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MORTENSEN *v.* BALLARD.

4-7708 188 S. W. 2d 749

Opinion delivered July 9, 1945.

Hays & Wait, for appellant.

Caudle & White, for appellee.

ROBINS, J. The question for determination is the sufficiency of the following complaint filed by appellant in the lower court:

"Comes the plaintiff, M. Mortensen, and suing the above named defendants, for his cause of action alleges:

"That plaintiff is a resident of Pope county, Arkansas.

"That the defendant Evelyn Pearson Ballard is a resident of Pope county, Arkansas.

"That the defendant Pearson Hotel Company is a corporation duly organized and existing under the laws of Arkansas, with its principal office and place of business in Russellville, Pope county, Arkansas.

"That prior to the 3rd day of March, 1924, the plaintiff, M. Mortensen, was the sole owner of the hotel furniture and equipment in and of a lease on The Majestic Hotel located in Mexia, Texas; that on said date plaintiff entered into a written agreement with the defendant Evelyn Pearson Ballard, then Evelyn H. Pearson, by the terms of which agreement she became manager of said hotel and an equal partner with plaintiff in all the net proceeds derived from the operation of said hotel; that it was further provided in said written agreement that upon a sale of the fixtures in said hotel during the term of the lease then existing or any renewal thereof the said Evelyn Pearson Ballard was to have one-half of the net proceeds arising from the sale of said fixtures; that from and after the execution of said agreement the plaintiff, M. Mortensen, and the defendant, Evelyn Pearson Ballard, became and were equal partners in the operations of said hotel and in the proceeds arising therefrom; that a copy of said contract and agreement is hereto attached, marked Exhibit 'A' and made a part of this complaint;

"That while plaintiff and the defendant Evelyn Pearson Ballard were so operating said hotel in Mexia, Texas, they agreed and decided to establish a hotel in Russellville, Arkansas, to be operated under the same terms and arrangements as the one at Mexia, Texas, each

to be equal partners in said new hotel; that pursuant to such decision they came to Russellville, Arkansas, and selected a site for the erection of the new hotel, and entered into a contract with the Trustees of the Elks Lodge at Russellville, Arkansas, the then owners, for the purchase of said site at and for the sum of Four Thousand Five Hundred ($4,500) Dollars, same to be paid as follows: Five Hundred ($500) Dollars Cash and Four Thousand ($4,000) Dollars to be paid later; that the $500 down payment and the $4,000 balance were both paid by plaintiff and Evelyn Pearson Ballard out of the earnings of the hotel at Mexia, Texas; that a copy of the contract of sale from the Trustees of Elks Lodge of Russellville, Arkansas, to M. Mortensen and Evelyn Pearson Ballard, then Evelyn H. Pearson, is hereto attached, marked Exhibit 'B' and made a part of this complaint;

"That by the terms of said contract and purchase the plaintiff and the defendant Evelyn Pearson Ballard became the joint and equal owners of the following property situated in Russellville, Pope county, Arkansas, to-wit: lots one (1), two (2) and three (3) in block ten (10), Mary A. Russell's Addition to the city of Russellville, Arkansas.

"That title to the above described lots was issued in the name of Evelyn H. Pearson, but that it was agreed and understood that she held title thereto in trust for herself and plaintiff as equal partners in said venture, and that title to said property should be decreed to be held by her for said purpose;

"That after the procurement of the site for the said new hotel at Russellville, Arkansas, plaintiff, who is an experienced contractor and builder and had wide experience in the planning and construction of such buildings proceeded to Russellville and without delay proceeded with the business of building and equipping said new hotel; that he obtained the drafting of plans and specifications therefor which met the approval of himself and defendant, contacted all necessary materialmen, contractors and draftsmen necessary to the planning and erection of said hotel and continued to superintend their

operations until said new hotel was fully completed and equipped, leaving the management and control of the hotel at Mexia, Texas, in the control of the defendant, Evelyn Pearson Ballard; that he gave her full power of attorney to act for him in the sale and disposal of the personal property belonging to himself and the defendant, Evelyn Pearson Ballard at Mexia, Texas, and that acting under and by authority of such power of attorney, the said Evelyn Pearson Ballard sold and disposed of their joint property in the hotel at Mexia, Texas, for the sum of Four Thousand ($4,000) Dollars, and that sum, together with certain items of personal property reserved from said sale, was invested and installed in the hotel at Russellville, Arkansas; that a copy of the contract of sale of the personal property at Mexia, Texas, is hereto attached, marked Exhibit 'C' and made a part of this complaint;

"That it was agreed and understood by and between plaintiff and the defendant, Evelyn Pearson Ballard, that upon the completion of said new hotel at Russellville, Arkansas, she was to be installed as manager thereof under the same terms and understanding governing the management of the hotel at Mexia, Texas, and was to reside in said hotel, and that the plaintiff, M. Mortensen was to be installed as assistant manager thereof and was to reside therein and receive room and board therein;

"That for several years after the completion of said hotel, plaintiff and the defendant Evelyn Pearson Ballard continued to operate same as a partnership in which each was an equal partner therein; that they made the regular partnership returns required to be made to the U. S. Internal Revenue Department, such returns showing them to be equal partners in the operation of said hotel; such returns sometimes being made by plaintiff, and sometimes by the defendant, Evelyn Pearson Ballard; that copies of such partnership returns for the years 1926 and 1927 are hereto attached, marked Exhibits 'D' and 'E' respectively and made a part of this complaint;

"That while the construction and equipment of the new Pearson Hotel at Russellville was financed in part by issuance of stock to local purchasers of such stock, it was financed in most part by loans and renewals thereof secured by liens upon the property and equipment of said company; that all of said loans are of record in the office of the Recorder of Pope county, Arkansas;

"That for the purpose of refinancing the debts incurred in the erection and equipping of said Hotel Pearson it was deemed advisable to incorporate same under the name of the Pearson Hotel Company, and on the 21st day of June, 1927, articles of incorporation were issued to Pearson Hotel Company of Russellville, Arkansas; that it was provided that capital stock in the amount of 3,000 shares of such stock with no par value, and common stock in the amount of 1,000 shares with no par value, and preferred stock in the amount of 2,000 shares with a par value of $25 per share might be issued;

"That for the purpose of the completion and organization of said corporation, shares of common stock were issued to the amount of 100 shares, 90 shares of which were issued to Evelyn Pearson Ballard, then Evelyn H. Pearson; 2 shares to M. Mortensen; 2 shares to R. L. Smith; 2 shares to J. B. Ward; 2 shares to F. W. Pearson and 2 shares to W. H. Holmes; that nothing was paid for said shares of common stock, and that although the defendant, Evelyn Pearson Ballard, then Evelyn H. Pearson, received 90 shares of such stock while the plaintiff received only 2 shares, it was understood and agreed that the original partnership of one-half to each was to continue between the said M. Mortensen and the said Evelyn Pearson Ballard, and that she held such shares of surplus common stock in trust for said M. Mortensen and herself jointly as equal partners therein; that it was provided that said corporation be under the control of a Board of Directors of five members, three to be selected by the stockholders and two to be elected by the members; that the Board of Directors were elected and met and organized by electing the plaintiff, M. Mortensen,

president, and the defendant, Evelyn Pearson Ballard, then Evelyn H. Pearson, its secretary and treasurer;

"That it was later determined that a coffee shop should be equipped and operated in conjunction with the Pearson Hotel, and that on January 2, 1929, to carry out this plan, the plaintiff, M. Mortensen, and the defendant Evelyn Pearson Ballard borrowed the sum of Two Thousand ($2,000) Dollars for that purpose and executed their joint note for said sum secured by a chattel mortgage on the furnishings and equipment of said coffee shop; that said mortgage appears of record in Mortgage Record Book 'MM' at page 283 of the records of Pope county, Arkansas; that all of the equipment of said coffee shop was paid for by the earnings of the Pearson Hotel and belong to plaintiff and the defendant Evelyn Pearson Ballard jointly in equal parts; and to other common stock owners in proportion to stock held by them;

"That preferred stock in said Pearson Hotel Company was issued to various parties and in various amounts; that the names of owners and of such stock issued to them is hereto attached, marked Exhibit 'F' and made a part of this complaint; that nearly all of said shares of preferred stock has been purchased from the original holders and acquired by or for the Pearson Hotel Company, and that said shares of stock was purchased from the proceeds of the earnings of said company; that the only shares of preferred stock now outstanding are as follows: Robberson Steel Company, Oklahoma City, Okla., 18 shares; Jack Walker, Russellville, Arkansas, 26 4/5 shares; O. S. Nelson, Russellville, Arkansas, 20 shares;

"That since all of said preferred stock was paid for out of the earnings of the Pearson Hotel, such stock belongs to the holders of the common stock of Pearson Hotel Company in proportion in which the shares of common stock issued to its various owners bear to the total amount of such shares issued, except, that as to the 92 shares of such common stock issued to the plaintiff M. Mortensen and to the defendant, Evelyn Pearson Ballard, then Evelyn H. Pearson, such stock should be held

to belong to them in equal parts, each owning one-half of such total;

"That on the 12th day of August, 1929, by proper action of a majority of the Board of Directors of Pearson Hotel Company, the plaintiff, M. Mortensen, was again elected president, and the defendant, Evelyn Pearson Ballard, was again elected secretary-treasurer of the corporation; that the said Evelyn Pearson Ballard was re-elected manager, and the plaintiff, M. Mortensen, was again re-elected assistant manager of the Pearson Hotel, and it was voted that each be allowed a permanent salary of Two Hundred Fifty ($250) Dollars per month as such manager and assistant manager; that a copy of said minutes of such meeting showing the re-election of said manager and assistant manager and the voting of said salary to each is hereto attached, marked Exhibit 'G' and made a part of this complaint;

"That plaintiff, M. Mortensen, remained as president of said Pearson Hotel Company until 1939, when he resigned as such president, but that he continued to serve as assistant manager of Pearson Hotel;

"That from the time of its construction, Pearson Hotel has been a successful venture, and its assets have at all times far exceeded its liabilities; that trial balances taken from the books of said company from time to time show that it has constantly reduced its liabilities and increased its assets;

"That from the time of the voting of salaries to the manager and assistant manager of said Pearson Hotel, the amounts due said manager and assistant manager have at all times been carried on the books of said company;

"That in the resolution of August 12, 1929, voting such salaries to the manager and assistant manager it was provided that payment of same should be deferred and not be paid until the accrued interest then due on the first and second mortgage bonds or mortgages given by the company be paid; that only a small portion of the salary due this plaintiff as assistant manager has been

paid; that the books showing the account with this plaintiff as such assistant manager are kept by the defendant, Evelyn Pearson Ballard, and that plaintiff has been denied access to said books and cannot state the exact balance now due him on salary; that at the last trial balance taken from the books of said company on June 30, 1939, the balance due this plaintiff at that time was Twelve Thousand Four Hundred Twenty-eight and 19/100 ($12,428.19) Dollars; that copies of the various trial balances taken from the books of the company for the years 1928 through 1932, and the trial balance taken in June, 1939, showing the increase of the assets of said company over its liabilities, and showing the amounts due this plaintiff as assistant manager at the various times is hereto attached, marked Exhibit 'H' and made a part of this complaint;

"That the defendant, Evelyn Pearson Ballard, is seeking to repudiate the agreement of partnership between herself and this plaintiff; that she is denying plaintiff's ownership of one-half of the real estate belonging to Pearson Hotel Company; that she is denying plaintiff's right to participate in the shares of preferred stock purchased by the Pearson Hotel Company or by herself from the earnings of said company; that she is denying the indebtedness of Pearson Hotel Company to this plaintiff for back salary as assistant manager of said Pearson Hotel; that she is denying his right to room and board in said Pearson Hotel;

"That in pursuance of her plan to deny to plaintiff his rights in said hotel property and in the shares of preferred stock purchased out of the earnings of said Pearson Hotel, and of his right to share equally with her in the common stock issued to her more than the amount issued to him, and of his right to the back salary now due him, as assistant manager, and of his right to remain in said hotel and continue as assistant manager thereof and receive his room and board therefrom, said Evelyn Pearson Ballard has ordered this plaintiff to give up his room in said hotel and to remove himself and his per-

sonal belongings therefrom, and has threatened and is now threatening to expel him therefrom.

"That unless the defendant, Evelyn Pearson Ballard, is enjoined and restrained from so doing she will expel this plaintiff from said Pearson Hotel and attempt thereby to deprive him of all his rights to remain therein and to receive his just share of the profits arising from the operation of said hotel;

"That because of the unsatisfactory conditions that have arisen between plaintiff and defendant as partners in the management and control of said Pearson Hotel it is necessary that a receiver be appointed by this court to take charge of the partnership hotel property and operate the same pending the adjudication of this action.

"Wherefore, plaintiff prays that he be declared to be an equal partner with the defendant, Evelyn Pearson Ballard, in the ownership of the real estate belonging to the Pearson Hotel Company; that he be declared to be an equal partner with her in the ownership of all shares of preferred stock purchased out of the earnings of said Pearson Hotel; that he be declared to be an equal partner with her in the ownership of the 92 shares of common stock issued to him and to her; that he be declared to be an equal partner with her in the ownership of the furniture and equipment in said Pearson Hotel, including the Pearson Hotel Coffee Shop; that he be permitted to remain in said hotel and receive his room and board therefrom and to continue to serve as assistant manager thereof and to receive his salary therefor; that this court ascertain the amount due this plaintiff as back salary for serving as assistant manager of said Pearson Hotel, and that if the court finds it necessary to do so that he appoint a master in chancery to determine the amount now due plaintiff for such services; that plaintiff be given judgment against Pearson Hotel Company for such amount as the court finds due him, and that such judgment be declared a lien upon the assets of said Pearson Hotel subject only to the subsisting liens now held against such assets; that the defendant, Evelyn Pearson Ballard, be permanently enjoined and restrained

from interfering with the plaintiff's occupancy of his room in said Pearson Hotel and from receiving his board in said hotel; that a receiver be appointed by the court to take charge of and operate said hotel under the orders of this court during the pendency of this action, and for all other proper legal and equitable relief."

To this complaint appellee, Pearson Hotel Company, filed a special demurrer and a motion to dismiss, and appellee, Evelyn Pearson Ballard, filed a special demurrer and both appellees filed general demurrers. The lower court found "all issues of law in favor of the defendants, and that said demurrers and motion to dismiss should be sustained, and that said complaint should be dismissed for want of equity." The decree does not recite that appellant, after demurrers to his complaint had been sustained, refused to plead further. To reverse the lower court's decree this appeal is prosecuted.

The contentions of appellees, chiefly relied on to support the findings of the court below, may be thus summarized:

(I). That the complaint was insufficient to allege the creation of a trust in favor of the appellant.

(II). That the complaint showed on its face that appellant was not entitled to recover his claimed salary as assistant manager, because he was a director of the corporation and therefore was ineligible to be employed under contract with the board of directors.

(III). That appellant's cause of action was barred by staleness, laches and limitation.

(IV). That the complaint embraced more than one cause of action.

I.

The complaint does not set forth whether either the alleged agreement as to the purchase of the real estate, or the later agreement, asserted by appellant, as to the ownership of the stock in the hotel company, was in writing or was oral. Appellees did not seek by motion to require the complaint to be made more certain and specific

so as to have this uncertainty removed. If the agreement relied on was oral, it would be insufficient to establish an express trust as to the real estate, because, under our Statute of Frauds (§ 6064 of Pope's Digest), it is required that "all declarations or creations of trusts or confidences of any lands or tenements shall be manifested and proven by some writing . . ."

But it is expressly provided by § 6065 of Pope's Digest that "where any conveyance shall be made of any lands or tenements, by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by anything contained in this act." The term "implied trusts" includes resulting and constructive trusts. They arise by implication of law and may be proved by parol. *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437.

"The general rule is well settled that, in the absence of circumstances showing a different intention or understanding, property paid for with the money or assets of one person, title thereto being taken in the name of a stranger or person for whom he is under no legal or moral obligation to provide, is held by resulting trust, the trust arising by operation of law in favor of the person furnishing the consideration, . . . and the person thus obtaining title is a trustee for the person paying the consideration." 65 C. J. 382, 384. "Parol evidence is admissible to prove a resulting trust from payment or ownership of the purchase money for a conveyance to another. . . ." 65 C. J. 385. "In the absence of a statutory provision preventing the trust, the resulting trust presumptively arises where property is bought by one person with the money or assets of another . . ." 65 C. J. 386.

In sustaining a constructive trust in favor of a partner as to real estate purchased with partnership funds, title to which was taken in another, this court, in *Edlin* v. *Moser,* 176 Ark. 1107, 5 S. W. 2d 923, said: "Here, from the result of their joint efforts, there is a profit from partnership activities, both in money and land. . . . They both contributed jointly to the acquisition

of such property. . . . We think this suit primarily is to compel a division of profits realized from a partnership activity."

In the early case of *Trapnall's Adx.* v. *Brown,* 19 Ark. 39, Chief Justice ENGLISH, speaking for the court, said: "*Resulting trusts,* or those which arise by implication of law, are specially excepted from the operation of the statute (§ 13). Trusts of this sort were said by Lord Hardwick, in *Lloyd* v. *Spillet,* 2 Atk. 148, to arise in three cases: *first,* where the estate is purchased in the name of one person, but the money paid for it is the property of another; *secondly,* where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and *thirdly,* in certain cases of fraud. 1 *Greenf. Ev. Sec.* 266; *Miller et al.* v. *Cotton et al.,* 5 *Geo. R.* 346; 4 *Kent Com.* 305. In all these cases, it seems now to be generally conceded that parol evidence, though received with great caution, is admissible to establish the collateral fact (not contradictory to the deed, unless in case of fraud) from which a trust may legally result. 1 *Greenlf. Ev.,* § 266; 1 *W. & T. Lead. Cases in Eq., by Hare & W.* 187 to 206, top paging, and cases cited."

In another early case, *Byers et al.* v. *Danley,* 27 Ark. 77, it was said by this court: "Thus we believe it to be a well established principle, both in England and most of the United States, that if one man purchases an estate in lands and does not take the conveyance in his own name, but in trust of another, the trust of the legal estate results to him, who pays the purchase money. This trust results by the mere operation of law, though the person, in whose name the conveyance is taken, executes no declaration of trust, and may be proved by parol evidence."

Chief Justice MCCULLOCH, speaking for this court, 360, 185 S. W. 467, Ann. Cas. 1917C, 1142, said: "It is contended in the first place that the court erred in allowing oral testimony tending to establish the fact that Powell held the title as trustee for appellee Routh. Counsel for appellants base their contention upon the well-established rule that an express trust can not be established by

parol testimony. They fail, however, to take into consideration the nature of a resulting trust, and the fact that such trust can be established by parol, as it results by operation of law and not from the contract of the parties. Appellee furnished the money for the purchase of the land and a trust resulted in his favor."

