. W. Griffin recover of and from appellant or from the receiver, heretofore appointed herein, all rents due and collected by said receiver of said land, less one-ninth of all taxes paid by

said receiver, upon the land described in appellant's complaint, from which findings and decree appellant has duly prosecuted an appeal to this court.

The sole question, therefore, growing out of the record in this cause is whether the deed executed by G. W. Griffin and Bessie Griffin to E. P. Griffin on the 10th day of March, 1919, was intended to be and is a mortgage in fact or an absolute deed conveying the one-ninth interest of G. W. Griffin and Bessie Griffin to E. P. Griffin in said 640-acre tract of land.

According to the record, Dr. J. L. Griffin, the owner of 640 acres of land, died intestate leaving his widow and nine children. Each of the children inherited one-ninth interest in said tract of land subject to the widow's dower. E. P. Griffin became the administrator of the estate, and the several heirs who resided upon the land accounted to him for rents thereon. E. P. Griffin, J. L. Griffin and G. W. Griffin each owned a one-ninth interest in said tract of land. During the years of 1918 and 1919, G. W. Griffin became involved, and on the 10th day of March, 1919, he executed a warranty deed to E. P. Griffin for his undivided one-ninth interest in said land for a recited consideration of $3,500 in hand paid, the receipt whereof was acknowledged. The grantor placed upon this deed government stamps in the sum of $3.50 and canceled same. The deed was then recorded, and has remained on the record since that date.

G. W. Griffin testified, in substance, that the instrument was given to secure $500 that E. P. Griffin had already advanced and such sums as he would advance in the future to him in order to pay his attorney's fee in the criminal prosecution against him and to pay off any judgment which might be rendered against him in favor of a certain party who was threatening a suit against him; that the party subsequently obtained a judgment for $2,000 against him, which was compromised for $1,200 and which he, E. P. Griffin, paid; that thereafter, from year to year, he paid out of sales from his crops, after paying his rent, the total amount which had been

advanced to him, the last payment being made in 1925; that after making the payment to E. P. Griffin he said something to him about conveying the one-ninth interest back to him, but that he told him that he would attend to the matter when they partitioned the land, and that after that nothing was done as to satisfying the record or deeding the land back to him; that he had resided upon and cultivated a part of the land, which consisted of about 30 acres, after his father's death and accounted for the rents to the administrator of the estate; that he paid the amount his brother had advanced to him in checks, but afterwards changed his testimony to say that he paid the same in cash; that the deed was given to secure the indebtedness aforesaid and was intended as a mortgage.

His wife, Bessie Griffin, testified that the last payment on the indebtedness to E. P. Griffin was paid out of cotton she had raised on the land.

E. P. Griffin testified, in substance, the same as his brother, G. W. Griffin, but in addition thereto stated that he consulted J. M. Barker, Sr., the president of the appellant bank, relative to the trouble his brother was in, and that Mr. Barker advised him to take a deed from G. W. Griffin to his one-ninth interest in said real estate to secure him for such loans as he had already made to his brother, G. W. Griffin, and such loans as he might make in the future, and that he followed his advice and took the deed as security for the advances he made him; that it was intended as a mortgage and not as a deed; and also that at the time he and J. L. Griffin executed the first and second mortgages to appellant he called the attention of J. M. Barker, Sr., to the fact that he had taken a deed from G. W. Griffin and his wife to their undivided one-ninth interest therein under his, Barker's advice, and that he was not mortgaging G. W. Griffin's interest in the real estate to appellant bank, and that J. M. Barker, Sr., told him that he remembered the incident and that he did not intend to take a mortgage on the undivided one-ninth interest of G. W. Griffin in favor of the bank.

J. M. Barker, Sr., testified, in substance, that he knew nothing about G. W. Griffin and Bessie Griffin giving E. P. Griffin a deed to G. W. Griffin's undivided one-ninth interest in the land, and that he had never advised E. P. Griffin to take such an instrument; that at the time E. P. Griffin and J. L. Griffin mortgaged their interest in the 640-acre tract to him he did not tell E. P. Griffin that he was not taking a mortgage on the interest of G. W. Griffin which G. W. Griffin had conveyed to E. P. Griffin. He also testified that when he took the first and second mortgages in favor of appellant to secure the indebtedness E. P. Griffin and J. L. Griffin owed said appellant bank he investigated the record and ascertained that on the 10th day of March, 1919, G. W. Griffin had conveyed his undivided one-ninth interest in said land to E. P. Griffin and that in making the loan he relied upon the record.