In determining the sufficiency of a complaint on demurrer, every reasonable intendment should be indulged in favor of the complaint, and, if the facts stated in the complaint, together with all reasonable inferences to be deduced therefrom, constitute a cause of action, the demurrer should be overruled. *Cazort & McGehee Company* v. *Dunbar,* 91 Ark. 400, 121 S. W. 270; *Cox* v. *Smith,* 93 Ark. 371, 125 S. W. 437, 137 Am. St. Rep. 89; *Dickerson* v. *Hamby,* 96 Ark. 163, 131 S. W. 674; *Claxton* v. *Kay,* 101 Ark. 350, 142 S. W. 517, Ann. Cas. 1913E, 972; *McLaughlin* v. *City of Hope,* 107 Ark. 442, 155 S. W. 910, 47 L. R. A., N. S., 137; *Kansas City Southern Railway Company* v. *Fort Smith Suburban Railway Company,* 180 Ark. 492, 22 S. W. 2d 21; *Arkansas Bond Company* v. *Harton,* 191 Ark. 665, 87 S. W. 2d 52; *Gus Blass Dry Goods Company* v. *Reinman,* 102 Ark. 287, 143 S. W. 1087; *Missouri Pacific Railroad Company* v. *Brewer,* 154 Ark. 96, 241 S. W. 864; *Adams* v. *McKay & Binns Inv. Co.,* 155 Ark. 556, 244 S. W. 708.

When the appellant's complaint is considered in the light of the rule stated above, we conclude that its allegations, with the reasonable inferences to be drawn therefrom, amounted to a charge that appellant furnished one-half of the purchase money of the lot on which the hotel was constructed under an agreement that he was to own an undivided half interest therein, that the cost of constructing and furnishing the building were paid from earnings of which he was entitled to one-half, and that the change from individual to corporate ownership of the property did not substantially alter the respective interests of appellant and appellee, Mrs. Ballard, therein. Now, if these averments are true, an implied or resulting trust in favor of appellant for an undivided half interest in the property would be established. *Lisko* v. *Hicks,* 195 Ark. 705, 114 S. W. 2d 9.

The fact that appellant claimed an express trust resting in parol would not defeat the implied trust growing out of the same transaction. "It has been held that the fact that there has been an express trust declared by parol which is invalid because of the statutory inhibition will not prevent a trust from resulting by operation of law from the acts of the parties. So, if the circumstances are such as to give rise to a resulting trust, it is not affected by an express parol agreement between the parties to the same effect." 65 C. J. 368.

As far as the interest asserted by appellant in the stock in the hotel company, issued in the name of appellee, Mrs. Ballard, is concerned, appellant might prove a trust in his favor in this stock by parol. "The rule that trusts in personalty may be created or established by parol has been applied to money, bank deposits . . . shares of corporate stock, . . ." 65 C. J. 255.

Appellees' contention that the complaint showed on its face (because of the allegation that nothing was paid for any of the stock issued by the hotel company) that the stock certificates evidencing the shares in the hotel company which appellant asserts were owned jointly by him and appellee, Mrs. Ballard, were void would not, even if justified by the language of the complaint, put appellees in a more favorable situation. If the organization of the corporation should be held to be void because of the illegality of all of the stock therein, the result would be that the title to the property is still in appellee, Mrs. Ballard, who, according to the allegations of the complaint, is holding a one-half interest therein as trustee for appellant.

II.

As to appellant's claim for salary alleged due him as assistant manager, appellees insist that the complaint shows that the agreement for this salary was void. We do not agree. The mere fact that appellant was a director and officer of the corporation would not prevent his employment, under proper circumstances, at a salary by the corporation. *Red Bud Realty Company* v. *South*, 96 Ark. 281, 131 S. W. 340; *Mt. Nebo Anthracite Coal*

Company v. *Martin,* 86 Ark. 608, 112 S. W. 882; *Corning Custom Gin Company* v. *Oliver,* 171 Ark. 175, 283 S. W. 977; *Clifford* v. *Walker,* 180 Ark. 592, 22 S. W. 2d 36. Nothing set forth in the complaint indicates that the alleged employment of appellant as assistant manager was irregular or not properly authorized or that he did not render valuable services to the corporation. If, in fact, appellant was not properly employed, or if he did not in fact render valuable services to the corporation under such employment, these facts would be matters of defense to be set up in an answer. Such a defense could not, under the allegations of the complaint, properly be raised by demurrer to the complaint.

III.

The complaint does not show when appellee, Mrs. Ballard, first repudiated the trust agreement or denied appellant's interest in the property as asserted by him. While the complaint shows the date of the contract under which it appears that appellee, Mrs. Ballard, and appellant purchased the real estate, the complaint does not show when a conveyance of this lot was made to appellee, Mrs. Ballard. It may be fairly deduced from appellant's complaint that appellant and appellee, Mrs. Ballard, for some years successfully and agreeably operated the hotel property under the contract alleged by appellant, by which it was recognized that appellant was the owner of an undivided one-half interest in the property, and it does not appear from the complaint that by reason of the delay of appellant in bringing his suit any such change has occurred in the condition or relation of the parties in the property which would make it inequitable for appellant now to assert his rights thereto.

In the case of *Sanders* v. *Flenniken,* 180 Ark. 303, 21 S. W. 2d 847, this court said: "Mere lapse of time before bringing suit, without change of circumstances or in the relation of the parties, will not constitute laches. Not only must there have been unnecessary delay, but it must appear that, by reason of the delay, some change has occurred in the condition or relation of the parties to the

property which would make it inequitable to enforce the claim. So long as the parties are in the same condition, a claim for land may be asserted within the time allowed by law.''

Nor can it be said that the complaint in this case shows on its face that appellant's cause of action is stale or barred by limitation. It is possible that, under the facts pertaining to the situation here involved, appellant's cause of action, if any he had, is barred by laches, staleness or limitation. But these facts do not appear from the complaint and are matters of defense which must be raised by answer rather than by demurrer.

It is also urged by appellee that the amount claimed to be due appellant for salary as assistant manager of the hotel is shown by the complaint to be barred. But, according to the complaint, this salary was not payable until certain debts owed by the company were paid. It is not shown definitely by the complaint when these debts were paid. Therefore it cannot be said that the complaint showed on its face that appellant's claim for salary was barred by the statute of limitation.

IV.

If the complaint embraced more than one cause of action, objection on this ground should have been made by motion to strike or motion to require appellant to elect which of the causes of action he would pursue. A demurrer to an entire complaint should not be sustained if any good cause of action is stated therein. *Burgett* v. *Allen,* 54 Ark. 560, 16 S. W. 573; *Jett* v. *Theo. Maxfield Company,* 80 Ark. 167, 96 S. W. 143; *Drury* v. *Armour & Co.,* 140 Ark. 371, 216 S. W. 40; *Martin* v. *Stratton,* 157 Ark. 513, 248 S. W. 554.

However, as we construe the complaint, appellant was seeking in this action to establish ownership in the appellant of an interest in the assets of the hotel company, to obtain an accounting as to its affairs, and to recover for salary due appellant; and there is no valid reason why all these objects might not be accomplished by one suit in equity.

We conclude that the lower court erred in sustaining the demurrers to the complaint and the motion to dismiss same; and, for this error, the decree of the lower court is reversed, and this cause is remanded with directions to overrule said demurrers and motion to dismiss, and for further proceedings, in accordance with the principles of equity and not inconsistent with this opinion.

CITY OF LITTLE ROCK *v.* ARKANSAS CORPORATION COMMISSION.

4-7707 189 S. W. 2d 382

Opinion delivered July 9, 1945.

Cooper Jacoway and *Henderson, Meek, Catlett & Henderson,* for appellant.

Guy E. Williams, Attorney General, and *J. F. Koone,* Assistant Attorney General, for appellee.

HOLT, J. The question presented, say appellants, "is to determine whether in passing Act 129 of 1941 the Legislature elected to employ an income tax on national bank stock dividends as a substitute for the ad valorem tax on national bank shares. In other words, did Act 129 relieve national banks of the payment of an *ad valorem* tax on their shares?"

It is conceded that a state may tax the shares of stock in national banks located within its limits only as Congress may direct.

Title 12, § 548, U. S. C. A., provides: "The Legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, . . . 1. (a) The imposition by any one of the above . . . forms of taxation shall be in lieu of the others, etc."

Over a long period of time, the State of Arkansas has adopted and followed the first method, *supra,* by an *ad valorem* assessment against the shares of stock (§§ 13729-35, Pope's Digest). This method of taxation was followed until our Legislature, at its 1941 session, passed Act 129, § 5 of which provides: "Section 5. That dividends derived from shares in State and National Banks shall be taxable in the same manner and at the same rate as taxable dividends from foreign and domestic corporations."

Obviously, this Act required all owners of national bank stock to report, as taxable income, dividends derived from such shares.

On March 3, 1942, the Arkansas Corporation Commission (now the Arkansas Public Service Commission), acting upon the advice of the Attorney General, issued an order directing all local tax assessors throughout the state to relieve national banks of the *ad valorem* tax assessment for 1941 on national bank stock.

By appropriate proceedings, appellants appealed from the Commission's order to the Pulaski Circuit Court, Second Division, where, upon a hearing, the Commission's order was affirmed. This appeal followed.

We think the holding of the trial court was correct.

Appellants say that "the solution of the question presented . . . depends upon whether the 1941 Legislature intended the stock dividend tax to be a substituted form of taxation or whether it was to be cumulative and additional to the old *ad valorem* tax on shares."

In the construction of the statute, certain well defined rules must be observed. In 50 Am. Jur., § 225, the text writer says: "A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute ex-

presses the legislative intention, so that such plain and obvious provisions must control." And in § 232: "Courts will not, as a general rule, undertake a correction of legislative mistakes in statutes. This principle is adhered to notwithstanding the fact that the court may be convinced by extraneous circumstances that the Legislature intended to enact something very different from that which it did enact. The question is not what the General Assembly intended to enact, but what is the meaning of that which it did enact."

In *Refunding Board of Arkansas* v. *Bailey,* 190 Ark. 558, 80 S. W. 2d 61, we quoted with approval from Lewis Sutherland Statutory Construction, vol. 2, p. 698, wherein it is said: "It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But, . . . first of all, in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction," and in the more recent case of *McLeod, Commissioner of Revenues,* v. *Santa Fe Trail Transportation Co.,* 205 Ark. 225, 168 S. W. 2d 413, wherein many authorities are cited in support of certain cardinal rules of construction therein announced, we held: (Headnote 1) "Effect must, if possible, be given to every part thereof." (Headnote 2) "A statute should be given that interpretation that will sustain rather than defeat it." (Headnote 3) "In construing a statute, it will be presumed that the Legislature, in enacting it, did so with the full knowledge of the constitutional scope of its powers, of prior legislation on the same subject and of judicial decisions under the pre-existing law."

It is our view that the meaning of the language used by our lawmakers in the act, *supra,* is so clear and unambiguous that it needs no judicial construction. Primarily, we are concerned here with the meaning of what the Legislature said, or did, rather than what it might have intended. By the language used, the Legislature definitely taxed the dividends received from shares in national banks. In doing so, the lawmakers must be presumed to have known the effect of such legislation, that they were governed by the Federal statute, *supra,* and therefore knew that Arkansas had the right to levy but one form of tax against national bank shares and that this levy would take the place of the former *ad valorem* method of taxing shares since § 5, *supra,* was in direct conflict with the former method.

While it is true that the repeal of a statute by implication is not favored, it is also well settled that where there is an irreconcilable conflict, the last enactment on the subject must control. In *Common School District No. 52* v. *Rural Special School District No. 11,* 146 Ark. 32, 225 S. W. 21, it is said: "There is an irreconcilable conflict between the two acts, and the last enactment controls."

It further appears that § 5 covers the whole field relating to the taxing of national bank shares in Arkansas and therefore the rule as to implied repeals announced in *McLeod, Sheriff,* v. *Shaver,* 198 Ark. 56, 127 S. W. 2d 258, applies here: "We must hold that under the canons of construction, long recognized by all the courts, if the Legislature take up the subject and treat it anew and cover the whole field of legislation, though it may not by express terms refer to any prior statute, the new or last statute must be declared to be the law and the oldest statute be regarded as having been repealed by implication. Particularly is this true if the two acts are repugnant to each other."

Appellants argue that in passing Act 129, the Legislature intended to increase revenues. Whether the Legislature intended to increase the revenues is not controlling in the circumstances here. As a matter of fact, it is

stipulated that the revenues derived under the entire Act were increased.

There is another well established rule of construction applicable here, announced by this court in *McCain, Commissioner of Labor,* v. *Crossett Lumber Company,* 206 Ark. 51, 174 S. W. 2d 114, wherein we said: ". . . It might be well to observe in passing that in construing an act imposing a special tax, such as we have here, we must construe the same strictly against the state and favorably to the taxpayer, and all ambiguities or doubts therein respecting liability for such tax must be resolved in favor of the taxpayer. *Wiseman* v. *Ark. Utilities Co.,* 191 Ark. 854, 88 S. W. 2d 81; *Hardin* v. *Ft. Smith C. & B. Co.,* 202 Ark. 814, 152 S. W. 2d 1015."

Finding no error, the judgment is affirmed.

ROBINS, J., not participating.

GULLEY *v.* BUDD.

4-7705 189 S. W. 2d 385

Opinion delivered July 9, 1945.

Jeff Duty, Glenn Wing, Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellant.

G. T. Sullins, Rex W. Perkins and *John M. Lofton, Jr.,* for appellee.

MILLWEE, J. On July 10, 1944, E. A. Budd was found guilty of the crime of voluntary manslaughter and given a sentence of five years in the penitentiary from which judgment an appeal was duly prosecuted to this court, which, after having been perfected, was dismissed on his motion January 2, 1945.

On January 5, 1945, the Governor of the State issued a pardon to Budd which reads as follows:

"To All to Whom These Presents Shall Come—Greeting:

"Whereas, E. A. Budd, of Fayetteville, was at the April, 1944, term of the Washington County Circuit Court convicted of the crime of voluntary manslaughter and sentenced to five years in the penitentiary; and

"Whereas, statements by several outstanding physicians and surgeons of Fayetteville, and Washington county, give as their unanimous opinion that the death of the deceased was not caused by any altercation she may have had with the defendant and state emphatically she was suffering from a brain tumor which undoubtedly caused her death several weeks later and they state that had an autopsy been performed they believe this point would have been proven conclusively; and

"Whereas, these physicians also stated that Mr. Budd is suffering from and is now being treated for a heart ailment and his commitment to the penitentiary at age sixty-seven (67) years would be equivalent to taking his life; and

"Whereas, a large number of outstanding citizens, including businessmen, city and county officials, bankers, ministers, and professional men of all types have urged that he has suffered sufficiently; and

"Whereas, a number of the jurors have likewise recommended that he be given a pardon; and

"Whereas, this pardon is being issued without solicitation of paid representation or attorney.

"Now, therefore, I, Homer M. Adkins, Governor of the State of Arkansas, by virtue of the authority vested in me do hereby grant a full and complete pardon to the said E. A. Budd, and all rights of citizenship are hereby restored.

"In testimony whereof, I have hereunto set my hand and caused to be affixed the Great Seal of State at Little Rock this 5th day of January, 1945.

"Homer M. Adkins, Governor.

"Attested: Secretary of State: C. G. Hall."

On January 13, 1945, the prosecuting attorney, who had represented the State, procured from the clerk of the circuit court where Budd had been convicted a commitment directing the sheriff of the county to take Budd into custody and deliver him to the keeper of the State penitentiary.

Knowing that this pardon had been granted, the clerk declined to issue the commitment until advised so to do by the Attorney General's office. Upon being advised of the issuance of the commitment, Budd's attorneys on the day of its issuance filed in the chancery court a petition for a temporary restraining order which was issued by the county judge, in the absence of both the circuit judge and the chancellor from the county.

The sheriff of the county testified that when he received the commitment he began looking for Budd and would have taken Budd into custody but for the restraining order. On January 15, 1945, the chancellor then being in Washington county where Budd had been tried and convicted, the injunction proceeding was dismissed and Budd surrendered himself to the custody of the sheriff upon whom a writ of *habeas corpus* was immediately served requiring him to appear before the chancellor and show cause why he detained Budd in custody. A hearing before the chancellor was concluded on February 13, 1945, and Budd's discharge was ordered and this appeal is from that decree.

It is first insisted that the writ did not lie for the reason that Budd had voluntarily procured his own arrest, but this position cannot be sustained. It is true Budd voluntarily surrendered to the sheriff, which he did after being advised that he was pursuing the wrong remedy in seeking to enjoin the sheriff from taking him into custody. Budd's attorneys were aware that the sheriff had a writ for Budd's arrest and that Budd would be taken into custody unless proper action was taken to prevent this from being done. The commitment was not issued with the consent or at the connivance of Budd, and if his pardon was valid, he had the right to take appropriate action to prevent the sheriff from arresting

him, as the sheriff was about to do, and would have done but for the temporary injunction.

It is next contended that the chancery court was without jurisdiction to issue the writ of *habeas corpus,* but that contention cannot be sustained. Express authority to issue the writ, either in term time or in vacation, is conferred upon the chancellors of this state by § 6347, Pope's Digest, where it is alleged that the petitioner for the writ is being illegally deprived of his liberty. Budd attempted the practice pursued and approved in the case of *Horton* v. *Gillespie,* 170 Ark. 107, 279 S. W. 1020, and *Nelson* v. *Hall,* 171 Ark. 683, 285 S. W. 386.

It is next insisted that the Governor was without power to grant the pardon inasmuch as it was issued without compliance with the provisions of Act 154 of the Acts of 1903, p. 270, appearing as §§ 4218 *et seq.,* Pope's Digest. This Act was construed and held constitutional in the case of *Horton* v. *Gillespie* and followed in the case of *Nelson* v. *Hall, supra.*

It was held in the Horton case that the provisions of the Act were mandatory and that the power of the Governor to pardon is not absolute, but is subject in its exercise to such regulations as the Legislature may see proper to impose which do not substantially deprive the Chief Executive of this power.

It is conceded that no notice of the application for Budd's pardon was published and the insistence is that this failure rendered the pardon void inasmuch as applications for the pardon were made by paid representatives of Budd. The Horton case, *supra,* reviewed and construed the provisions of Act 154, *supra,* and stated the conditions under which notice must be given and other conditions under which the pardon might be granted, although no notice of the application had been published. It was there said (170 Ark. 107, 279 S. W. 1024):

"Section 4 further provides that the Governor, acting upon his own motion, or being prompted by the result of an investigation made at his instance, shall have the right to grant a pardon in any case without the publica-

tion being made under either § 2 or 3 of the act. After enumerating the exceptions stated above, when publications shall not be required, it is further provided in § 4 that 'all such pardons so granted by the Governor shall state on the face of the certificate thereof that the same was granted by the Governor without application therefor being made to him by any attorney or paid representative of the person pardoned.' '' The pardon to Budd contained that recital in substance.

Now the testimony shows that paid attorneys of Budd solicited various persons to intercede with the Governor for the issuance of the pardon, but Act 154 contains no inhibition against a paid attorney soliciting another person to intercede with the Governor to grant a pardon. The inhibition is against the attorney himself or other paid representative interceding with the Governor. If he does so and thus attempts to influence the Governor to grant the pardon, the law in that event imposes the requirement that notice of the application be given. But if this is not done, and no paid representative intercedes with the Governor he, the Governor, is authorized to act and to grant a pardon, although no notice of the application had been given. In other words, the Governor may grant a pardon where no notice of the application was published provided no intercession for that act is made by an attorney or paid representative, and if and when a pardon is thus granted, that fact shall be recited in the pardon itself. If this recital is not conclusive of the fact recited, a question unnecessary here to decide, it is certainly *prima facie* true, and if that recital may be shown to be false, certainly the burden is upon the person that makes that charge to substantiate it, and that was not done in the instant case. Many persons of high character and unquestioned standing did intercede with the Governor to grant the pardon, one personally, others by letters, but there is no proof that any of these persons were paid for so doing. We must, therefore, hold that the Governor acted in conformity with the requirements of the law as stated by him in the pardon and not in violation of the law.

It is not probable that many, if any, pardons are granted unless in some manner someone calls to the Governor's attention matters which suggest that a pardon should be granted, and the law does not prohibit such suggestions, and the Governor may act thereon even in the absence of the publication of notice, unless the person making the suggestion and request is an attorney or paid representative.

It is insisted that the record does not show that Budd was financially unable to pay for the publication of the notice of the application for the pardon, and that the contrary is true in that he was able to pay the cost of publication of the notice, but the statute does not make inability to pay a prerequisite for the issuance of a pardon in this manner. It provides that, ". . . The Governor, acting upon his own motion, or being prompted thereto by the result of investigations made at his instance, shall have the right to grant a pardon in any case without the publication provided for herein . . . ," in which case it must be stated in the pardon that it was granted without application therefor by an attorney or paid representative.

It is insisted that the pardon was procured through fraud practiced upon the Governor, the fraud consisting of false statements of fact made to the Governor. He has not said so. His deposition was not taken and there is no showing that he did not act advisedly.

We are without power to review the Governor's discretion in issuing this pardon and it is unimportant whether we approve or disapprove that action. The discretion is his and not our own, and we may consider only the Governor's power to act.

The case of *Rathbun* v. *Baumel,* 196 Ia. 1233, 191 N. W. 297, 30 A. L. R. 216, is a decision by the Supreme Court of Iowa, written by a divided court, in which the right of a court of equity to cancel a pardon on account of fraud practiced upon the Governor in its issuance is considered. Many authorities were reviewed and the conclusion was reached that fraud in the procurement of a

pardon, as in the case of any other written instrument, vitiates the instrument in the hands of one seeking to benefit thereby, and that a court of equity has the power to investigate title to a pardon which is attacked on the ground that it was procured by the applicant's fraud on the Governor, and that the entertainment by the courts of such a suit is not an interference with the executive as would be an investigation of fraud by the Governor in issuing the pardon.

There was a strong dissent in this case written by one member of the court and concurred in by another which took the position that, if such a suit could be maintained at all, it must be instituted by the Governor himself and not by another. The dissenting justices said: "If he discovers such fraud or deceit and is disposed to waive the affront and permit the pardon to stand, no other person or authority may rightfully object, but, having discovered it, there is no constitutional provision or reason which prohibits him from applying to the court and on due notice to the holder of the pardon asking a decree of cancellation of the grant, but, in the absence of any such complaint on his part, neither the court nor any public officer or citizen is entitled to assume or exercise powers of guardianship over the executive or to interfere in any matter upon any pretense in the exercise of the executive discretion."

This statement, however, was not the opinion of the court, but the majority did discuss the quantum of proof necessary to cancel the pardon on account of fraud practiced upon the Governor and the majority quoted with approval the following statement from Wharton's Criminal Procedure, vol. 2, § 1469: "A pardon fraudulently procured will, it has been held, be treated by the courts as void. And this fraud may be by suppression of the truth as well as by direct affirmation of falsehood. Yet this test should be cautiously applied by the courts, for there are few applications for pardon in which some suppression or falsification may not be detected. It is natural that it should be so, when we view the condition of persons languishing in prison, or under sentence of

death; and if departure from rigid accuracy in appealing for pardon be a reason for canceling a pardon, there would be scarcely a single pardon that would stand. The proper course is to permit fraud to be set up to vacate a pardon only when it reaches the extent in which it would be admissible to vacate a judgment. And an erroneous recital is no proof of fraud."

The quantum of proof required to set aside a pardon on the ground that it was procured by fraud is the same that would be required to set aside a judgment or decree of a court on the ground that it was procured by fraud and many cases have announced the requirement as follows: "Fraud as the basis of an action to impeach a judgment, must be a fraud extrinsic of the matter tried in the cause; it must not consist of any false or fraudulent action or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is assailed; it must be a fraud practiced upon the court in the procurement of the judgment." The law was thus declared in the case of *Turley* v. *Owen,* 188 Ark. 1067, 69 S. W. 2d 882, quoting from the case of *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10. Other cases to the same effect are the following: *Burbridge* v. *Gotsch,* 107 Ark. 136, 154 S. W. 200; *Reeves* v. *Conger,* 103 Ark. 446, 147 S. W. 438; *Hall* v. *Cox,* 104 Ark. 303, 149 S. W. 80; *Holland* v. *Wait,* 191 Ark. 405, 86 S. W. 2d 415; *Baker* v. *State,* 201 Ark. 652, 147 S. W. 2d 17; *Kersh Lake Drainage Dist.* v. *Johnson,* 203 Ark. 315, 157 S. W. 2d 39.

The only fraud alleged or attempted to be shown was that inaccurate statements of fact were made to the Governor. Among other statements were the opinions of four doctors as to the cause of the death of the woman Budd was alleged to have killed, these being to the effect that in the opinion of the doctors Budd had not killed the woman. But the pardon recites that these statements were the opinions of the doctors and no attempt was made to show that the doctors did not entertain the opinion expressed, however erroneous it may have been. Another doctor stated the condition of Budd's health and

the truth thereof is not denied. In addition this doctor expressed the opinion that Budd's confinement in the penitentiary would probably result in his death. Other letters to the Governor expressed the opinion that Budd had been sufficiently punished, which may or may not be true, and four members of the trial jury recommended clemency. We do not consider or decide whether this recommendation should have induced the Governor in the exercise of sound discretion to have granted the pardon, for as has been said, it was he and not we who had the right and power to exercise discretion. But we do hold that such representations all made by responsible persons whose veracity is not questioned, except to say they were mistaken, do not support the finding that the pardon was procured by fraud practiced upon the Governor.

In the appellants' brief, in discussing the power of the Governor to grant the pardon, there is the following language: "Also § 12773 of Pope's Digest is § 6 of Act 178 of 1937 and provides in brief that the Board of Pardons and Paroles shall investigate and consider all applications for executive clemency and make recommendations thereon to the Governor. We submit that this requirement is no less mandatory than are those of the act of April 20, 1903 (§§ 4218 to 4222, Pope's Digest), which have as heretofore been seen by this court held to be mandatory. There was no compliance with either of these acts. There is not even any contention that Act 178 of 1937 (§ 12773 of Pope's Digest) was even attempted to be complied with. It is agreed that the whole file in the Budd pardon was admitted in evidence and appears in this record. There is nothing therein showing a compliance with § 12773 of Pope's Digest."

The above quotation is the only reference to § 6 of Act 178 of 1937 (§ 12773 of Pope's Digest), that we have been able to find in the entire transcript and briefs; so it is clear that this act is mentioned for the first time in the brief on appeal.

When Budd filed his petition for *habeas corpus* and pleaded his pardon, the appellants filed a ten-page re-

sponse; and the five points mentioned below are the only ones therein pleaded by appellants:

(1) Lack of chancery jurisdiction;

(2) Voluntary surrender to custody;

(3) Lack of power of the Governor to grant the pardon, because the notice of application therefor was not published;

(4) Invalidity of the pardon because of the absence of the statutory words from the face of the pardon, the statutory words being "without application therefor being made to him by an attorney or paid representative of the person pardoned";

(5) Fraud in the procurement of the pardon. These same five points are the ones listed in the appellants' brief as the ones relied upon. It will be observed that no reference to § 6 of Act 178 of 1937 (§ 12773, Pope's Digest) was contained in the response in the chancery court, and that no evidence was offered concerning any action or failure to act on the part of the pardon board.

In his petition for *habeas corpus* Budd pleaded his pardon. In *Horton* v. *Gillespie, supra,* it was said: "It may be first said that pardons are to be liberally construed in favor of the pardonee, and that there is a presumption in favor of their validity." With the presumption in favor of the validity of the pardon, the burden was on the appellants to allege and prove that the pardon was illegal. If appellants had desired to claim that § 6 of Act 178 of 1937 (§ 12773, Pope's Digest) was applicable to this case and had not been complied with, then appellants should have pleaded the act and proved the facts supporting their contention. This they failed to do. The stipulation to the effect that letters to the Governor were the "entire file in the case" cannot be twisted to constitute a stipulation that there was no compliance with § 6 of Act 178 of 1937, even if that act were applicable.

We reach the inevitable conclusion that § 6 of Act 178 of 1937 (§ 12773, Pope's Digest) was not urged as a contention below, and the argument about it was thrown into

the brief in this court as a mere after thought. In *Mo. P. R. Co.* v. *Myers Commission Co.,* 196 Ark. 976, 120 S. W. 2d 693, we said:

"This court has frequently held that no issue can be raised in this court which was not raised in the trial court; and since appellant's present contention was not raised in the trial court, as we have herein pointed out, we believe the relief it is now asking on appeal should be denied. *Bolen* v. *Farmers' Bonded Warehouse,* 172 Ark. 975, 219 S. W. 62; *Leonard* v. *Luther,* 185 Ark. 572, 48 S. W. 2d 242; *Banks* v. *Corning Bank & Trust Co.,* 188 Ark. 841, 68 S. W. 2d 452, *Id.* 292 U. S. 653, 54 S. Ct. 863, 78 L. Ed. 1502; *Illinois Bankers' Life Assurance Co.* v. *Lane,* 189 Ark. 261, 71 S. W. 2d 189."

The question of the effect of § 6 of Act 178 of 1937 (§ 12773, Pope's Digest) on the pardoning power of the Governor is of too great importance to be decided lightly or casually. It would be improper to decide or discuss that section in this opinion because there was neither allegation nor proof in this case as to whether that section was ignored, even if the section were applicable. Therefore, we pretermit any further discussion of it, since the question is not properly presented.

We conclude, therefore, that the chancellor correctly held that the pardon was a valid instrument and Budd's discharge was, therefore, proper. The decree is accordingly affirmed.

GRIFFIN SMITH, C. J., dissents.

McFADDIN, J., concurring. I concur in the result reached in this case by the majority, but I cannot agree with certain statements in the opinion which I consider to be very dangerous dicta. The purposes of this concurring opinion are (1) to demonstrate the dicta, and (2) to point out the dangerous implications therefrom.

I. The majority holds—and I agree thereto—that the appellant failed to prove any fraud in the procurement of the pardon. This holding conclusively disposes of all questions as to what official could raise the issue of

fraud in procuring the pardon; because, if no fraud was shown, then it makes no difference what official might try to raise the question. Therefore, all language in the opinion—as to which official (*i.e.*, the Governor, Attorney General, Prosecuting Attorney, arresting officer, etc.) could raise the issue of fraud in procurement—must be dicta.

Notwithstanding this fact, the majority opinion cites and discusses the Iowa case of *Rathbun* v. *Baumel,* 196 Ia. 1233, 191 N. W. 297, 30 A. L. R. 216, and refers to the fact that there was a strong dissenting opinion in the Iowa case, and, with apparent approval, gives this quotation from the Iowa dissenting opinion in referring to the Governor: "If he discovers such fraud or deceit and is disposed to waive the affront and permit the pardon to stand, no other person or authority may rightfully object, but, having discovered it, there is no constitutional provision or reason which prohibits him from applying to the court and on due notice to the holder of the pardon asking a decree of cancellation of the grant, but, in the absence of any such complaint on his part, neither the court nor any public officer or citizen is entitled to assume or exercise powers of guardianship over the executive or to interfere in any matter upon any pretense in the exercise of the executive discretion."

Certainly, this quotation is dicta, because, when we hold—as we did in the case at bar—that no fraud was shown, then it is immaterial who is seeking to raise the issue of fraud, and all language as to whether the Governor could waive the fraud is dicta, since no fraud was shown.

II. This dicta has dangerous implications. The quotation from the dissenting opinion in *Rathbun* v. *Baumel, supra,* says that the *Governor,* after discovering the fraud, may waive the fraud and permit the pardon to stand and "no other person or authority may rightfully object." This is dangerous. A Governor, in granting a pardon, does not act in a private capacity, but acts in his official capacity as the chief executive of the state. In 39 Am. Jur. 527, in speaking of the pardoning power, it is

stated: "It is as much an official act as any other act. It is vested in the Governor, not for the benefit of the convict only, but for the welfare of the people, who may properly insist upon the performance of that duty by him if a pardon or parole is to be granted." And in 39 Am. Jur. 529 the rule is stated: "The Governor, however, does not hold the power simply because he is the chief executive, but because the sole power to pardon is delegated to his *office.*"

To say that the Governor may personally waive the fraud is to make the issuance of a pardon a personal or private act, rather than an official act. Any fraud in procuring the pardon is not a fraud against the individual who grants it, but is rather a fraud against the office and the state. If the quoted language from the Iowa dissenting opinion means what it says, then, if a Governor should be absent and a Lieutenant Governor should grant a pardon, the Governor, upon return to the state, could not question the pardon on the basis of fraud in procurement. Furthermore, if the quoted language from the Iowa dissenting opinion means what it says, then the Attorney General of the state could never question a pardon on the basis of fraud in the procurement. These two previous sentences demonstrate how dangerous is the dicta of which I complain. In *Horton* v. *Gillespie,* 170 Ark. 107, 279 S. W. 1020, and in *Nelson* v. *Hall,* 171 Ark. 683, 285 S. W. 386, the Governor, on return to the state, questioned, through the warden of the penitentiary and the sheriff of the county, the validity of the acts of the Lieutenant Governor (there called Acting Governor) in issuing pardons. Those cases did not present the issue of fraud in procurement; but they might well have done so, because the right of the Governor to question the acts of the Lieutenant Governor was not considered of sufficient importance to be raised as an issue. In the recent case of *State, ex rel. Attorney General,* v. *Karston,* 208 Ark. 703, 187 S. W. 2d 327, we had occasion to review the power of the Attorney General, and we there said that the Attorney General was the chief law officer of the state. As such official he should certainly be not only allowed, but required to see, that no fraud be practiced on the office

of Governor in the obtaining of a pardon. To hold otherwise is to restrict the power and duty of the Attorney General as the chief law officer of the state.

The dangerous implications from this dicta impel this separate concurrence.

RODGERS *v.* STATE.

4395 189 S. W. 2d 608

Opinion delivered October 1, 1945.

Bon McCourtney and *Claude B. Brinton,* for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

ROBINS, J. Charged in information filed by the prosecuting attorney with the offense of murder in the first degree alleged to have been committed by unlawfully shooting to death Edward Howard, appellant was by a jury found guilty of murder in the second degree and his punishment was fixed at confinement in the penitentiary for twenty-one years. From judgment in accordance with the verdict appellant prosecutes this appeal.

For some time prior to the killing, appellant had been operating a poker game at his residence in Paragould. He testified that he was unable to work on account of being afflicted with tuberculosis, and was running the poker game in order to make a living. On the afternoon of August 12, 1944, Edward Howard, aged 23, married, employed in a defense plant, was one of appellant's patrons. Howard lost eleven dollars and complained that he had been cheated by the use of marked cards. He demanded that appellant give him his money back. Appellant protested that others in the game had won Howard's money, and offered to prove that the cards were not marked. After Howard had threatened appellant, Wilkerson, another of appellant's patrons,

intervened and was struck on the head by a club in the hands of Howard. Wilkerson finally overcame Howard, threw him to the ground and held him until Howard promised to go home. Upon being released by Wilkerson Howard left appellant's premises. About sundown of the same day Howard and appellant met near the intersection of King's Highway and Pekin Street in Paragould. Appellant testified that he was going to town to get some medicine for his wife, who had become nervous as a result of the row over the poker game, and that he armed himself with a pistol because of Howard's threats and because he (appellant) was not physically able to resist the apprehended attack by Howard. According to witnesses for the State, no words were exchanged between Howard and appellant. It is undisputed that Howard was unarmed. When Howard was within about five feet of appellant, appellant began firing at him, at least four shots taking effect in Howard's body. Some witnesses for the State testified that appellant shot Howard twice after he fell. Appellant testified that immediately before the shooting Howard, with his right hand in his pocket, again demanded repayment of his losses in the poker game, saying: "I want my eleven dollars back or here's where it begins." Appellant further testified: "He kept coming and when he got within five feet of me I shot him. After I shot the first shot I guess I lost my head . . . He didn't make any effort to get his hand out of his pocket and didn't pull any weapon." Appellant also stated on the witness stand that he feared an attack by Howard would bring on a hemorrhage with fatal results to appellant and that he fired at Howard for this reason. Several witnesses testified as to threats made by Howard against appellant, and there was some corroboration of appellant's version of the fatal encounter.

For reversal of the judgment of the lower court, appellant urges here: (I) That the lower court erred in refusing to give appellant's requested instruction No. 1; and (II) that the lower court erred in permitting introduction of a transcript of testimony given by Willis

Carpenter at the preliminary hearing of appellant before a justice of the peace.

I.

Appellant's requested instruction No. 1 was: "You are instructed by the court that if you find from the evidence threats by the deceased to the defendant were communicated to the defendant, and if you further find that the defendant believed those threats and believed and anticipated because of his weakened physical condition and the superior physical condition of the deceased that he would receive great bodily harm from the deceased, even though no weapons were used by the deceased, you are instructed that the defendant had a right to arm himself and could act with less provocation in order to repel the assault and prevent the deceased from taking his life or doing him great bodily harm with his fist."

It was not error to refuse to give the instruction in this form. Appellant did not have a right (because of fear arising from his weakened physical condition and the superior strength of his adversary) "to arm himself" and to "act with less provocation."

By § 3508 of Pope's Digest of the laws of Arkansas the carrying of a pistol as a weapon (except by an officer making an arrest or by a person on a journey) is forbidden. The statute makes no exception in favor of one who is physically disabled. Under the law, a man weakened by disease has no more right to carry a pistol as a weapon than does a healthy person. And while it might appear necessary for a person so disabled to resort to use of a weapon in necessary self-defense sooner than such a necessity would present itself to a person of ordinary strength, it cannot properly be said that the person under disability would have a right to shoot another "with less provocation."

II.

By § 3746 of Pope's Digest it is provided: "The magistrate, in the minutes of the examination, shall state

the name and place of residence of each witness, and shall make a general statement of the substance of what was proved and file the same with the proceedings." Section 3755 is as follows: "The magistrate shall in ten days, and before the commencement of the next term of the court to which the defendant is sent for trial, deliver to the clerk of such court the warrant, if any; the minutes of the examination, including the statement of the witnesses; the instruments of writing and other things used in evidence; the decision and action of the magistrate; the bail-bond, if any; and the recognizance of the witnesses."

Section 14 of Initiated Act No. 3, adopted November 3, 1936 (Acts of 1937, p. 1390), thus authorizes the use of the testimony of an absent witness: "On the trial of any cause, civil or criminal, the properly authenticated transcript of the testimony of any witness, or other evidence of the testimony of any witness when properly proved, which testimony was given in any court at any former trial or examination of the same cause between the same parties or their privies, may be read or admitted in evidence, when the former witness is dead, beyond the jurisdiction of the court, has become insane since the former trial or examination, or when for any reason the former witness may not be available, and also in all cases in which for any reason a former witness refuses to testify concerning the matters as to which he formerly testified. But no such transcript of testimony, nor proof of such testimony, may be admitted on behalf of either party in a criminal case unless it is first shown that the party against whom it is sought to be used was present, in person or by attorney, at the former trial or examination and there had the opportunity to examine or cross-examine the witness whose testimony or the transcript of whose testimony is offered in evidence."