The mortgages given to the bank by E. P. Griffin and J. L. Griffin in defining the interest in said land they were conveying to secure the loans recite:

" . . . all undivided interest which we now have or which we or either of us may acquire by inheritance or otherwise in the future to the following described lands. . . ."

The rule as to the *quantum* of testimony necessary to construe deeds absolute as mortgages is that the testimony must be clear, cogent and convincing.

This court said in the case of *Frazier* v. *Lofton,* 200 Ark. 4, 137 S. W. 2d 750, that: "Before a court would be warranted in setting aside the solemn recitals in a deed or any written instrument acknowledged, the *quantum* of testimony required must rise above a preponderance of the testimony. To do this the testimony must be clear, cogent and convincing. A mere preponderance is not sufficient."

The court said in the case of *Burns* v. *Fielder,* 197 Ark. 85, 122 S. W. 2d 160, that: "The evidence necessary to impeach the solemn recitations of the deed must be clear and convincing. As was said in *Bevans* v. *Brown,*

196 Ark. 1177, 120 S. W. 2d 574, such evidence 'must be so clear that reasonable minds will have no doubt that such an agreement was executed. It must be so convincing that serious argument cannot be urged against it by reasonable people'."

In the case of *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253, this court approved a declaration of the Supreme Court of North Dakota in the case of *Jasper* v. *Hazen,* 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58, as follows: "The presumption that an instrument executed with the formality of a deed, or a contract deliberately entered into, expresses on its face its true intent and purpose, is so persuasive that he who would establish the contrary must go far beyond the ordinary rule of preponderance."

We have said in many cases that the evidence necessary to have a deed declared a mortgage should be "clear, unequivocal and convincing."

Applying this rule of evidence to the instant case, we do not think appellees have introduced testimony sufficient to meet the requirement or test of the rule of evidence.

A very strong circumstance showing that the instrument was intended as a deed and not a mortgage is the fact that government stamps in the sum of $3.50 were affixed to the instrument. At the time the deed was executed the government required that deeds be stamped, and did not require that mortgages be stamped.

Another cogent circumstance indicating that the instrument was intended as a deed is that no attempt was ever made to have same canceled, and the undisputed evidence shows that no attempt was made by E. P. Griffin to reconvey G. W. Griffin's one-ninth interest in said real estate back to him. It has been permitted to remain on the record as a deed from the 10th day of March, 1919, until the present time.

We think G. W. Griffin is estopped after this great length of time from intervening in appellant's foreclosure proceedings on the ground that the deed he exe-

cuted to his brother on the 10th day of March, 1919, is intended as and is a mortgage instead of a deed. Appellant relying upon the record made by G. W. Griffin in that year, loaned E. P. Griffin and J. L. Griffin $10,000 under the belief that it was receiving a mortgage on a three-ninths interest owned by them in the 640-acre tract of land. Had G. W. Griffin required his brother to reconvey to him his interest in this land when G. W. Griffin claimed he paid off the mortgage, then it would have appeared from the record that E. P. Griffin and J. L. Griffin only had two-ninths interest in said land. In that event appellant would not have been misled as to the security it was receiving.

This court said in the case of *Trapnall* v. *Burton*, 24 Ark. 371, that: "When a man has deliberately done an act or said a thing, and another person who had a right to do so, has relied on that act or word and shaped his conduct accordingly and will be injured if the former can repudiate the act or recall the word, it shall not be done."

We are not convinced from this record that it has been shown by clear, unequivocal and convincing evidence that the deed executed by G. W. Griffin and Bessie Grifin on the 10th day of March, 1919, to G. W. Griffin's one-ninth interest in said land was intended to be and was a mortgage, nor are we convinced by even a preponderance of the evidence that appellant, through its president, J. M. Barker, Sr., knew anything about said deed or advised the execution thereof or that the bank's president told E. P. Griffin that it was not taking a mortgage or intending to take a mortgage on G. W. Griffin's one-ninth interest in said real estate which he had theretofore conveyed to E. P. Griffin.

The decree is, therefore, reversed and remanded with directions to the trial court to foreclose the mortgage lien of appellant against three-ninths undivided interest in said tract of land instead of two-ninths interest therein to pay the balance due said appellant by E. P. Griffin and J. L. Griffin.

VINCENT *v.* WESSON.

4-6907 166 S. W. 2d 1023

Opinion delivered December 14, 1942.