Appellant objected to the reading of transcript of Carpenter's testimony on the ground that proper foundation for introducing same had not been laid. A deputy sheriff testified that a subpoena to obtain the attendance

of Carpenter as a witness had been issued, but that he was unable to serve it because Carpenter was in California.

In the case of *Shackleford* v. *State,* 33 Ark. 539, decided before the use of the testimony of an absent witness had been expressly authorized by statute, the State was permitted by the circuit court to introduce as a witness the justice of the peace before whom Shackleford's preliminary examination was held and to prove by the justice of the peace the substance of damaging testimony given against the accused at the preliminary examination by a witness who had afterwards disappeared from the community and could not be found at the time of the trial. This court held that there was no error in permitting the introduction of the testimony of the justice of the peace, and cited in support of its decision the case of *Hurley* v. *State,* 29 Ark. 17, where it was held that admission of such testimony did not violate the right of the accused to be confronted with the witnesses against him, because the accused was present at the preliminary examination and had a right to cross-examine the witness whose testimony was the subject of controversy.

A question somewhat similar to the one raised here was thus disposed of by this court in the case of *Rogers* v. *State,* 136 Ark. 161, 206 S. W. 152, also decided before the adoption of the Initiated Act of 1936, *supra*: "The court did not err in permitting the transcript of the testimony of Cora Critz at a former trial of the cause to be read in evidence. The official court stenographer duly authenticated the testimony as that of Cora Critz, taken down in shorthand at the former trial after the witness was duly sworn and when appellant and his counsel were present and had an opportunity to cross-examine the witness. He stated that the testimony so taken was correctly transcribed. A witness, who was personally well-acquainted with Cora Critz, testified that, after the death of her son, she stated that she was going to Texas. She left and had not returned, so far as the witness knew. Two subpoenas for Cora Critz had been issued and were returned *non est.* The returns re-

cited that the sheriff had made diligent search for the witness and had been unable to find her in Pulaski county, and that her whereabouts were unknown. The proper foundation was laid for the introduction of the secondary evidence and the ruling of the court in admitting it was correct. *Hurley* v. *State,* 29 Ark. 17; *Kelley* v. *State,* 133 Ark. 261, 202 S. W. 49; *Shackleford* v. *State,* 33 Ark. 539; *McNamara* v. *State,* 60 Ark. 400, 30 S. W. 762; *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885; *Wimberly* v. *State,* 90 Ark. 514, 119 S. W. 668; *Poe* v. *State,* 95 Ark. 172, 129 S. W. 292."

This court, in the case of *Walls* v. *State,* 194 Ark. 578, 109 S. W. 2d 143, decided after the adoption of the Initiated Act of 1936, held admissible transcript of the testimony of the principal witness for the State, given at the preliminary examination, upon a showing of the absence of the witness from the state, and, after reviewing previous decisions, said: "If Initiated Act No. 3, 1936, had never been adopted, still the secondary evidence in this case would have been proper, as this court has frequently held."

It appears from the record in this case that appellant was represented by counsel at the preliminary hearing, and the cross-examination of Carpenter by appellant's attorney is shown in the transcript of Carpenter's testimony that was read to the jury. While this transcript was not identified by the justice of the peace, or by the circuit court clerk, with whom it should have been filed, its introduction was not objected to on this ground; and it was identified by the young lady who took down Carpenter's testimony in shorthand and transcribed it on the typewriter. She also testified that the witnesses were duly sworn by the magistrate. There is no contention by appellant that Carpenter was not a witness at the preliminary hearing or that his testimony was not properly shown in the transcript read in the trial court. Appellant did not refute in any way the showing made by the State to the effect that Carpenter was out of the jurisdiction of the court. Under these

circumstances it was not error to permit this transcript to be read to the jury.

Other errors, not complained of here, were set up in appellant's motion for new trial. We have examined the record as to these contentions, and find no merit in any of them. There was substantial evidence to support the verdict of the jury, not only as to guilt of appellant, but also as to the degree of homicide of which he was found guilty. The judgment of the lower court is, accordingly, affirmed.

PHELPS *v.* PHELPS.

4-7605 189 S. W. 2d 617

Opinion delivered October 1, 1945.

E. W. Brockman, for appellant.

Maurice L. Reinberger, for appellee.

SMITH, J. Appellant and appellee were married in 1928, and lived together until February, 1944. Three children were born to them, a son, Charles, age 10, a daughter, Wilma Jane, age 7, and a son, Vester, age 5 years.

After their separation, Mrs. Phelps brought suit for divorce, and for custody of her children. A decree granting her a divorce was rendered March 21, 1944, and alimony in the sum of $25 per month was allowed her. The custody of their children was awarded the father, with the privilege to the mother of visiting them at reasonable times. No appeal was taken from this decree, but within the time when an appeal might have been prosecuted—May 22, 1944—Mrs. Phelps filed a petition for a change of custody, which petition was heard June 21, 1944, and denied, and from that decree is this appeal.

The attorney who represented Mrs. Phelps in the original suit advised her that an appeal might be taken from the decree awarding the custody of the children to Mr. Phelps, but instead of appealing as she might have done, Mrs. Phelps employed another attorney, who filed a motion for change of custody.

The record in the case makes the fact appear that the custody of the children was awarded to the father

for the reason that in the opinion of the court, Mrs. Phelps was not physically and mentally capable of taking care of the children. This opinion was evidently based upon the testimony of Mr. Phelps' employer, who testified in the case and expressed that opinion.

We have many cases dealing with the circumstances and conditions under which an order of court awarding custody of minor children could and would be changed, the most recent of these being the case of *Miller* v. *Miller,* 208 Ark. 1058, 189 S. W. 2d 371, in which case we have only today overruled a petition for rehearing. In that case we said: "In *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450, we approved the rule as stated in 9 R. C. L., p. 476, as follows: 'A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child.' " We also there quoted from the case of *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817, as follows: "It is the well-settled doctrine in this state that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity. Act 257 of 1921. *Caldwell* v. *Caldwell,* 156 Ark. 383, 246 S. W. 492; *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47." In this Miller case, *supra,* we reversed the action of the chancellor, who had refused to change the custody of two minor children.

In the Chapter on Divorce, 27 C. J. S., p. 1188, § 317, the law is stated as follows: "To justify a substantial modification there must be a change of circumstances or the discovery of material facts unknown to the court at the time of the original decree. The welfare of the child is controlling, and in determining this a number of factors may be considered.

"To justify a substantial modification of the decree awarding custody of the children, there must be shown

a change of circumstances or the discovery of material facts existing, but unknown to the court, at the time of the rendition of the decree. If the welfare of the child so requires, the decree may be modified without a change of circumstances, on the presentation of facts which although existing at the time of the original decree were not then presented or considered. The welfare of the child is the controlling consideration, and whenever it is shown that it is best for the welfare of the child that it be transferred from the custody to which it was awarded, the court will in its discretion modify the decree; otherwise modification is properly denied. The decree should not be modified merely to conform to the wishes of a parent, nor should it be modified for the reward or punishment of a parent, but the rights and wishes of the parents should, if possible, be considered. The court will take a child of tender years away from the mother to whom it was awarded only for the most cogent reasons."

Among the numerous cases cited in the notes to the text quoted are our cases of *Caldwell* v. *Caldwell,* 156 Ark. 383, 246 S. W. 492; *Stone* v. *Crofton,* 156 Ark. 323, 245 S. W. 827; *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47; *Nelson* v. *Nelson,* 146 Ark. 362, 225 S. W. 619.

The record affirmatively shows that the parties to this litigation are good people, but of humble circumstances, and we have the view that had the divorce been denied, they would have composed their differences and would have resumed their marital relations. In appellee's brief, it is said, "There has been no effort consciously or unconsciously to question the moral character of the appellant. It is freely admitted that that is beyond question."

We are, however, primarily concerned with the welfare of these children, the eldest only 10 years and the youngest 5 years of age, the other a girl 7 years of age. We cannot order the restoration of this home, and must be content to make such order as will be least harmful to the children. We have in mind the fact that the custody of these children was awarded to the father in a

decree from which no appeal was taken, and that order must stand until some valid reason is shown for a change, and the text from which we have just quoted states the circumstances and conditions under which a change of custody will be ordered.

Has there been any change of circumstances? We think there has been a change in two particulars at least, and these we proceed to discuss. The decree awarding custody to the father gave the mother the right of visitation at all reasonable times, and we think there has been a substantial denial of this right. Mrs. Phelps testified that the right of visitation was not denied, but was accorded under circumstances which made its exercise very unpleasant. Several letters written by the oldest child for himself and his brother and sister to Mrs. Phelps were offered in evidence, which manifest the tenderest affection for their mother, and their longing for her companionship. One of these letters strongly corroborates the testimony of Mrs. Phelps, that her visits to her children were made very unpleasant by Mr. Phelps:

"Dear Mother: How are you getting along this rainy A. M. I don't know why we haven't heard from you this week. We were looking for you this evening on the bus you did not come. Daddy will be gone Saturday night so you can come and he won't know it. If you don't come be sure to come to Pine Bluff Sunday. So by by, Mrs. Jones and all Yours son Charles."

The Mrs. Jones mentioned in this letter was Mr. Phelps' housekeeper.

The child had, of course, noticed how his mother had been received, and ascribed to this treatment her failure to make an expected visit, and he suggested to her a surreptitious visit when his father would not be at home. The import of this letter cannot be mistaken and evidences a change of circumstances from those contemplated by the chancellor when he awarded the right of visitation.

The record reflects that in awarding custody of the children to the father, the chancellor was under the ap-

prehension that the mother was not physically and mentally capable of taking care of the children. She passed the physical examination required to secure employment at the Pine Bluff Arsenal, a government war project, where she earned good wages. As that employment is now terminated she may, if awarded the custody of her children, require financial assistance from the father; if so, the law provides facilities whereby it may be obtained.

We think it is to the best interest of these children that the mother have their custody, especially the little boy, and more especially the little girl, and as we think it to the best interest of the children that they should not be separated, the mother will be awarded the custody of all of them.

The decree of the court will, therefore, be reversed, and the cause remanded with directions to award the custody of the children to appellant, reserving to their father the right to visit them at all reasonable times and places.

KIMBLE *v.* STATE.

4390 189 S. W. 2d 643

Opinion delivered October 1, 1945.

J. H. Spears, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

McHANEY, J. Appellant was charged by information with murder in the first degree for the shooting and

killing of Will Smith on September 28, 1944. In February, 1945, he was tried, convicted of murder in the second degree, and sentenced to 21 years in the penitentiary.

The only ground urged for a reversal of the judgment is that the evidence against him is not sufficient to sustain the verdict.

In determining this question, it is the long established rule in this court that if there is any substantial evidence to support the verdict, when viewed in the light most favorable to the State, it is sufficient and the verdict must be permitted to stand. When the evidence is viewed in the light of this rule we find it amply sufficient. Several witnesses for the State testified that the appellant came to the deceased on or about the store porch of the Danner plantation and asked deceased to pay him the $10 he owed him. The deceased said he didn't owe him anything, according to one witness, and, according to others, he said "Go ahead, I don't want to have nothing to do with you, I'm not bothering you." And then, without further words or action on the part of deceased, appellant drew a pistol which he carried in a scabbard on his left side under a raincoat and shot the deceased twice, from which he died some time later. There was some evidence of previous trouble between them, of threats made by the deceased to kill appellant and of deceased's bad reputation for peace and quietude, —all of which went to the jury in support of appellant's plea of self-defense. The jury did not accept his plea and we think properly so. It appears to us from the record before us, as no doubt it did to the jury, that appellant maliciously killed the deceased in an effort to collect the $10 he claimed was due him. While appellant testified that deceased advanced upon him in a threatening manner, he was not supported by any other witness to the shooting. In any view of the case, the evidence is amply sufficient to support the verdict and the judgment is, accordingly, affirmed.

4391 189 S. W. 2d 641

Opinion delivered October 1, 1945.

Bon McCourtney and *Claude B. Brinton,* for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

HOLT, J. Appellant was charged by information with the crime of assault with intent to kill "H. J. Bosler with a deadly weapon, to-wit: a knife." He was found guilty by the jury and his punishment fixed at one year in the state penitentiary. For reversal of the judgment, appellant alleges five grounds in his motion for a new trial. The first four questioned the sufficiency of the evidence, and the fifth alleges that "the court erred in permitting the introduction of the knife in the evidence without sufficient showing that said knife was used in the assault."

The facts when viewed in the light most favorable to the State (*Cheney* v. *State,* 205 Ark. 1049, 172 S. W. 2d 427) are: At about 9:30 p. m., after attending a picture show with two ladies in the city of Jonesboro, the victim of appellant's assault, Mr. Bosler, and the two ladies got in Bosler's car. Bosler was in the rear seat, and one of the ladies was driving, when they noticed appellant driving a car on the wrong side of the street. There was another Negro in the car with appellant. Bosler testified: "When they got close enough for me to see who they were, there was Ralph Donelson and Frank Lewis, and Frank Lewis was so drunk he was staggering. I went and got out of my car and got my gun, which was in its holster, out of glove box, and I stepped around and the gun was down beside me and I asked Frank what was wrong, and he said 'There's not a God-damned thing wrong with me,' and I said 'You're under arrest,' and he said 'You can't arrest me, I haven't done anything.' I said 'Come on, Frank, get in the car,' and he refused to do it. He said I couldn't arrest him as he hadn't done anything. I not only had the right as mayor of Jonesboro to arrest him, but I also have a duly filed commission in the sheriff's office just the same as any deputy sheriff. . . . Frank came towards me and pushed me and I fell and when I got up he started again toward me. My gun was still in its holster, and I hit him on the side of the head and knocked him down. He came upon me the second time after he got up and I struck him with the gun sideways. He was cursing all that time." Appellant had his hands behind him as he advanced on Bosler.

During the encounter, appellant cut Bosler with a knife. Bosler testified: "There was a cut place on my wrist here. I went to the doctor and had him dress the wound on my right wrist; the cut was about three-quarters of an inch long and it went clear to the bone. The wound has healed, but there still is a scar there and the bone is welted and swollen from the knife point striking the bone. There was a wound here, right about where my finger is, about half an inch deep. When I took off my

coat and looked at it, I found three cuts, but the padding on my coat kept the knife from going through."

Appellant finally got in the Bosler car and after they had reached the police station, he was searched and a white-handled knife was found in his pocket. One of the ladies testified that Mr. Bosler told appellant, "You're under arrest; come and get in the car. . . . He (appellant) had something in his hand. I said 'Look out, he has something in his hand,' and when I got out of the car, Mr. Bosler had knocked him down to the ground, and when he started getting up—when this Negro man started getting up—he had this knife in his hand. I could see the knife in his hand, and Mr. Bosler told him—he got him by the arm when he started to get to his feet, and this other colored man with him said, 'This is the mayor. Come on and get in the car and let's go on with the mayor,' and he wouldn't and he kept resisting arrest. . . . I knew that he (appellant) had been drinking because I could tell from the way he was cursing—the way he was talking; I could tell that."

Appellant and his witnesses gave a different version of the encounter which made a disputed question of fact for the jury. The court fully instructed the jury on the law governing the case and there is no complaint as to any instructions given. In its instructions, the court declared the law as announced many times by this court in a case of assault with intent to kill, such as is presented here.

One of our most recent cases is that of *Craig* v. *State,* 205 Ark. 1100, 172 S. W. 2d 256, wherein we said: "In order to sustain the charge of assault with intent to kill proof of two distinct elements are necessary: (1) a specific intent to take life, and (2) facts which would have been sufficient to have sustained a conviction of murder if death had resulted from the assault. *Lacefield* v. *State,* 34 Ark. 275, 36 Am. Rep. 8; *Chrisman* v. *State,* 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; *Chowning* v. *State,* 91 Ark. 503, 121 S. W. 735, 18 Ann.

Cas. 529; *Francis* v. *State,* 189 Ark. 288, 71 S. W. 2d 469. . . . Although the State is required to prove that the defendant actually intended to kill, it need not depend upon declarations made by the defendant to establish such fact. While the intent to kill cannot be implied as a matter of law, it may be inferred from facts and circumstances of the assault, such as the use of a deadly weapon in a matter indicating an intention to kill, or an act of violence which ordinarily would be calculated to produce death, or great bodily harm. In determining whether or not the intent to kill should be inferred, the trier of the facts may properly consider the character of the weapon employed and the way it was used, the manner of the assault and the violence attendant thereon; the nature, extent and location on the body of the wound inflicted, if any; the state of feeling existing between the parties at and anterior to the difficulty; statements of the defendant, if any; and all other facts and circumstances tending to reveal defendant's state of mind. *Chrisman* v. *State,* 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; *Beavers* v. *State,* 54 Ark. 336, 15 S. W. 1024; *Davis* v. *State,* 115 Ark. 566, 173 S. W. 829; *Killian* v. *State,* 184 Ark. 239, 42 S. W. 2d 12; *Higgins* v. *State,* 171 Ark. 1187, 285 S. W. 359. It is not essential that the intent should have existed for any particular length of time before the assault, as it may be conceived in a moment. *Hankins* v. *State,* 103 Ark. 28, 145 S. W. 524; *Evans* v. *State,* 147 Ark. 69, 226 S. W. 1063; *Slaytor* v. *State,* 141 Ark. 11, 215 S. W. 886." See, also, *Davis* v. *State,* 206 Ark. 726, 177 S. W. 2d 190; and *Wilhite* v. *State,* 206 Ark. 887, 178 S. W. 2d 55.

Here we think the jury was warranted in finding that appellant entertained the intent to kill Bosler at the time he attacked and cut him with a knife.

There was no error in admitting the knife in evidence. It was positively identified by one of the ladies as being the one which she saw in appellant's hand during the encounter, and later it was taken from appellant's pocket at the police station.

Finding no error, the judgment is affirmed.

Opinion delivered October 1, 1945.

Roy Gean, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

McFaddin, J. Appellant was convicted of the crime of carnal abuse (§ 3406, Pope's Digest); and presents this appeal. His motion for new trial contains nine assignments.

Assignments Nos. One to Four relate to the sufficiency of the evidence; and these assignments are without merit. The prosecuting witness (the girl) testified to the acts of intercourse and the dates and venue. A physician testified to penetration. The age of the girl was shown by the testimony of herself and her mother. Venue was also shown by other witnesses. The evidence was sufficient. For cases involving carnal abuse, where the sufficiency of the evidence is discussed, see: *Gray* v. *State,* 125 Ark. 272, 188 S. W. 820; *Stinson* v. *State,* 125 Ark. 339, 189 S. W. 49; *Ragsdale* v. *State,* 132 Ark. 210, 200 S. W. 802; *Tugg* v. *State,* 206 Ark. 161, 174 S. W. 2d 374.

Assignment No. Five relates to instructions. No specific objection was made to any instruction; and a study of the record shows that each was correct as against a general objection.