E. G. Ward, for appellant.

Rhine & Rhine, for appellee.

SMITH, J. Appellee, who is a physician, recovered judgment for the amount of a doctor's bill for professional services rendered appellant's brother. The statute of frauds was pleaded as a defense, and its applicability presents the principal question in the case.

The suit was begun in the court of a justice of the peace, where judgment was rendered for the defendant, appellant here, and a motion was filed by her to dismiss the appeal in the circuit court for the reason that the appeal had not been prosecuted and perfected within the time and manner required by law. This motion was overruled, and upon a trial before the court sitting as a jury the judgment was rendered from which is this appeal.

Appellant insists in her brief that the appeal had not been perfected as required by law; but since the filing of the brief in which this question was raised the record has been amended by stipulation of the parties. From this stipulation it appears that judgment was rendered in the justice court on January 18, 1940, and that a transcript of the proceedings in the justice court, including affidavit and bond for appeal, were filed with the clerk of the circuit court on February 7, 1940. The justice did not then attach a verifying certificate to the transcript, but this he did on September 30, 1941, when the motion to dismiss was heard.

Section 8475, Pope's Digest, prescribes the prerequisites for an appeal from the judgment of a justice of the peace, and these are three in number. First, an affidavit must be filed to the effect that the appeal is not taken for the purpose of delay, but that justice may be done; Second, the appeal must be taken within thirty days after the judgment was rendered, and not thereafter; Third, a bond to perform the judgment must be given. However, the section of the digest next following—No. 8476—provides that either party may appeal without giving bond, but that such appeal shall not operate as a suspension of the proceedings upon the judgment appealed from, and no certificate shall be given stating that an appeal has been allowed, and no execution issued upon the judgment shall be recalled.

All these jurisdictional requirements were complied with, and the motion to dismiss the appeal on account of the failure of the justice to attach a certificate to the transcript was properly overruled.

The statutes contemplate that proceedings in the court of a justice of the peace may be, and frequently are, informal. Sections 8481 and 8482, Pope's Digest, are a part of the same act (Act 135 of the acts of 1873, pages 430 to 458), of which § 8475 was also a part, and by § 8481 it is provided that if the requirements of § 8475 are substantially complied with, "the cause shall be deemed to be in court and be subject to be tried anew upon its merits." And when § 8475 has been complied with, § 8482 requires the justice to so amend his record as to preserve the appeal. *Guy, McClellan & Co.* v. *Walker,* 35 Ark. 212; *Young* v. *King,* 33 Ark. 745; *Martin* v. *Tennison,* 56 Ark. 291, 19 S. W. 922; *Railway Co.* v. *Deane,* 60 Ark. 524, 31 S. W. 42. The rule announced in these cases has been applied in many later ones.

Appellant pleads the second paragraph of § 6059, Pope's Digest, which is a part of our statute of frauds, and provides that "No action shall be brought . . . To charge any person, upon special promise to answer for the debt, default or miscarriage of another, . . . unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." Many cases have construed this section, a number of which are cited by the digestor in his note to this section.

The testimony out of which this question arises is to the following effect. Albert Vincent, who was appellant's brother, became ill at her home. Their cousin, Hilda Cox, who resides with appellant, was sent to appellee's office, and requested appellee to call on the sick man. There is a conflict in the testimony as to whether Hilda made this request as the agent of appellant or as agent of the sick man. Appellee testified that he was told that appellant had sent for him, and that he visited the sick man at her request. Appellee further testified that after he had called and had examined the sick man "She (appellant) asked how her

brother was, and I said he was pretty sick, and she said, 'Here is $2. It is not much. But it will help some, and take care of him the best you can. When it is over I will pay you the bill'." Appellant admitted paying the $2, but testified that it was given to appellee to buy gasoline to contact the county health officer, which statement appellee categorically denied. Appellant denied having agreed to pay the bill, and was corroborated to some extent by the testimony of Hilda Cox. On the other hand, appellee was corroborated by testimony of a collecting agent who interviewed appellant in regard to the payment of this bill. The testimony is so conflicting that it may not be reconciled; but this conflict was resolved in appellee's favor by the finding and the judgment of the court.

Appellant insists that the testimony of appellee shows nothing more than a mere promise to pay her brother's bill, and that the promise was, therefore, a collateral agreement, and within the statute of frauds, and cases such as *Swaboda* v. *Throgmorton-Bruce Co.,* 88 Ark. 592, 115 S. W. 380, are cited for the reversal of the judgment. We think, however, that the testimony warranted the court in finding that appellant's promise to pay was not a collateral—but an original—undertaking, and is ruled by cases such as *Cauthron Lumber Co.* v. *Hall,* 76 Ark. 1, 88 S. W. 594, where it was held that a contract whereby defendant undertook to pay for goods to be furnished his employees (and the rule would be the same in the case of an agreement to render services) is an original undertaking, and not within the statute of frauds as a promise to pay another's debt. Here, as we have said, the testimony supports the finding that the agreement was not to pay the bill of the sick man, but was an original undertaking to pay for those services, which were rendered, not on the credit of the sick man, but on that of his sister, and in consideration of her promise to pay therefor.

In the reply brief the question is raised for the first time that there was no change of the venue from the court of the justice of the peace in which the suit

was brought to that of the justice who tried the case. Two answers may be made to this contention. First, that no such point was made in appellant's original brief. It was held in the case of *Groves* v. *Keene,* 105 Ark. 40, 150 S. W. 575, (to quote a headnote) that "Appellant can not raise in his reply brief a question not raised below nor in his original brief." See, also, *Commonwealth Public Service Co.* v. *Lindsay,* 139 Ark. 283, 214 S. W. 9. A second answer is that appellant filed in the court of the justice who did try the case a written denial of liability. This was, of course, an entry of appearance, which dispenses with any inquiry as to the sufficiency of the process by which the suit was brought into the court where appellant's answer was filed.

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

BECKWITH *v.* JINGLES.

4-6893 166 S. W. 2d 661

Opinion delivered December 14, 1942.

McDaniel, Crow & Ward and *W. A. Waddell,* for appellant.

Ernest Briner, for appellee.

HUMPHREYS, J. On May 23, 1940, appellee filed suit in ejectment in the circuit court of Saline county against appellants to recover possession of the following described real estate in Saline county, Arkansas, to-wit: "A part of lot 2 of the northwest quarter, section 19, township 3 south, range 15 west, more particularly described as follows: Beginning at the northwest corner of said lot 2, of the northwest quarter, section 19, township 3 south, range 15 west, and run thence south 1336 feet to the center of Traskwood and Franceway Road; thence west along said road 658 feet; thence north 1340 feet to the north line of said lot 2; thence east to the place of beginning, containing 20 acres, more or less."

In the complaint appellee deraigned his title through *mesne* conveyances from the government of the United States to himself, alleging that his immediate grantor, Mrs. Ollie McDade, conveyed said real estate by warranty deed to him for a valuable consideration on January 5, 1939, which deed was filed for record in the office of the circuit clerk and ex-officio recorder on April 6, 1939; that appellants, without his knowledge and consent, took possession of said real estate wrongfully and unlawfully and have refused to deliver the possession thereof to appellee; that appellee is entitled to recover from appellants damage in the sum of $100 for rents and profits during their unlawful occupancy of said real estate. Appellee prayed for possession of said real estate and $100 for rents and profits and for costs.

On September 2, 1940, appellants filed an answer to the complaint, stating that on March 15, 1938, Mrs. Ollie McDade executed and delivered a mortgage to Chester Carter and John M. Smith on the real estate described in the complaint except it described said real estate as being in "township 2, south, range 15 west," instead of "township 3, south, range 15 west," and stating that on February 4, 1939, Mrs. Ollie McDade executed a warranty deed to Chester Carter in satisfaction of said mortgage on said real estate as described in said mortgage; also stated that on February 8, 1939, Chester Carter and wife executed and delivered a warranty deed to appellant, H. M. Beckwith, to said real estate describing same as described in said mortgage, and stating further that Mrs. Ollie McDade intended to convey the real estate described in appellee's complaint in her mortgage to Chester Carter and John M. Smith, and in her deed to Chester Carter, and that Chester Carter intended to convey to H. M. Beckwith the real estate described in appellee's complaint, but made a mistake and described the real estate as being in "township 2, south, range 15 west"; and also stating that on August 2, 1939, Mrs. Ollie McDade executed a correction deed to Chester Carter, and on October 28, 1939, Chester Carter executed a correction deed to H. M. Beckwith, both of which correction deeds properly described said real estate; and also stating that the instrument executed and delivered by Mrs. Ollie McDade to appellee on January 5, 1939, was intended as a mortgage and not a deed; also stating that H. M. Beckwith, appellant, has been in the continuous and uninterrupted possession of said real estate and claiming said real estate since February 8, 1939, under deed executed to him on February 8, 1939.