Assignment No. Six relates to the extent and scope of the cross-examination of Jones, who was a character witness for the defendant. The defendant offered evidence of his good reputation in the community for truth and morality. This he had a right to do; for in *Seaton*

v. *State,* 151 Ark. 240, 235 S. W. 794, we said that the trait of character to be covered by the question depended on the crime charged and the moral wrong involved in its commission. Since carnal abuse involves immorality, the reputation of the defendant for morality could be shown by him in defense. See, also, 20 Am. Juris. 307. The witness Jones testified that he had known the defendant all of his life; and for the past several years had lived one block from the defendant and had sold him groceries regularly; that the witness knew defendant's general reputation in the community for truth and morality, and that it was good. On cross-examination the State undertook to show that the witness did not know the general reputation of the defendant in the community. We copy from the record:

"Q. Did you know in March, 1943, he was convicted and fined $25 for beating his wife? A. No, sir. Q. If you had known that, would it have affected your testimony as to his reputation? A. If I knew the whole thing, both sides, it might. Defendant objected; objection overruled; defendant excepted. Q. Did you know that on the 29th of March, 1944, in Paris, Arkansas, he was fined on account of some bad checks or overdrafts? Defendant objected; objection overruled, defendant excepted. Would you say he had a good reputation if you had known that? A. I didn't know it. Q. Did you know that he had been examined and sent to Hot Springs for a venereal disease? Defendant objected; objection overruled; defendant excepted. A. I didn't know that. Q. If you had known that, would it have affected your testimony as to his reputation? A. It wouldn't have looked very good. Q. Did you know that in March this year, 1945, he was convicted and fined $25 for assault? Defendant objected; objection overruled; defendant excepted. Q. Did you know that in July, 1943, he was fined $15 in the lower court for gambling? Defendant objected; objection overruled; defendant excepted. Q. Did you know in March this year, 1945, he was fined $25 for assault? Did you know that? A. No, sir. Defendant objected; objection overruled; defendant excepted. Q.

Did you know that in September, 1934, he was convicted of assault? Defendant objected, overruled and defendant excepted. Q. Do you know anything else that is material? A. No, sir."

It will be observed that only a general objection was made to the cross-examination. The rule is well settled that a general objection is insufficient to call the court's attention to the fact that evidence admissible for one purpose is inadmissible for another purpose. If the evidence is admissible for any purpose, then the objecting party must ask the court to limit the evidence to the one admissible purpose, or the objection is wholly unavailing. See *Bodcaw Lumber Co.* v. *Ford,* 82 Ark. 555, 102 S. W. 896; and cases collected in West's Arkansas Digest, "Trial," §§ 85 and 86. So, if the cross-examination here objected to was admissible for any purpose, then the assignment is without merit. Was the cross-examination proper for any purpose?

Appellant argues that this cross-examination was an attempt to show specific acts of misconduct too remote to have any bearing on the case at bar, and forced the accused to defend himself on other acts for which he was not then being tried. If that was the sole purpose and effect of the cross-examination, then it would be violative of the rule stated by this court in *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927, and followed in *Belford* v. *State,* 96 Ark. 274, 131 S. W. 953; and also in *Tullis* v. *State,* 162 Ark. 116, 257 S. W. 380.

But in *Clark* v. *State,* 135 Ark. 569, 205 S. W. 975—and without citing *Ware* v. *State, supra*—we pointed out that the character witness might be cross-examined as to particular acts of misconduct of the defendant, *in order to test the value of the knowledge of the character witness*; and we there said: "Appellant had voluntarily put his reputation in issue, and the witness had testified that it was good, and it was not, therefore, improper to interrogate the witness as to the basis of this opinion. The rule in such cases is announced as follows in 10 R. C. L., p. 953, § 124: 'Accordingly, evidence of defend-

ant's good character by general reputation cannot be rebutted by evidence of particular acts of misconduct or crime, and that by rumors and reports in the country. But a witness as to character may, on cross-examination, be interrogated as to what he had heard in the community touching the character of the party inquired about. This is to afford a test of the value of his evidence in chief, to show that his conclusions as to the reputation in issue, and which rests upon the estimation of the community, is not supported by the expressions of that estimation, and thus to weaken its force.' "

See, also, *Carr* v. *State,* 147 Ark. 524, 227 S. W. 776, and *Weakley* v. *State,* 168 Ark. 1087, 273 S. W. 374. In *Powell* v. *State,* 149 Ark. 311, 232 S. W. 429, this court pointed out that evidence of specific acts could be limited by the court on request of counsel, saying: "In admitting this testimony the court told the jury that the testimony could not be considered upon the question of guilt or innocence of the accused, and expressly limited it to the credibility of the witness. As thus limited, the testimony was competent. *Hunt* v. *State,* 114 Ark. 239, 169 S. W. 773, L. R. A. 1915B, 131, Ann. Cas. 1916D, 533; *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927."

In 20 Am. Juris. 306, the rule is stated: "Upon cross-examination, however, some decisions allow a wider scope in the matter of specific crimes. A witness as to character may, on cross-examination, be interrogated as to what he has heard in the community respecting the character of the party inquired about."

In 71 A. L. R. 1504 there is an extensive annotation on the subject, "Cross-Examination of Character Witness for Accused with Reference to Particular Acts or Crimes"; and it is there stated:

"According to the overwhelming weight of authority, a witness testifying to the good reputation or character of a defendant in a criminal prosecution may be interrogated on cross-examination with respect to rumors or reports of particular acts imputed to the de-

fendant, and as to what the witness has heard of specific charges of misconduct made against the defendant.

. . . . .

"The purpose of the cross-examination of the defendant's character witness with reference to particular acts of the defendant is not to establish such acts as facts, or to prove the truth of the rumors or charges inquired about, but merely to show the circulation of rumors of such acts, and to test the credibility of the character witness, by ascertaining his good faith, information, and accuracy." See, also, 22 C. J. 483.

The cross-examination of the witness Jones in the case at bar was proper, to test his knowledge under the above-quoted rule from *Clark* v. *State*. The appellant failed to ask the court to limit the cross-examination to the point for which it was competent, so the general objection was unavailing; and the assignment is, therefore, without merit.

Assignment No. Seven relates to cross-examination of a witness named Kellogg, but referred to in the motion for new trial as named Oldham. A careful reading of the record discloses that no objection of any kind was made to the cross-examination; so there is nothing on which to base this assignment. See *Wilkerson* v. *White*, 182 Ark. 1014, 33 S. W. 2d 365.

Assignment No. Eight relates to the evidence of the truant officer. She testified that she had received complaints that a cab driver was picking up a girl at junior high school, and the truant officer testified that she made an investigation and learned from the prosecuting witness the name of the defendant; and that she made this investigation on April 19th. The only statement to which objection was made was: "I had information that a cab driver had been going to the junior high school and picking up a young girl." There was no error in admitting this statement. It merely showed why the truant officer made an investigation, and thereby fixed the date of the acts for which the defendant was being

tried. The remark was merely explanatory of how the truant officer fixed the date of the offenses charged. See *Reeves* v. *Jackson,* 207 Ark. 1089, 184 S. W. 2d 256. There is no merit in this assignment.

Assignment No. Nine relates to the refusal of the court to allow testimony to the effect that the prosecuting witness had gone to a tourist court with a man other than the defendant. The court instructed the jury to consider this evidence only on the question of the credibility of the prosecuting witness, and not for the purpose of showing acts of intercourse with others as a defense for the defendant on trial. The appellant complains of this limitation. The trial court was correct. In carnal abuse cases, acts of intercourse by the prosecuting witness with others cannot be shown as a defense by the defendant on trial. See *Smith* v. *State,* 90 Ark. 435, 119 S. W. 655; *Gray* v. *State,* 125 Ark. 272, 188 S. W. 820.

Finding no error, the judgment of the circuit court is in all things affirmed.

ARTHUR MURRAY COMPANY, INC., *v.* COLE.

4-7692 189 S. W. 2d 614

Opinion delivered October 1, 1945.

Donham, Fulk & Mehaffy and *Leffel Gentry,* for appellant.

Smith & Judkins and *Blackford & Irby,* for appellee.

GRIFFIN SMITH, Chief Justice. Bobby Cole, age 16, died from an injury arising out of and in the course of his employment by Arthur Murray Company, Inc. The master was indemnified by Massachusetts Bonding and Insurance Company under provisions of Act 319, Acts 1939—the Workmen's Compensation Law.

Neal and Agnes Cole, the boy's parents, each filed claim, asserting they were dependent upon Bobby's earnings. The Commission disallowed as to the father, but found that the son made substantial contributions to the family budget under an arrangement whereby the income of different members of the family was "pooled." Agnes Cole made the necessary purchases for family maintenance from the fund so provided, upon which she relied, and without which her status would have been measurably impaired. Appeal is from a Circuit Court judgment holding that the Commission did not err in awarding the mother $7.78 per week for 450 weeks.

It was stipulated that the only question to be considered by the Commission was that of dependency, the agreement being that the youth's income at the time of death was $31.10 per week. It was sought in Circuit to show that this was not an average because lower wages had been paid by other employers, and that the brief period during which $31.10 was earned did not meet the requirements of Act 319 as a basis for computation.

We agree with the appellee that the stipulation is broad enough to limit inquiry to the one question of dependency.

The appeal is controlled by *Crossett Lumber Company* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, decided April 23, 1945. It was there held that "dependent," within the meaning of Act 319, is to be distinguished from "wholly dependent." One is dependent if he or she relies partially upon contributions of a person whose aid constitutes a material element in the claimant's support.

Affirmed.

4-7734 189 S. W. 2d 615

Opinion delivered October 1, 1945.

Harry Robinson, for appellant.

Claude M. Erwin, for appellee.

SMITH, J. Petitions identical in all respects, except as to the names of the persons signed thereto, were filed in the county court of Jackson county, reading as follows:

"To the Honorable D. J. Nance, County Judge, Jackson county, Arkansas,

"We the undersigned citizens and tax payers, of Glass township, Jackson Co., Arkansas, respectfully petition you to call a special election to be held in the regular voting precincts of said township, for the purpose of determining, whether intoxicating liquors shall be manufactured or sold in Glass township, Jackson Co., Arkansas, by initiated Act Number 1—of 1943."

After due notice had been given, a hearing upon the petitions was had, and the prayer thereof was granted, and the election ordered held, from which order of the county court an appeal was duly prosecuted to the circuit court, where the order of the county court calling the election was affirmed, and from that judgment is this appeal.

For the reversal of the judgment of the circuit court, it is insisted (a) that the court erred in holding the petitions sufficient as to form, (b) that the court erred in holding that the circulators of the petitions could verify them in open court. They were not otherwise verified, and (c) that the court erred in allowing the unverified petitions to be offered in evidence. None of these contentions was sustained.

It will be observed that petitioners recited that they were proceeding under the authority of "initiated Act Number 1—of 1943." The court held that this was a mere clerical misprision, and that initiated Act No. 1 of 1942 was intended. We think there was no error in this ruling. There was no initiated act of 1943, as that was not an election year, but an initiated act numbered one was adopted at the general election in 1942. The mistake probably arose out of the fact that the initiated act was published in the acts of 1943, and appears at page 998, *et seq.*, of the "Acts of Arkansas, 1943."

As has been said, there was no verification of the petitions by the circulators thereof, but the court permitted the persons who had circulated the petitions to testify as to the genuineness of the signatures made in their presence, and these witnesses identified and proved the signatures which altogether largely exceeded fifteen

per cent of the qualified electors of Glass township. There is no question as to the sufficiency of the petitions so far as the number of signers is concerned, provided proper proof thereof was made.

No attempt had been made to comply with the provisions of §§ 13285, *et seq.*, Pope's Digest, which are parts of Act No. 2 of the Acts of 1911, entitled, "An Act to provide for carrying into effect the initiative and referendum powers reserved by the people in Amendment No. 10 to the Constitution of the State of Arkansas . . . etc."

It was held in the case of *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547, that the provisions of this Act, as to the verification of petitions by the circulators thereof, was mandatory, and that such petitions as were not verified as required by that Act would not be considered. The petitions here under consideration were not so verified and the question arises whether they were required to be.

Our opinion in the case of *Mondier* v. *Medlock,* 207 Ark. 790, 182 S. W. 2d 869, is decisive of that question. There petitions were filed under the authority of Act No. 1, adopted November 3, 1942, for calling an election. In opposition to making an order calling this election, it was insisted that the provisions of §§ 1 and 2 of Art. No. 7, of Act 108, approved March 16, 1935, had not been complied with. These sections of Act 108 provided for holding local elections on the question of authority to sell intoxicating liquors and its provisions had not been complied with by the petitioners in the Mondier case, *supra.* It was held in the Mondier case that Initiated Act No. 7 did not require that they should be. It was there said: "Since §§ 1 and 2 of the Initiated Act are not ambiguous, and no essential constituent of an election is left to intendment, it must be held that the restrictive provisions of Act 108 were purposely eliminated." In other words, Initiated Act No. 1 is in and of itself a complete act prescribing all the conditions which must be complied with to hold a legal election and

the "restrictive provisions of Act 108," as well as those of §§ 13285, *et seq.*, Pope's Digest, were purposely eliminated from Initiated Act No. 1.

In the case of *Johnson* v. *Bramlett*, 193 Ark. 71, 97 S. W. 2d 631, certain electors filed with the county court of White county petitions praying that an election be held on the question whether or not spiritous, vinous or malt liquors should be sold in and throughout that county. Other electors of the county who opposed the calling of the election insisted that the provisions of Act 108 of the Acts of 1935, under which the petitioners were proceeding, were in conflict with the provisions of the Initiative and Referendum Amendment and its enabling act. In overruling that contention it was there said: "There is no conflict between this law and the Constitution. This is not an election provided for by the Constitution, and the provisions of the Constitution cited have no application."

It was not necessary, therefore, to comply with the provisions and requirements of §§ 13285, *et seq.*, Pope's Digest. It was permissible and entirely proper to inquire whether the persons whose names appeared on the petitions had actually signed their names to the petitions. This proof could have been made by the persons whose names appeared on the petitions, but it was competent also for the circulators of the petitions to testify that certain persons had signed the petitions which they circulated, in their presence, and this proof was made.

The judgment is correct and must, therefore, be affirmed.

MITCHELL *v.* MARTINDILL.

4-7710 189 S. W. 2d 662

Opinion delivered October 8, 1945.

W. D. Davenport, for appellant.

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

HOLT, J. Appellants, F. R. Mitchell and wife, came from Texas to White county, Arkansas, to purchase a farm, in answer to an advertisement appearing in a Texas newspaper. Upon arrival in White county, they contacted a real estate agent who showed them a farm belonging to appellees, and on October 27, 1944, they entered into a written contract with appellees to purchase the farm for a consideration of $5,500, $3,500 being paid in cash, and the balance evidenced by four promissory notes of $500 each. Pursuant to this contract appellees, G. G. Martindill and his wife, on November 11, 1944, executed and delivered to appellants their warranty

deed. Neither the contract nor the deed contained any reservations whatsoever. The contract was an agreement to convey the land in question and the deed conveyed only the land without any reservations as to crops and was absolute on its face. Following the purchase, appellants moved on the property and took possession.

At the time the farm was sold to appellants, there was a crop of strawberries growing thereon, which matured in 1945. Appellees claimed ownership of the berries and the right to harvest them when they matured by virtue of an alleged oral agreement with appellants. Upon appellants' denying them this alleged right, appellees brought suit in which they alleged that "during the negotiations for the sale and conveyance of said lands and before the execution and delivery of the deed thereto, an oral contract and agreement was entered into between plaintiffs and defendants by the terms of which plaintiffs were to retain as their property one acre, more or less, of strawberries which had previously been planted and were at the time growing upon the lands aforesaid and which were owned jointly by the plaintiffs, for the purpose of harvesting and selling the strawberries therefrom during the crop season of 1945, it being further understood and agreed that either the plaintiffs or the defendants, or both, might dig plants therefrom for the purpose of setting out new strawberries during the spring of 1945 and that when plaintiffs had harvested and sold the crop therefrom during the 1945 season the same would be and become the property of defendants." They prayed that appellants be enjoined from interfering with their right to harvest the berries, etc. Appellants answered with a general denial. The court found the issues in favor of appellees and this appeal followed.

For reversal, appellants earnestly contend that the trial court erred in permitting the introduction by appellees of oral testimony to vary the terms of the deed executed by appellees.

We have reached the conclusion that appellants' contention must be sustained. We think the undisputed

testimony shows that the alleged oral agreement by which appellees claimed reservation of the strawberry crop took place prior to the execution of the deed by appellees on November 11, 1944. In these circumstances, the rule is well established that where a party executes a deed in fee of the land without an express reservation of a growing crop, his interest in the crop passes by the conveyance.

This court announced this rule as early as the 10th Arkansas in *Gibbons* v. *Dillingham, et al.*, page 9, 50 Am. Dec. 233, where it is said: "The first question raised by the record in this case, is whether the defendant, Dillingham, by his deed of conveyance for the land, also passed to the plaintiff all his interest in the crop of corn then growing upon it. The deed is absolute upon its face and contains no reservation whatever. The authorities are full and clear upon the point that where a party executes an absolute deed in fee of the soil, and without an express reservation of the growing crop, his interest in such crop also passes by such conveyance. A reservation by parol, if permitted to be established in a court of justice, would come directly in conflict with the well settled rule of law which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. Such evidence is not only contrary to the statute of frauds, but to the maxims of the common law. The written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol," and in *Broderick* v. *McRae Box Company,* 138 Ark. 215, 210 S. W. 935, Judge Hart, speaking for the court, said: "All the articles of agreement between Dr. Hall and Broderick for the sale of the land were merged in and extinguished by the subsequent deed thereto between the parties. The deed, in the absence of fraud or mistake, is the final contract between the parties and cannot be varied or modified by parol evidence. In the application of this rule, this court has held that an oral agreement between the vendor and purchaser of land made at the time of the execution of the deed to the

effect that crops growing on the land shall be excepted from the conveyance and remain the property of the vendor is of no effect and may not be proved by the vendor. *Gibbons* v. *Dillingham, et al.,* 10 Ark. 9, 50 Am. Dec. 233, and *Gailey* v. *Ricketts,* 123 Ark. 18, 184 S. W. 422."

Again, in the more recent case of *Western Union Telegraph Company* v. *Bush,* 191 Ark. 1085, 89 S. W. 2d 723, 103 A. L. R. 367, we said: "We have followed the ancient doctrine in regard to conveyances without reservations. Such conveyances carry the growing crops as a part of the realty. . . . Until the matured crops are severed, whether actually or constructively, they remain a part of the real property," again citing with approval *Gibbons* v. *Dillingham.*

Appellees say: "But if it be held that the parol evidence rule is violated by the testimony as to a contemporaneous oral agreement of reservation not included in the deed, the decision of the lower court must nevertheless be affirmed on the ground that the testimony was sufficient to show that a subsequent parol agreement was entered into reserving the crops." On this point, appellee, G. G. Martindill, testified: "Q. All this conversation you claim you had with Mr. Mitchell about reserving the berries happened that day while you were out there and before you ever executed a written contract, wasn't it? A. Yes, sir, we talked it over as we came out of the field and agreed on the price of the place—that is the berries —I reserved my potatoes, cotton and berries." On the next morning following the execution of the written contract, October 27, 1944, appellee, G. G. Martindill, offered to sell the strawberries to appellants for $500, and appellant, Mitchell, replied that "I will let you go ahead and reserve the berries." It will be observed that these conversations took place prior to the execution of the deed on November 11, 1944, and therefore, this testimony was inadmissible for the reasons assigned above.