Appellants prayed in their answer for a decree to the effect that appellee's deed from Mrs. Ollie McDade be adjudged a mortgage and not a deed.

A motion was attached to the answer to transfer the cause to the chancery court, which motion was granted.

On the 22nd day of January, 1942, the cause was submitted to the chancery court upon the pleadings, exhibits thereto and the testimony introduced by the respective parties with exhibits thereto, resulting in a finding and decree that the instrument of Mrs. Ollie McDade executed by her to appellee on the 5th day of January, 1939, was a deed and not a mortgage, and canceled the conveyances executed by Mrs. Ollie McDade to Chester Carter and by Chester Carter to appellant, H. M. Beckwith, as clouds upon appellee's title and vested the title and the right of possession to the real estate described in appellee's complaint in said appellee, and offset any taxes and improvements appellant, H. M. Beckwith, had placed upon the property, with rents and profits said Beckwith owed appellee during the time he was unlawfully and wrongfully in possession of said real estate, together with all costs, from which findings and decree appellants have duly prosecuted an appeal to this court.

The testimony in this case is conflicting in some respects, but we have concluded, after carefully reading same, that it clearly and decidedly reflects that the deed executed by Mrs. Ollie McDade to appellee on January 5, 1939, was intended by the parties as a deed.

This court said in the case of *Beloate* v. *Taylor,* 202 Ark. 229, 150 S. W. 2d 730, that: "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 con-

veyance. *Porter* v. *Clements,* 3 Ark. 364; *Johnson's Executor* v. *Clark,* 5 Ark. 321; *Stryker* v. *Hershy,* 38 Ark. 264'."

It is true in the instant case that appellee testified that when he took the deed absolute on its face from Mrs. Ollie McDade on January 5, 1939, he advised her not to sell the real estate as long as she had children to look after and he proposed to Mrs. Ollie McDade that he would not record the deed for ninety days and that if she paid him the amount in the meantime he would convey the real estate back to her. He testified, however, that she did not accept this proposition. Mrs. Ollie McDade testified that she did not execute a deed to appellee at all, but that she simply signed a note against the real estate for the amount he paid her and that she owed. The great weight of the evidence reflects that she did sign a deed after it was read and explained to her and shows that she never offered at any time to pay the debt; that she treated the debt as extinguished by the execution of the instrument which was a deed and not a mortgage in form. The record also reflects that at the time she made this deed to appellee she was in possession of the real estate in question by tenant. The absolute title to the property as we read the evidence, passed from her to appellee upon the execution of her deed to appellee, and she had no right thereafter to attempt to convey said real estate to anyone. The record reflects that she did not convey it to anyone thereafter by correct description. The conveyance that she made to Chester Carter and Chester Carter's conveyance to H. M. Beckwith described the real estate as being in "township 2, south," whereas it was in "township 3, south."

This court ruled in the case of *McLain* v. *Jordan,* 174 Ark. 738, 298 S. W. 10, that: "The record of a mortgage containing a description of the land as being in section 15, instead of section 16, where it was actually situated, was not constructive notice that it was intended to cover land in section 16."

The record reflects that appellee's deed from Mrs. Ollie McDade was filed for record several months before Mrs. Ollie McDade attempted to correct the description in her deed to Chester Carter and before Chester Carter attempted to correct the description in his deed to H. M. Beckwith, and, of course, these deeds from Mrs. Ollie McDade to Chester Carter and from Chester Carter to H. M. Beckwith were not constructive notice that they had any interest in the real estate at the time Mrs. Ollie McDade conveyed same by warranty deed to appellee. According to the record, Mrs. Ollie McDade was the owner and in possession of the real estate described in appellee's complaint under deed from F. L. Hilliard. On January 5, 1939, she conveyed by warranty deed her title and right of possession thereto to appellee, and she had no right thereafter to convey same to Chester Carter, and Chester Carter had no right to convey same to appellant, H. M. Beckwith. When she did convey to Chester Carter and when Chester Carter conveyed to H. M. Beckwith the real estate described in appellee's complaint was not conveyed by correct description. The description was not corrected or attempted to be corrected until months after appellee had recorded his deed. In other words, they acquired no interest in the real estate described in appellee's complaint before appellee acquired his title from Mrs. Ollie McDade and had filed his deed from her for record.

No error appearing, the decree is affirmed.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* MCCOY, ADMINISTRATRIX.

4-6892 166 S. W. 2d 663

Opinion delivered December 14, 1942.

[redacted]

Thos. S. Buzbee and *A. S. Buzbee,* for appellant.

O. D. Longstreth, John D. Thweatt and *Cooper Thweatt,* for appellee.

SMITH, J. This is the second appeal in this case. The opinion in the former appeal appears in 203 Ark. 596, 157 S. W. 2d 761. It was there held that the purported bill of exceptions was not filed within the time and in the manner required by law, and as no error appeared upon the face of the record the judgment was affirmed.

It was alleged in the original complaint in this case that plaintiff's intestate sustained an injury which caused his death while employed by the railway company, and suit was brought to recover damages therefor.

After the affirmance of the judgment, for the reason just stated, a motion was filed in the court below where the cause had been tried to vacate the judgment upon the ground that the court had no jurisdiction of the cause of action, and that the judgment was, therefore, void. Upon the hearing of this motion testimony was offered to the effect that the injured servant resided in Lonoke county, and was injured in that

county, yet his administratrix brought suit in Prairie county. It is alleged that under these facts the court was without jurisdiction to try the case, and the insistence is that the judgment should be vacated as having been rendered by a court having no jurisdiction of the subject-matter of the action.

Under the facts stated, the Prairie Circuit Court was without jurisdiction of the subject-matter. *Fort Smith Gas Co* v. *Kincannon, Judge,* 202 Ark. 216, 150 S. W. 2d 968; *Terminal Oil Co.* v. *Gautney, Judge,* 202 Ark. 748, 152 S. W. 2d 309; *Kornegay* v. *Auten, Judge,* 203 Ark. 687, 158 S. W. 2d 473.

When these facts were made to appear, the plaintiff should have been non-suited and the cause of action dismissed. But these facts were neither alleged nor admitted in the pleadings, and testimony was required to establish their existence.

Assuming that such facts were shown by the testimony at the original trial, a bill of exceptions would, nevertheless, be necessary to bring them into the record. In the absence of a bill of exceptions, it must be presumed—and the presumption is conclusive—that, if competent testimony could have been offered which would have sustained the judgment, such testimony was offered. A great many cases have announced and applied this rule of practice, and, among others, the following: *Young* v. *Vincent,* 94 Ark. 115, 125 S. W. 658; *London* v. *McGehee, Trustee,* 126 Ark. 469, 191 S. W. 10; *Coblentz & Logsdon* v. *L. D. Powell Co.,* 148 Ark. 151, 229 S. W. 25; *Dixie Life & Accident Ins. Co.* v. *Leach,* 197 Ark. 1072, 126 S. W. 2d 926.

In the case of *Young* v. *Vincent, supra,* Justice Hart said: "No bill of exceptions was filed or brought into the record. Where the record does not contain the evidence adduced at the trial, 'every intendment is indulged in favor of the action of the trial court, and this court will presume that every fact susceptible of proof that could have aided appellee's case was fully established. The salutary rule of law is that every judgment of a court of competent jurdisdiction is per-

sumed to be right unless the party aggrieved will make it appear affirmatively that it was erroneous.' *McKinney* v. *Demby,* 44 Ark. 74; *Hempstead County* v. *Phillips,* 79 Ark. 263, 95 S. W. 133, and cases cited.''

In the case of *London* v. *McGehee, Trustee, supra,* Justice Wood said: ''The uniform holding of this court is that where the record shows that the cause was heard upon oral testimony and that testimony has not been brought into the record by the bill of exceptions, this court will presume, on appeal, in favor of the finding and judgment of the trial court that every fact necessary to sustain the judgment was proved where evidence adduced at the proper time would have justified the court's ruling. *Railway* v. *Amos,* 54 Ark. 159, 15 S. W. 362; *Tucker* v. *Hawkins,* 72 Ark. 21, 77 S. W. 902; *K. C., Ft. S. & M. Ry. Co.* v. *Joslin,* 74 Ark. 551, 86 S. W. 435; *Hempstead County* v. *Phillips,* 79 Ark. 263, 95 S. W. 133; *Jonesboro, L. C. & E. Ry. Co.* v. *Chicogo Portrait Co.,* 81 Ark. 327, 99 S. W. 75.''

Numerous other cases have applied the same rule.

It follows, therefore, that the judgment here appealed from must be affirmed, and it is so ordered.

[redacted]