Before an oral agreement could be upheld here, it must have been made subsequent to the execution of the

deed here in question and for a valuable consideration. We find no evidence in the record to support any such oral agreement. *Cook* v. *Cave,* 163 Ark. 407, 260 S. W. 49.

Appellees next insist "that they were entitled to the relief granted them on the ground that a mutual mistake was made in the execution of the deed and for that reason the reservation should be engrafted thereon and enforced."

We think this contention clearly untenable for the reason that we have not been pointed to any evidence in this record to support it. At least, we are unable to find evidence of that clear and convincing character required to support such a contention.

The rule is announced by this court in *Sewell* v. *Umsted,* 169 Ark. 1102, 278 S. W. 36, in this language: "The authorities all require that the parol evidence of the mistake, and of the alleged modification, must be most clear and convincing, . . . or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error."

For the error indicated, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion.

JENNINGS *v.* RUSSELL.

4-7704 189 S. W. 2d 656

Opinion delivered October 8, 1945.

Virgil D. Willis, for appellant.

Nat T. Dyer, for appellee.

McFaddin, J. From an unsuccessful attempt to secure a chancery decree to open a so-called "street," appellant brings this appeal.

The Federal Government constructed the Norfork Dam on the Big North Fork of White River, in sections 2 and 11 in township 18 north, range 12 west, in Baxter county, Arkansas. During or after the construction, some promoters planned to build a new town to be located in section 12 about a mile southeast of the dam site. Appellee, Ben McClellan, owned several hundred acres of land in section 12 and adjoining sections; and his holdings included the eighty acres described as the west half of the southwest quarter of section 12 (hereinafter referred to as the "townsite"), and also the forty acres adjoining, and being the southeast quarter of the southwest quarter of section 12 (and being referred to hereinafter as "the first addition"). These promoters were C. E. Murphy and Fred Henley, and in June, 1940, they secured from McClellan an option contract on the 120 acres for $100 cash and $4,900 to be paid within a

stated time. The promoters had the "townsite" for the proposed new town platted into lots and blocks by a surveyor on October 28, 1940. Murphy and Henley signed on the corner of the plat an attempted dedication of the streets and alleys shown on the plat; but there were several defects on the face of this plat, to-wit:

(1) There was nothing on the plat to indicate the definite location of the "townsite" except that it was "part of section 12, township 18 north, range 12 west." There was nothing on the plat to show any compass direction, or any known corner or monument as a beginning point to tie the plat to the physical surroundings; and (2) the promoters did not own the land; and in the facts in this case the attempted dedication was no better than their title. Appellant's claim that there was a dedication of the streets and alleys, insofar as McClellan is concerned, is based on estoppel, as we will subsequently elucidate.

Some time after the platting of the "townsite" the promoters added "the first addition," being the forty acres described as the southeast quarter, southwest quarter, section 12. There was no language on the plat of the first addition even attempting a dedication of streets or alleys. Before the first addition was platted, the promoters sold to the appellant some of the property in the "townsite," and also some in the "first addition": being lots 1, 2, and 3 in block 4 of the "townsite" (each lot being 25x125 feet), and being blocks 19 and 20 in the "first addition." These blocks in the "first addition" had not been platted, but their physical location was verbally pointed out.

The appellant paid $1,100 for the property that he purchased, and the promoters paid the money to McClellan, who made a deed to the appellant under date of December 23, 1940, in which the following is the description:

"Lots Nos. 1, 2 and 3 in block 4, and all of Blocks Nos. 24 and 25 in the Townsite of Jordan, Arkansas, as shown by plat to be filed and recorded. Said lots to be

not less than 25 feet wide and 120 feet long, and said blocks to contain in excess of one acre each."

It will be observed:

(1) That blocks 19 and 20 in the "first addition" were erroneously described in the deed as being blocks 24 and 25 in the "townsite"; and (2) the plat was not recorded at the time of the deed. In fact, no plat was ever recorded, because the entire project was abandoned, as we will explain hereinafter.

According to the unrecorded plat of the "first addition," the following appear:

(1) Block 20 fronted on what is designated on the plat as "Main Street," but which was merely the Norfork Dam public road already in use and independent of the townsite project. This block 20 was an irregularly shaped plot lying on the south side of the said public road. The block was 353 feet on the east side, 200 feet on the south side, 260 feet on the west side, and curved on the north side with the contour of the public road.

(2) On the entire east side of block 20 there was a roadway 20 feet wide.

(3) On the entire west side of block 20 there was shown "Jennings Avenue" as sixty feet wide.

(4) Just west of "Jennings Avenue" was block 19, being 220 feet north and south and 200 feet east and west; lying south of and fronting on the public road designated as "Main Street."

(5) Immediately west of block 19 (and with no intervening alley) was block 18, which was also 224x200 feet, just as was block 19.

(6) Immediately west of block 18 was "Baxter Avenue," 60 feet wide and extending south from the public road.

(7) Extending east and west all along south of said blocks 20, 19, and 18 was "Elm Street," shown as 60 feet wide.

(8) North of the public road (designated on the plat as "Main Street") were blocks 1 to 9 of the "first addition," with several streets and alleys.

As before stated, appellant paid $1,100 and received his deed on December 23, 1940, and began improving the property that should have been described as blocks 19 and 20 of the "first addition" to the "townsite." At the time appellant (plaintiff below) received said deed, no streets or alleys had ever been opened in the "townsite" or the "first addition," with the exception of "Main Street," which had all the time been a public road as aforesaid. The land on which was located the "townsite" and the "first addition" was used as pasture land, hill land, and orchard land; and the cross fences ran in entire disregard of the streets shown on the plat. There was a fence across "Elm Street." Large trees grew on the "streets." Lots 1 to 4 of the "townsite" were several hundred feet northwest of block 18, and on up the public road towards Norfork Dam, and in no wise contiguous to blocks 18 and 19 of the first addition.

The promoters were unable to pay the balance to McClellan on the option, and lost all their rights shortly after appellant received his deed. The entire project of building a town was abandoned. In short, the town was "prospective" at best, and appellant seems to have been the only person to have purchased any property as lots and blocks under the plat. McClellan had some sort of successful litigation with the promoters and had their rights cancelled; but the exact nature of that litigation is not before us.

At all events, by April 22, 1942, the whole concept of a town and addition appears to have been abandoned: for on that date McClellan conveyed to the appellant approximately 40 acres that had been in the original "townsite," and also about nine acres that had been in the "first addition" (being all of the "first addition" north of the public road); and the descriptions in the deed of April 22, 1942, ignored all references to streets or alleys or lots or blocks. In the same deed—and at

appellant's request—McClellan described by metes and bounds what had been blocks 19 and 20 in the "first addition," and also included what had been a 20-foot roadway on the east side of block 20, and also included a strip 20 feet wide of what had been "Elm Street" south of blocks 19 and 20. Thus, appellant received some 49 or more acres out of what had been parts of the "townsite" and "addition," and received a correct description by metes and bounds of the blocks 19 and 20 erroneously described in the former deed of December 23, 1940, and received a portion of what had been "Elm Street."

Later appellee, Charles Russell, purchased from McClellan an acre of ground lying southwest of, and adjoining, what would have been block 19 of the "first addition" if the promotional project had materialized. Before Russell made his purchase he asked appellant to point out on the ground appellant's west line; and appellant did this. Then Russell purchased the acre, and erected a barn and house, all with the appellant's knowledge. Eighteen months later appellant filed this suit against appellees McClellan and Russell, alleging that Russell's barn was in "Elm Street" according to the plat, and that "Elm Street" should be opened and the barn removed. In the alternative, appellant asked damages against McClellan for selling "Elm Street" to Russell and thereby damaging appellant's property. The Chancery Court dismissed the appellant's complaint as without equity, and this appeal challenges that decree.

The basis of appellant's claim is that there was a dedication of the streets and alleys by McClellan, and that no subsequent act could destroy or defeat that dedication. Appellant says: "When the owner of land makes a plat thereof, or adopts one made by another person, and sells lots by reference to the plat, this constitutes a dedication of the streets and alleys shown thereon." And appellant cites the following cases to sustain the statement: *Town of Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 1003; *Davies* v. *Epstein,* 77 Ark. 221, 92 S. W. 19; *Brewer* v. *Pine Bluff,* 80 Ark. 489, 97 S. W. 1034;

Stuttgart v. *John,* 85 Ark. 520, 109 S. W. 541. These cases hold what the appellant says; and we affirm the rule stated in each of these cases. But the facts in the case at bar differ from the facts in these reported cases so greatly that these cases afford no comfort to the appellant or guide to the court in the case at bar.

I. *The Promotional Scheme Was Abandoned.* We have here a case where an entirely promotional scheme was abandoned by the promoters, the landowner, and the purchaser (appellant); and appellant is the only party shown by this record to have made any purchase under the promotional scheme. The "streets" and "alleys" shown on the plat were never in fact opened, and there was a fence and also many trees all the time blocking what the appellant now claims was "Elm Street." The case at bar has facts similar to the facts in the cases of *Holly Grove* v. *Smith,* 63 Ark. 5, 37 S. W. 956, and *Dickinson* v. *Arkansas City Improvement Co.,* 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170. In *Holly Grove* v. *Smith,* a landowner made a contract with certain promoters whereby designated land of the former was to be laid off in lots and blocks and streets and alleys; and the promoters were to receive certain of the lots. A plat was made and placed on record, but the landowner remained in possession of nine acres of the property and continued to farm and cultivate the same. The promotional scheme failed of realization and was abandoned. Eventually a dispute arose wherein it was claimed that the fences should be removed from the nine acres of farm land, and the streets opened as shown on the plat. This court denied the claim. While the reason for the holding was given as the lapse of years between the original contract and the assertion of the claim of dedication, nevertheless, it is evident from a study of the case that the abandonment of the promotional scheme and complete failure to have the streets opened were matters considered as evidence that there had never been a dedication in fact, even though streets had been shown on the plat.

In *Dickinson* v. *Arkansas City Improvement Company* there was a promotional scheme which failed of

realization; and in refusing to allow the streets to be opened, this court said:

"It follows that, the dedication never having been in any way accepted by the public, and having been revoked by abandonment of the scheme for converting the lands into additions to the adjacent town, the title to the streets, avenues and alleys passed to the owners of abutting platted lots and blocks as grantees of the original dedicators. That is to say, they own to the center of the platted streets, etc., and of course where they own the lots on both sides it carries the title to the whole street."

While the facts in the case at bar are not identical with the facts in either or both of the reported cases just discussed, nevertheless, we believe the result in each of these cases affords considerable support for the decree of the Chancery Court in the case at bar.

II. *The Appellant Is Estopped to Claim a Dedication.* There is, however, another cogent reason why the appellant cannot prevail, and that is the application of the rule of estoppel against estoppel, which is stated in 19 Am. Juris. 810, as follows:

"Moreover, one party to a transaction may be denied the right to assert an estoppel against the other party by reason of certain facts which create an estoppel against himself. The doctrine applied in this situation is characterized as one of counter estoppel or estoppel against estoppel. The effects of such doctrine are that two estoppels may destroy each other or, as otherwise expressed, one estoppel may set another at large, . . ."

And in 31 C. J. S., Estoppel, § 12, p. 196, the rule is stated:

"An estoppel against an estoppel sets the matter at large; so, the setting up of an estoppel by deed may be prevented or offset by another such estoppel, or a different form of estoppel, against the party seeking to set it up."

Here the appellant, in filing his suit and seeking the affirmative aid of a court of equity, claimed that McClel-

lan, by making the deed of December 23, 1940, recognized the plat and dedicated the streets shown on the plat. This was a plea of estoppel by the appellant against McClellan, because, as stated in 26 C. J. S., Dedication, § 23, p. 78:

"Where an owner makes a sale of land with reference to a map or plat, in the absence of a manifestation of a contrary intention, he thereby manifests an intention to dedicate the streets and alleys shown thereon to the public use.

* * * *

"The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchaser to believe that the streets and alleys will be kept open for their use and benefit, which use includes the right in the purchasers that all persons whatsoever as occasion may require or invite may so use the streets; and having acted on the faith of the grantor's implied representations based on his conduct, he is equitably estopped as well in reference to the public as to his grantees from denying the existence of the easement, and from appropriating the land so dedicated to a use inconsistent with that represented by the map on the faith of which the lots are sold."

To sustain the text above quoted, there is cited in Corpus Juris Secundum our own case of *Porter* v. *City of Stuttgart,* 135 Ark. 48, 204 S. W. 607, where we said:

". . . dedication may be implied as well as expressed, and one may estop himself to deny that there has been a dedication, . . ."

In *Holly Grove* v. *Smith, supra,* Mr. Justice BATTLE, in discussing the reason why a landowner might be held to have dedicated streets by reference to a plat, said:

"He is estopped by his conduct."

In 16 Am. Juris. 368 it is stated that the theory of dedication from a plat and the sale of lots with reference thereto is sometimes based upon estoppel. Thus, the appellant's case for dedication was predicated on the

theory that McClellan was estopped to deny the dedication.

But, in seeking to affirmatively assert an estoppel against McClellan, the appellant (plaintiff below) is met by his own acts which estop him from making such a claim against McClellan. Here are some of the things that the record shows that the plaintiff did:

(1) In April, 1942, he demanded and accepted a deed from McClellan to 20 feet of what was "Elm Street" on the plat, and now has that strip under fence, while seeking to have the same street opened west of his fence line.

(2) The appellant purchased about 49 acres out of what had been a part of the "townsite" and "addition," and he entirely ignored the plat in that purchase.

(3) The appellant pointed out to Russell the southwest corner of appellant's land, and at that time said nothing about "Elm Street" being open, and sat silently by for 18 months, and allowed Russell to build his barn in what the appellant is now claiming should be opened as "Elm Street." By these acts together, and by others shown in the record, appellant has estopped himself to claim an estoppel against McClellan. This is a private suit, and the rights of the public to claim dedication are not involved; and appellant is estopped to claim an estoppel.

The decree of the chancery court is in all things affirmed.

CALHOON *v.* CALHOON.

4-7711 189 S. W. 2d 644

Opinion delivered October 8, 1945.

J. C. Brookfield, for appellant.

J. L. Shaver, for appellee.

Robins, J. This is a divorce suit brought by appellee against appellant. In her complaint appellee alleged that "appellant continually nagged at her, . . . fussed and quarreled, failed to support her, and generally showed contempt and indignity for her to such an extent that it rendered her condition in life intolerable." Appellant in his answer denied these charges. The lower court found "that plaintiff is entitled to a divorce from the defendant on account of the fact that the said defendant treated her with such contempt and indignities and to such an extent as to render her condition in life intolerable," and rendered decree granting appellee an absolute divorce from appellant and awarding her the custody of their nine-year-old daughter.

These parties were married on December 27, 1932. They lived together as husband and wife until July 8, 1943, at which time, according to appellee's testimony, she told appellant she would no longer live with him as his wife, and a short time later appellant was, at her request, moved to the home of one of his relatives. For more than nine years before the separation appellant had been afflicted with arthritis, and much of this time he had been virtually helpless. Appellee was forced to work and make a living for the family. She testified: "We never did fuss because I would not fuss. He would just nag and nag, and I never did anything to please him. He always had to make some remark about what I did. He just fussed about why I didn't do it this way, and would say: 'What went with your money? I don't see what you did with it.' I would have to listen to this every time I had pay-day. . . . He kept on a constant nagging and I couldn't stand it any longer. . . . When company came in he would just talk and have more to say than anybody, but when they left he shut up like a clam. . . . I told his brother to come and get him and he did."

Corroborating witnesses for appellee were Mrs. Florence McElroy and Mrs. Leta Wood. Mrs. McElroy testified that she was a friend of both the parties; that on one occasion appellant called her (Mrs. McElroy) a liar, but apologized for doing so, and that this was the only occasion on which she ever heard a fuss between appellant and appellee. "They were not congenial—at least they didn't talk like a man and wife should; I never heard him say he loved her; . . . their temperaments were such that you could tell they couldn't get along." Mrs. Wood testified: "Henry (appellant) was hard to please, and he seemed to me unappreciative of what Ida Lea would do for him. Of course, he couldn't help himself, and Ida Lea had to wait on him, and I never heard him say 'thank you' or seem to appreciate the good treatment he was getting. Q. Did you have occasion to observe whether their temperaments and dispositions would blend together, and whether they could live

happily? A. Yes, I did and I didn't think they could. Q. What was the trouble? A. She appreciated a good home, clean house, and cleanliness about the person, and just several things that he did not care about. There was just kind of a conflict there I would think."

The statute under which appellee sought and was granted relief (subdivision 5 of § 4381, Pope's Digest, of the laws of Arkansas) authorizes the granting of a divorce when one spouse shall "be guilty of such cruel and barbarous treatment as to endanger the life of the other, or shall offer such indignities to the person of the other as shall render his or her condition intolerable."

Judge McCulloch, in the case of *Malone* v. *Malone,* 76 Ark. 28, 88 S. W. 840, said: "In the case of *Kurtz* v. *Kurtz,* 38 Ark. 119, Judge Eakin, speaking for the court, approving the rule laid down in *Rose* v. *Rose,* 9 Ark. 507, that the personal indignities contemplated by the statute as grounds for divorce included 'rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation and estrangement,' said: 'It must be confessed that this position goes to the very verge of safety, and should be pressed no further. In applying it the chancellor should act with great caution to avoid the gradual approach, by imperceptible steps, to the practice of holding all matrimonial bickerings by which parties may render each other unhappy to be valid ground of divorce. Where there are no fixed and well defined barriers of principle, it is difficult to limit the encroachment of precedents setting in one direction. Each so nearly supports the next that before one is aware the bounds of reason are passed.' In *Cate* v. *Cate,* 53 Ark. 484, 14 S. W. 675, Chief Justice Cockrill said that 'courts are not quick to interfere in domestic quarrels, and where the parties are equally at fault it must be shown at least that there is something that makes cohabitation unsafe, to move the courts to interfere.' We think that this court has gone to the limit in the case of *Rose* v. *Rose, supra,* and that it

would be extending the rule entirely too far to hold that a divorce should be granted upon the testimony of appellee, corroborated only by the daughter, who was but nine years old at the time of the occurrence about which she undertakes to testify, and by one other witness who relates one instance of harsh language used by appellant to his wife."

In the case of *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86, this rule as to the cruel treatment that would justify the granting of a divorce was laid down: "In order to constitute cruel treatment, which our law recognizes as ground for divorce, there must be proof of wilfulness or malice on the part of the offending spouse, and the effect of that treatment must be to impair or threaten the impairment of the complaining party's health or such as to cause mental suffering sufficient to make the condition of the complaining party intolerable. Mere incompatibility of temperament or want of congeniality and the consequent quarrels causing unhappiness are not sufficient to constitute that cruelty which, under our statute, will justify divorce. The marriage state cannot be considered as one of convenience, but it is one which has been entered into 'for better or for worse,' and must continue for life unless sundered for the grounds named in the statute justifying its dissolution, which must be proved by clear evidence. As is said in the case of *Cate* v. *Cate,* 53 Ark. 484, 14 S. W. 675: 'It must be shown at least that there is something that makes cohabitation unsafe to move the courts to interfere.' "

When the evidence in the case at bar is weighed in accordance with the principles enunciated in the above cases, it must be held that appellee's proof was insufficient to entitle her to a divorce. Assuming, without deciding, that appellee's own testimony sufficiently established grounds for divorce, there was no corroboration thereof; and, under the long established rule in this state, the party seeking a divorce must establish grounds therefor by evidence other than his own. *Rie* v. *Rie,* 34 Ark. 37; *Kurtz* v. *Kurtz,* 38 Ark. 119; *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098; *Kientz* v. *Kientz,*

104 Ark. 381, 149 S. W. 86; *Arnold* v. *Arnold,* 115 Ark. 32, 170 S. W. 486; *Welborn* v. *Welborn,* 189 Ark. 1063, 76 S. W. 2d 98.

Giving the testimony of appellee's corroborating witnesses its strongest probative force, it showed only that appellant was unappreciative of his wife's good treatment of him and that there was a lack of congeniality and difference of temperament between the parties. But want of appreciation, lack of congeniality and difference in temperament do not constitute grounds for divorce.

While the evidence was not sufficient to authorize the granting of a divorce to appellee, we think the lower court properly awarded appellee the custody of the nine-year-old daughter of appellant and appellee. So far as the record shows, appellee has been giving the little girl suitable care and attention and there is nothing in the record to indicate that she is not a fit person to have custody of this child.

So much of the decree as grants appellee a divorce from appellant is reversed with directions to dismiss the complaint for divorce for want of equity; that portion of the decree awarding custody of the child of the parties to appellee is affirmed.

McGILL *v.* STATE.

4387 189 S. W. 2d 646

Opinion delivered October 8, 1945.

[redacted]

Lucien E. Coleman and *Claude F. Cooper*, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis*, Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. A jury was impaneled and sworn to try appellant on an information filed against him October 13, 1944, charging rape, alleged to have been committed upon the person of Betty Jean McGill, June 15, 1943. In his explanation to the jury, the prosecuting attorney stated that the crime was committed May 20, 1943. Permission was asked and granted to amend the information in this respect. Counsel for the appellant stated that the defense was an alibi, and that McGill was unprepared to defend against the accusation on a date different from that alleged in the information. After granting permission to amend, the court discharged the jury. The following morning the prosecuting attorney announced that after conference with the prosecuting witness he would amend by substituting May 20, 1944. When arraigned on this information the defendant stood mute, and his counsel said they would rather not enter a plea for him; whereupon the Court asked the defendant, "How do you plead?" the answer being, "I am not guilty." When trial was ordered to proceed, a plea of former jeopardy was entered by counsel for defendant, and the following colloquy reflects the facts upon which the former plea is based.

Counsel for appellant: "This is unquestionably former jeopardy. The original information charges rape, and rape is a capital offense. There is no limitation on rape. There is no limitation that runs on that. This information was filed on October 13, 1944. The new infor-

mation says that the act was committed on May 20, 1944. Now, any act committed at any time before October 13, 1944, he could have been convicted of that at any time, so the information as originally filed charging the offense and the date has nothing to do with it, especially under the new initiated act, because under that all you have got to do is just to charge rape."

The judge, (speaking to counsel for appellant): "Mr. Cooper, let me see if we understand the facts. The Court has this understanding of the case: that it is the contention of the State that several other offenses were committed by this defendant. In other words, the State says that the defendant committed rape on the 20th of May, 1943, and possibly again on the 15th of June, 1943. The Court permitted the State to amend its information, changing the date from June 15, 1943, to May 20, 1943; and, learning that the defense was an alibi, the Court felt that the defendant should have additional time in which to prepare his defense to this amended date. However, prior to the actual amending of the information, the prosecuting attorney, after conferring with the prosecuting witness, came back into Court and announced that the date on which the State wished to rely was May 20th, 1944. Thereupon, the Court declared a mistrial, discharged the jury, and a new information was filed against the defendant based on the date of May 20th, 1944. Probably if the State could prove only one offense, your contention would be correct, but if there were several offenses of rape upon the prosecuting witness, the Court feels that the plea is not sufficient."

Counsel for appellant then requested a bill of particulars, and the Court inquired whether the exact date was wanted. The prosecuting attorney replied that the date relied upon was May 20, 1944, and the place was Wilson, Arkansas.

A jury was selected to try appellant upon the second information, and after it had been sworn and witnesses placed under the rule, the trial proceeded. It resulted in a verdict finding appellant guilty as charged, and fixed punishment at imprisonment for life.

Appellant did not ask for further time in which to prepare his defense. In the brief filed by his counsel it is said: "For the reversal of this case appellant submits the single issue, viz.: the Court erred in overruling defendant's plea of former jeopardy."

We do not recite the revolting testimony in this case, which is to the effect that appellant carnally knew Betty Jean McGill, who was his daughter, when she was only eight years of age, and that he continued that practice, always by force, or by putting the child in fear, and never with her consent, until May 20, 1944. The girl was only fourteen years of age in 1944. He was tried for the last offense.

Sufficiency of the testimony to support the verdict is not questioned.

This Court has many times held that one has been placed in jeopardy when a jury has been impaneled and sworn to try the accused upon a charge contained in a valid indictment, and so far as we know there are no cases to the contrary in any jurisdiction. An exception more apparent than real is where the jury is discharged through a failure to agree, or because of other impelling necessity not necessary here to discuss.

In *State* v. *McMinn,* 34 Ark. 160, the headnote is: "If, upon a former indictment, the defendant could not have been convicted of the offense described in the latter, then an acquittal upon the former is no bar to the latter." In the body of the opinion it is said: "If, upon the first indictment, he could not have been convicted of the offense described in the second, then an acquittal upon the former is no bar to the latter." "The rule," says Mr. Wharton, "is that if the prisoner could have been legally convicted on the first indictment, upon any evidence that might have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not."

It would appear that if appellant had raped his daughter only once the plea of jeopardy should have been

sustained, as the date alleged in the first information was unimportant, inasmuch as the statute of limitations does not run against this capital offense. But, as was shown in this case, the crime may be repeated in respect of the same female, constituting a separate offense on each occasion.

The Court sustained a plea as to the crime alleged June 15, 1943, as charged in the first information, and told the jury that appellant was being tried for rape "which is alleged to have occurred on May 20, 1944, and unless you find that he committed such crime or crimes on such date, it will be your duty to acquit him. In other words, gentlemen, he cannot be convicted for an alleged crime occurring at any other date except on May 20, 1944."

In the chapter on Criminal Law, 15 A. J., § 381, subtitle, "Continuing Crimes; Offenses Consisting of Series of Acts," it is said: "As a general rule, conviction or acquittal of a sexual offense is not a bar to a prosecution for a similar offense with or against the same person at a different time."

In *Minnesota* v. *Healy,* L. R. A., 1917D, 726, 161 N. W., 590, the defendant was tried for carnally knowing a female under the age of consent, the offense having been committed January 16, 1914. There was an acquittal. He was subsequently tried and convicted for a like offense against the same female on July 16, 1914. It was held that acquittal on the January 16th charge was not a bar to the prosecution for the offense of July 16th, and that the trial Court properly disallowed the plea of former acquittal.

A number of cases are cited by the annotator in the note to the Healy case, among them being *Leonard* v. *State,* 106 Ark. 453, 153 S. W. 591. In the Leonard case a second conviction for continuous illegal cohabitation with the same woman was affirmed.

In *Franklin* v. *State,* 149 Ark. 546, 233 S. W. 688, a juror was discharged after the jury had been impaneled and sworn; and when this juror's place had been filled,

the plea of former jeopardy was interposed. This plea was not allowed. On appeal the authorities were reviewed, with the conclusion that the trial Court had the right to take such action as would insure a fair and impartial trial. It was said that "Manifestly the action of the Court in discharging the juror was in the interest of the accused and for the purpose of enabling him to obtain a fair and impartial trial."

So, in the instant case, the trial judge was actuated by the same motive. As previously shown, counsel for appellant had stated the defense to the original information was an alibi. This, of course, would not have been available if the date was changed. Filing the new information was unnecessary, as the charge would have been sustained if proof of its commission at any time prior to the date of the information had been made. Proof of the exact date alleged was not essential. Sec. 3841, Pope's Digest. *Hunter* v. *State,* 93 Ark. 275, 124 S. W. 1028. Since the change was made for protection of appellant he was not prejudiced. He did not request time in which to meet the amended charge.

Affirmed.

SMITH, J., dissenting. The law applicable to this case is correctly stated in the quotation appearing in the majority opinion in the case of *State* v. *McMinn,* 34 Ark. 160, but, in my opinion, has been misapplied.

The only difference between the first and second informations in this case is the date of the alleged commission of the offense, but both dates are subsequent to the date of the filing of the first information. It, therefore, appears that appellant could have been convicted under the first information upon the same testimony on which he was convicted under the second information.

Now, of course, a man might commit the crime of rape more than once upon the same woman, but here the first information does not negative its commission at any time, other than the date alleged, as it might have done,

and it would, therefore, have been proper and permissible to have convicted the appellant under the first information on any date prior to the date on which it was filed.

In the case of *Binganan* v. *State,* 181 Ark. 94, 24 S. W. 2d 969, Justice KIRBY said that the test whether the plea of former jeopardy should be sustained is, "whether he (the appellant) had been put in jeopardy for the same offense." Appellant has been, because he could have been convicted under the first information, on the same testimony upon which he was convicted in his trial upon the second information.

The case of *Minnesota* v. *Healy,* L. R. A. 1917D, 726, 161 N. W. 590, from which the majority quote, the Supreme Court of Minnesota quoted from one of its former opinions as follows: "In *State* v. *Klugherz,* 91 Minn. 406, 98 N. W. 99, 1 Ann. Cas. 307, this court said: 'A plea of former acquittal is sufficient whenever it shows on its face that the second indictment is based upon the same . . . criminal act which was the basis of the indictment upon which the defendant was acquitted.' "

In the opinion in the Healy case, *supra,* it was said: "At the trial for the offense of January 16, the state could not convict by proving the act of July 16, and consequently did not need to prove the act of July 16, and in fact did not prove that act. Likewise at the trial for the offense of July 16, the state could not convict by proving the act of January 16, and did not need to prove that act, and proof thereof was admissible only as corroborative evidence. At each trial defendant was in jeopardy only as to one specific crime. It is true that at each trial, when the evidence disclosed that he had committed several similar criminal acts, the particular crime for which he was in jeopardy was uncertain until made certain by the election which the state was required to make; but this resulted from the rules of evidence which apply in such cases, not from an attempt to convict him at such trial if he had committed any one of two or more offenses. At neither trial could the jury have returned a verdict of guilty in case they found that defendant had not committed the specific crime pointed

out, but had committed another similar crime. Our conclusion is that the acquittal of defendant for the offense of January 16, 1914, is not a bar to the present prosecution for the offense of July 16, 1914."

Not so here. Appellant could have been convicted under the first information, upon the testimony offered at the trial upon the second information, inasmuch as the first information did not negative the commission of the crime upon any date subsequent to the date alleged in the first information.

In the case of *Leonard* v. *State,* 106 Ark. 453, 153 S. W. 591, cited by the majority, the defendant was convicted under an indictment which charged that he had illegally cohabited with one Pearl Gilbert, on June 28, 1912. He had formerly been convicted of the same offense committed with the same female, under an indictment returned November 4, 1911, so that a second conviction was for an offense committed subsequent to the date of the first indictment. In other words, he was convicted of one offense, and later was convicted for the same crime committed subsequent to the date of the first indictment. Of course, the plea of former conviction could not have been sustained in that case.

No doubt, appellant is guilty of the heinous crime for which he was convicted, but he might have been convicted under the first information had that trial proceeded to a verdict, but he should have been convicted conformably to established rules of law. Guilty as appellant, no doubt, is, it were better that he should escape punishment, rather than that he should be convicted in violation of established rules of law.

It is an ancient and sacred right that "no person, for the same offense, shall be twice put in jeopardy of life or liberty." It is so provided in the Constitution of the United States, and in the constitution of every state in the union, and this protection should not be frittered away.

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

POSKEY *v.* BRADLEY.

4-7713 189 S. W. 2d 806

Opinion delivered October 8, 1945.

Rehearing denied November 12, 1945.

Chas. F. Cole, for appellant.

W. M. Thompson, for appellee.

MILLWEE, J. J. T. Williams owned certain lands in Independence county upon which a school building was erected in 1906. The building was used as a schoolhouse until 1940 or 1941 when the district was consolidated with another district. After the building ceased to be used as a schoolhouse, the people of the community continued to use it for church services and a community meeting place.

J. T. Williams died in 1909 and appellee, W. A. Parr, obtained deeds from the widow and heirs of Williams to the lands upon which the building was erected. These deeds purported to convey title in fee simple without reservation as to that part of the lands occupied by the school district. On November 19, 1941, W. A. Parr and wife sold and conveyed by warranty deed to appellee, Claude C. Bradley, 120 acres of land which included the 40-acre tract upon which the school building was located. Appellee Bradley moved on a 40-acre tract adjoining the lands upon which the school building was located soon after his purchase from Parr. Early in August, 1944, Bradley began tearing down the building for the purpose of erecting a barn on the adjoining 40-acre tract. Appellants brought this suit in behalf of themselves and other citizens of the Williams community to restrain appellee

Bradley from injuring and destroying the building and for damages alleged to have already been done.

It was alleged in the complaint that J. T. Williams had agreed for the school district to construct the school building upon his property, and that the building was used by the district for school purposes until it was donated to appellants by the directors of the district for the use and benefit of the community for a place of worship and public meetings. It was further alleged that appellants and other members of the community were in possession and had made improvements to the building, and that appellants had no adequate remedy at law.

A temporary order restraining appellee Bradley from further destruction of the property was issued, after appellants had posted bond in the sum of $100. On September 1, 1944, the amount of the bond was increased to $300 upon motion of appellee Bradley. Upon failure of appellants to execute bond in the increased amount within the 10 days fixed by the court, the temporary order was dissolved, and Bradley razed and removed the building.

Appellee Bradley then filed an answer and motion to make W. A. Parr a party defendant. The answer contained a general denial and alleged that W. A. Parr had permitted the school district to erect a building on the lands with the understanding that same could be used during the existence of the district, but that said district had been dissolved and title to the property had reverted to Parr; that he had purchased the property upon such representations by Parr for a price $300 in excess of what he would have paid for such lands had said building not been situated thereon or reserved to the use of appellants; that he had a warranty deed to the property and had suffered damages in the sum of $100 by reason of issuance of the temporary restraining order. There was a prayer for recovery of the value of the building from Parr upon a breach of warranty of title, in the event it should be determined that Parr did not own the lands.

Parr was made a party defendant and the cause proceeded to trial on November 16, 1944, resulting in a

dismissal of appellants' complaint for want of equity. This appeal followed. We now proceed to a review of the testimony upon which the trial court based his order of dismissal of the suit.

Appellant L. E. Poskey testified that the school building was erected by School District No. 25 in 1906 on the lands of J. T. Williams; the district later became District No. 103, which was a few years later consolidated with District No. 48; after consolidation, the building was used for church and Sunday School and as a place for children to gather while waiting for the school bus; that on July 31, 1940, the directors of District 48 executed a quitclaim deed to appellants, as trustees, to a parcel of land two acres long and one acre wide in the southeast corner of the 40-acre tract where the building was located. This deed purported to convey the property to appellants as trustees for the use of citizens of the Williams community, as a place of public worship and other public meetings. Witness obtained the signatures of the directors to the deed, which was delivered to him but was never acknowledged. The people of the community have recently put new seats in the building.

Frank Latting testified he had lived within one-half mile of the building site for 67 years and hauled most of the material for the building. Witness was present in 1906 when J. T. Williams told the directors, including Almus Williams, son of J. T. Williams, that if they wanted to put the school building on his property he would give the district a deed to two acres of land, which he pointed out. This conversation took place at the site where the building was erected, and others present have since died. At that time, the building site was in a large field, but was fenced outside by J. T. Williams after the building was erected. Witness worked on the building after it was damaged by a storm in 1927 and knew about the directors going to see W. A. Parr about getting a deed to the property. The school district has had continuous possession of the property since 1906.

R. K. Forrester testified that he was employed by Almus Williams and built the schoolhouse in 1906. He

did not see J. T. Williams there while the house was under construction, but knew that he later relocated his fence to put the school site on the outside.

Appellee Bradley testified that he bought the land from Parr and had lived on a 40-acre tract adjacent to the school building site for two years at the time of the trial. He and Parr looked at the building about two weeks before he bought it and Parr told him the school building belonged to him (Parr) since the consolidation. About three years after witness bought the land, he began tearing the building down for the construction of a barn on the 40-acre tract where he resided. Witness has known the property 18 years. No school was held in the house after witness bought it, but they had church and Sunday School there without objection from witness until he began tearing it down. Nobody told him the building belonged to the district, but the people objected when he said anything about tearing it down.

Appellee W. A. Parr testified that he lived near the property for 37 years before he moved to Jackson county. He was a director of district 25 at one time and knew nothing about J. T. Williams giving two acres to the district for building purposes. He tried to buy the property from Williams before the house was built. He later bought the lands from the widow and heirs of J. T. Williams, receiving a deed from the widow in 1911 and the last deed from the heirs in 1920. After the storm damaged the school building in 1927 the directors came to his home and tried to buy the property, but he did not tell them whether or not he would sell it to them. When witness went with Bradley to look at the lands, they had dinner with a big crowd at the schoolhouse and the ladies present insisted on witness keeping the building so they could use it. There was no reservation of the school property in the deeds to him or in the deeds to Bradley. Witness knew the property had been used by the school district and general public since 1906 and never attempted to fence the property or otherwise exercise any control over it. When the school district was planning consolidation with district 48, he executed and

delivered a statement to the directors of the consolidated district as follows:

"Tuckerman, Arkansas,

"June 28, 1940.

"I agree to allow the use of the property known as Williams School House and school yard for community meeting place as long as the people of the community use it as such.

"(signed) W. A. Parr."

Witness did not read the statement before he signed it, but the directors wanted him to give them permission to use the building for church purposes as long as he owned it and he did. Bradley knew that the school building was used as a community meeting place at the time he bought the property. Witness permitted the district to use it for school and community purposes, but did not offer to give or sell them the property, and has never conceded that they own it.

Kenneth Reeves testified that he went with the directors of the district to see if they could obtain a deed from Parr, after the building was damaged by a storm in 1927. Parr refused to give a deed, but told the directors to go ahead and rebuild the schoolhouse, and the property would belong to Parr whenever school was discontinued.

W. N. Osborne testified that he was a member of the County Board of Education and went with the directors to see Parr about keeping the building for community purposes, if the district was consolidated with No. 48, and was present when the agreement was made. Witness knew nothing about Williams giving a deed.

Appellant D. C. Brewington testified he had never seen the deed which the school district delivered to appellant Poskey, but knew about it and that Poskey was to handle the matter. He had known the property since the schoolhouse was built and it had always been fenced off from the other lands.

Appellants contend they have acquired absolute title to the lands in controversy by a parol gift from J. T.

Williams, followed by possession and the making of valuable improvements by the school district. The chancellor found that the evidence adduced did not satisfy the rule which prescribes the quantum of proof necessary in such cases. We do not decide this question for the reason that a careful consideration of the foregoing evidence convinces us that there was a valid common-law dedication of the property involved in this suit to the public use: first, by J. T. Williams for the use of the school district as a schoolhouse in 1906; second, by W. A. Parr, in 1940, to the use of the people of Williams community for public worship and a meeting place. We deem it appropriate to set out some of the principles applicable to the issues in this case.

In 16 Am. Jur. 348 the following definition of a common-law dedication is given: "Dedication is the intentional appropriation of land by the owner to some proper public use. More specifically, it has been defined as an appropriation of realty by the owner to the use of the public and the adoption thereof by the public having respect to the possession of the land and not the permanent estate, express when explicitly made by oral declaration, deed, or note, implied when there is an acquiescence in a public use, and applying in this country not only to highways, but to public squares, commons, burying grounds, school lots, lots for church purposes, and pious and charitable uses generally." And, at 16 Am. Jur. 360, the author says: "Neither a written grant nor any particular words or ceremonies, or form of conveyance, are necessary to render the act of dedicating land to public uses effectual at common law. Anything which fully demonstrates the intention of the donor and the acceptance by the public works the effect. Words are unnecessary if the intent can be gathered from other sources. A parol dedication is good as well as a dedication by deed or by unsealed writing." In discussing the owner's power of revocation of dedication at pages 410-11 of the same volume we find the following statement: "As distinguished from a mere revocable license and an unaccepted offer to dedicate, a dedication once completed is in its nature irrevocable, as where, for example, it is

completed by an express dedication and an express acceptance. He cannot resume control of or convey the land free from the public easement. The owner or his successor can reclaim the use of the property only when the object and purpose of making the dedication have completely failed. Even though a common-law dedication does not pass the legal title to the land out of the party making it, it is sufficient to defeat an action for the recovery of the possession of the property as against those who are using it in accordance with the purpose and object for which it was dedicated."

There was clearly a dedication of the property to the use of the school district by J. T. Williams in 1906 which was accepted and continuously enjoyed by the public for a period of 35 years without objection from the original owner or his successors in title. On June 28, 1940, and prior to consolidation of District No. 103 with District No. 48, W. A. Parr signed the statement heretofore set out which, in our view, reveals an intent to dedicate the property to the continued use of the people of the community as a meeting house and place of worship. Parr testified that he only agreed to public use of the property so long as he owned it, but other witnesses deny this, and the signed statement contains no such limitation. While the fact of dedication depends upon the intention of the owner to dedicate, the intention to which the courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. 26 C. J. S., Dedication, § 11, p. 63; *Frauenthal* v. *Slaten,* 91 Ark. 350, 121 S. W. 395.

The offer of dedication by Parr was accepted and the property used by the members of the community for three years and became irrevocable until the object of making the dedication had failed, unless it may be said that appellee Bradley was an innocent purchaser without notice of the dedication. Was Bradley an innocent purchaser? He had known the property and observed the public nature of its use for 18 years prior to his purchase. Only two weeks prior to such purchase he had visited the property with the seller and participated in a public dinner there with members of the community. If he did not

have actual notice of the dedication before purchase, he knew the facts of possession and continuous use of the property by the people of the community, and this was sufficient to put him upon inquiry. As stated in 26 C. J. S., page 141: "The general rules as to the title taken by *bona fide* purchasers without notice apply when the encumbrance is a dedication to the public use. However, a purchaser who is put on inquiry must take notice of a dedication to the public; and usually the state of the property itself, or the records, constitute notice by which the purchaser is bound, whether his knowledge of the easement is actual or not." This statement is in harmony with our decisions. See *Morris* v. *School District,* 63 Ark. 149, 37 S. W. 569; *Barrett* v. *Durbin,* 106 Ark. 332, 153 S. W. 265. We conclude, therefore, that Bradley was not an innocent purchaser.

In the case of *Conner* v. *Heaton,* 205 Ark. 269, 168 S. W. 2d 399, under facts somewhat similar to those in the instant case, we held there was a valid dedication of lands for church and other community purposes, and that interested citizens were capable of taking and holding the lands for the public use. There we ordered the cause remanded and the damages determined and assessed against those responsible for razing the dedicated structure provided it was not restored within a reasonable time fixed by the court. Appellee Bradley has used the materials from the building in this case for construction of a barn which would make restoration impracticable. Since this is true, the trial court should appoint interested and responsible citizens to act as trustees for the use and benefit of the citizens of the Williams community who shall be entitled to possession of the lands involved so long as same may be used for the purposes for which it was dedicated. Such trustees shall further be entitled to damages for destruction of the building, but we think the evidence on this point should be more fully developed.

The decree is accordingly reversed, and the cause remanded with directions to the trial court to appoint trustees to take charge of and hold the dedicated lands for the use and benefit of the people of the Williams

community, so long as the property may be used as a place of public worship and community meetings; that such trustees be awarded damages against appellees for the destruction and removal of the building in such sum as a further development of the testimony may determine or as may be agreed to by the parties; and the trial court is authorized to prescribe reasonable regulations necessary to a proper administration by said trustees of the funds arising from the damages thus determined.

GUARDIAN COMPANY *v.* CLEVELAND & COMPANY.

4-7672 189 S. W. 2d 650

Opinion delivered October 8, 1945.

House, Moses & Holmes and *W. H. Jewell,* for appellant.

Rose, Loughborough, Dobyns & House, for appellee.

McHANEY, J. The principal and most important question presented by this appeal is whether the mort-

gagor or the mortgagee, under the provisions of the deeds of trust here involved, had the primary right and duty to procure fire and other hazard insurance on the houses and other improvements covered by the several deeds of trust under a clause therein requiring such insurance, hereinafter quoted.

In 1941, and subsequently, appellee, Cleveland & Company, a corporation, hereinafter called Cleveland, was engaged in building defense housing units in Little Rock and North Little Rock, which numbered in excess of one hundred. Appellant, The Guardian Company, hereinafter called Guardian, is a corporation engaged in the business of making loans on real estate. Appellant, Smith-Reid-East, is a separate corporation and engaged in the business of writing fire and other hazard insurance on property, although at that time, appellee, Jack C. East, was executive vice-president of Guardian and president of Smith-Reid-East.

At various times during 1941 and 1942 Cleveland borrowed various sums of money from Guardian, at the solicitation of the latter, acting through Jack C. East, to finance the construction of numerous houses in its housing projects. These loans were F. H. A. insured and were secured by separate deeds of trust, on F. H. A. forms, on each house and the lot on which it was built, by Cleveland. These loans were later sold by Guardian to the First National Bank in St. Louis, but it has ever since continued to act as servicing agent for said bank to make collections and remittances, and see after insurance, etc. Insurance on each house was procured by consent or acquiescence of Cleveland by Smith-Reid-East, Jack C. East causing the policies to be written.

On July 31, 1944, Jack C. East resigned from both Guardian and Smith-Reid-East and opened an insurance agency of his own, and thereafter Cleveland, claiming the right so to do under the clause in the deeds of trust, gave the business of writing renewal policies to him. Policies were written through his agency and delivered to Guardian before the expiration date of existing poli-

cies written by Smith-Reid-East, but these policies were refused by Guardian, not because of any objection to the form of the policies, or to the responsibility of the insurance companies, or the amount of insurance, but solely upon the ground that under the clause in the deeds of trust, hereinafter quoted, it had the right to designate the agency to write the insurance and that it had already caused Smith-Reid-East to renew the policies which had been issued and delivered to it.

The deeds of trust required Cleveland to pay to Guardian each month one-twelfth of the estimated annual premium for insurance which created a fund in the hands of Guardian to pay the next annual premium, and was designated in said deeds of trust as a trust fund for such purpose. It is conceded that, at the time Cleveland caused renewal policies to be issued by Jack C. East and delivered to Guardian which it refused to accept, the latter had not charged the account of Cleveland with the premiums on the policies it caused to be issued, since the outstanding policies had not expired. After making three attempts to deliver to Guardian three different sets of renewal policies, all of which were refused for the same reason, and after Guardian had used said insurance trust fund held by it to pay premiums on renewal policies caused to be issued by it, Cleveland brought this action to compel Guardian to cancel the policies so caused to be issued by it, to enjoin it from causing to be issued renewals of existing policies on properties other than those now involved without giving Cleveland an opportunity to procure the insurance and to recover from Guardian a judgment for $633.11, the amount it had paid out for premiums out of the trust fund on policies caused to be issued by it. Guardian answered with a general denial and filed a cross-complaint against Cleveland and Jack C. East. As to East it alleged that by reason of his former position with it and Smith-Reid-East he had acquired confidential information which he and Cleveland were wrongfully using to rewrite all insurance formerly handled by it and Smith-Reid-East and were taking an unfair advantage of them. It prayed they be enjoined

from so doing. Smith-Reid-East intervened, made similar allegations as to Cleveland and East as did Guardian, with a similar prayer.

Trial resulted in a decree for Cleveland, enjoining Guardian from procuring policies on the properties of Cleveland and from charging Cleveland's account for premiums without first giving Cleveland an opportunity to procure such insurance, and dismissing the cross-complaint and intervention of Smith-Reid-East. Guardian was ordered to cancel the policies specifically described in the complaint and cross-complaint. Judgment was rendered against Guardian for $979.29, the amount used by it for premiums to date of trial. This appeal followed.

Appellants first contend that under the deeds of trust the mortgagee, Guardian, had the right to select the agency to write the insurance. The trial court held that Cleveland had this right primarily. This question is to be determined by the language in the deeds of trust. It was stipulated that each loan was secured by a separate deed of trust on the standard F. H. A. form No. 3102B, which contains this provision as to insurance:

"5. That the Party of the First Part will keep the improvements now existing or hereafter erected on the said premises insured as may be required from time to time by the Party of the Third Part against loss by fire and other hazards, casualties, and contingencies, in such amounts and for such periods as may be required by the Party of the Third Part, and will pay promptly when due any premiums on such insurance, provision for payment of which has not been made hereinbefore. All insurance shall be carried in companies approved by Party of the Third Part, and policies and renewals thereof shall be held by it and have attached thereto loss payable clauses in favor of and in form acceptable to the Party of the Third Part."

In this deed of trust the "Party of the First Part" is Cleveland and the "Party of the Third Part" is Guardian. The paragraph just quoted is the 5th in a

series of 10 covenants or agreements set out in the deed of trust which are immediately preceded by this declaration: "And the said party of the first part, in order more fully to protect the security of this Deed of Trust, does hereby covenant and agree as follows:". The express language of said paragraph 5 provides that Cleveland "will keep the improvements now existing or hereafter erected on said premises insured as may be required from time to time" by Guardian. It is Cleveland's duty, not Guardian's, to keep the improvements insured, but in such amounts and for such periods as may be required by Guardian. The provision that insurance shall be carried in companies approved by Guardian necessarily implies that Cleveland shall have the primary right to procure the insurance, as there would be no necessity of approval by Guardian if it had the primary right to procure the insurance and did procure it. As here used the word "approved" means ratified, confirmed, sanctioned, or acquiesced in.

In *Fire Association of Philadelphia* v. *Bonds,* 171 Ark. 1066, 287 S. W. 587, a similar situation existed. Bonds had mortgaged his property to a bank to secure a loan. The mortgage contained a clause requiring Bonds to keep the property insured in a sum sufficient to protect the bank, which he did, delivering the policy to the bank. Just before this policy expired the bank as agent for another company caused a renewal policy to be issued and sent to Bonds, who thereupon caused a policy on the same property to be issued by the agency that issued the former one. A fire occurred and the Fire Association refused to pay because of the outstanding policy in another company, and Bonds brought suit against it. Trial resulted in a judgment against it. In affirming the judgment, this court used this language:

"It is true that the Bank had the right to protect its security. The mortgage required the mortgagor to insure the property, and this provision would have given the mortgagee the right to take out insurance to protect its security had this been necessary. But this was a secondary right. The primary duty to insure was upon the

mortgagor. It was his duty to take out the insurance and pay the premium."

The effect of the holding was that the policy issued by the bank was invalid, that company having been made a party by cross-complaint of the Fire Association, and the latter's policy valid.

Appellants cite the case of *Townsend* v. *First Fed. Sav. & L. Ass'n,* 153 Fla. 535, 15 So. 2d 199. We think this case is not in point because there the mortgagor took out insurance in a company that did not write the usual form of fire insurance, but a new and untried method, and it was held that the mortgagee's refusal to accept said policy was not arbitrary, but recognized the rule that such discretion in approving companies cannot be exercised "in an arbitrary, unreasonable, and capricious manner." We think this is in line with the holding in our own case above cited. See, also, *Eberich* v. *Solomon,* 112 Conn. 498, 152 A. 823. We, therefore, hold that Cleveland had the right to cause renewal policies to be issued under section 5 of the deed of trust.

Two other contentions are made for a reversal by appellants: (1) That Cleveland made an "agreement designating Smith-Reid-East as the agency to write insurance and renewals during the life of the loans"; and (2) the "question of whether the fiduciary obligation of Jack C. East to those companies would foreclose his right to write insurance policies on the Cleveland property, and would entitle those companies to an injunction restraining him from interfering with their business." Both of these contentions are questions of fact. There were two objections raised to the evidence of Guardian that there was an oral agreement at the outset to the effect that all insurance and renewals over a period of either twenty or twenty-five years should be written by Smith-Reid-East. One was that all prior agreements were merged in the individual or separate deeds of trust, and the other was the statute of frauds, § 6059 of Pope's Digest. We do not enter upon a discussion of these objections, even though they might be well taken, for the

court found as a matter of fact Cleveland "did not make an oral agreement or contract or a written agreement or contract designating Smith-Reid-East Company as the agency through whom such insurance should be written . . ." The evidence thereon is in sharp dispute and we cannot say this finding is against the preponderance of the evidence. The same thing may be said as to the question raised in point 2 above, regarding "confidential information." The court found as a fact that neither Jack C. East nor Cleveland had taken any unfair advantage of or used any confidential or private information of appellants in connection with their own business, and we think the preponderance, if not the undisputed, evidence supports this finding.

The decree is accordingly affirmed.

PLANT *v.* SANDERS.

4-7617 189 S. W. 2d 720

Opinion delivered October 8, 1945.

O. T. Ward and *J. M. Smallwood,* for appellant.

Linus A. Williams, Joe D. Sheppard and *J. J. Montgomery,* for appellee.

McHaney, J. Plant brought this action against appellees who are the widow and heirs-at-law of W. C. Sanders, deceased, under whose will Lula Sanders was given a life estate in the lands here involved with remainder in said heirs to enjoin them from interfering with his alleged possession of said lands. He claimed to be the owner and in possession of said lands, and that appellees were entering upon same and interfering with his tenants. He did not deraign his alleged title to said lands, but the facts are that same forfeited and were sold to the state in

1931 for the taxes of 1930, and remained in the state until September 28, 1940, when the then Land Commissioner executed and delivered a deed therefor to said Plant.

Appellees answered with a general denial and pleaded by way of cross-complaint that they were the owners and in possession of said lands, and alleged a number of grounds of invalidity of said tax forfeiture and sale to the state. They also alleged that the deed from the state to Plant was and is void for the reason that said lands had been classified by the Land Use Committee of State Planning Board on August 29, 1939, as agricultural lands, suitable for settlement or for private ownership, and that said committee had appraised said lands at a minimum value of $1 per acre as required by Act 331 of 1939, and that the State Land Commissioner, instead of selling same to the highest bidder, as required by said act, sold same at private sale to said Plant.

Trial resulted in a decree holding that the forfeiture and sale to the state of a portion of the lands was void for incorrect or indefinite descriptions and as to the remainder the sale was held good. The sale to Plant was canceled as to part and held good as to the remainder. Both parties were dissatisfied, and there is here a direct and cross-appeal. Pending trial in the lower court, Plant died, and the cause was revived in the name of his daughter in her own right and as executrix of her father's estate. The state's title to this and other land was confirmed on February 15, 1938.

As stated above, said lands were forfeited and sold to the state in 1931 for the nonpayment of the 1930 taxes. They were described on the tax books and in the delinquent notice, which was duly published, and in the confirmation decree of February 15, 1938, as follows:—all being in Johnson county and in township 8 north, range 22 west:

Parts of Section	Sec.	Area	Year
SW	17	160	1930
S SE	17	80	1930
E SE	18	80	1930
E NE	19	20	1930
NE	20	58.87	1930
NW	20	98.30	1930
Accretions and other lands	20	60	1930

As to the description E NE of 19, 20 acres, it is conceded that appellees never owned this tract and it passes out of consideration. On a trial of the case the court held that the first three descriptions as above listed were good and that the sale to the state and the confirmation decree above mentioned and the deed from the state to Plant of September 28, 1940, gave a good title to Plant and his successor, appellant. As to the last three mentioned descriptions above listed the court held that they were indefinite and that the sale by the collector in 1931 of these three tracts was and is void for lack of power to sell, and that the state's deed to Plant of these tracts should be and is canceled.

On the direct appeal, appellant challenges the correctness of the court's action in canceling the deed to Plant of these last three mentioned tracts, and we agree with appellant as to the first two of them, that is the NE of section 20, 58.87 acres; and NW of section 20, 98.30 acres. Just why the court held them indefinite and void is not revealed by the decree. We assume that it was because of the acreage mentioned after each description which is less than a full quarter section in each case. Certainly a conveyance of the NE of section 20 means the northeast quarter of said section and would convey all the land in the northeast quarter, whether a whole or a fractional quarter. It so happens that the section 20 here involved is fractional as indicated by the acreage listed after these descriptions and as shown by the government plat. This is caused by the Arkansas River which runs through section 20, and only these two tracts in the north half of section 20 lie north of the river. "The acreage

mentioned in a government call of lands does not control or dominate the description. Wherever one is granted land by government call, he takes the whole of the call without reference to the amount of acreage added to the description. In other words, if one is deeded the northeast quarter of any particular section containing any particular number of acres, he would take the whole quarter section, irrespective of the number of acres mentioned." *Turner* v. *Rice,* 178 Ark. 300, 10 S. W. 2d 885. See, also, *Bartel* v. *Ingram,* 178 Ark. 699, 11 S. W. 2d 488.

Nor does the failure to use the word "fractional" before these descriptions in section 20 invalidate the descriptions employed. *Chestnut* v. *Harris,* 64 Ark. 580, 43 S. W. 977, 62 Amer. St. Rep. 213, and cited in *Rucker* v. *Ark. Land & Timber Co.,* 128 Ark. 180, 194 S. W. 21. We conclude that the court erred in canceling these two descriptions from the state's deed to Plant. We agree that the last tract set out above and described as accretions and other lands in section 20, 60 acres, is void for indefinite description and was properly canceled by the court in Plant's deed.

On cross-appeal, appellees contend that the court erred in holding the second and third descriptions above set out, that is, S SE of section 17 and E SE of section 18, good and valid descriptions in a tax assessment and sale, and we agree with the appellee. A description identical with these was held bad in *Cooper* v. *Lee,* 59 Ark. 460, 27 S. W. 970, where it was held that a description "N. NE. Sec. 3, Town. 15, Range 6, 87.19 acres" was not a description by abbreviations the knowledge and use of which is so general as to warrant the court in holding that they sufficiently identify the land to be sold. "On the contrary," says the court, "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."

So far as our investigation discloses *Cooper* v. *Lee* has never been overruled. It is cited with approval in many cases, one of the latest being *Shelton* v. *Byrom,* 206 Ark. 665, 177 S. W. 2d 421. It was distinguished in *Chestnut* v. *Harris,* 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep.

213. We, therefore, hold said descriptions S SE of Sec. 17 and E SE of Sec. 18 were insufficient "and that the sale of the land must be treated as a sale without notice, and therefore void."

Appellee on cross-appeal also contends that the sale of all the lands first above described is void because the levying court did not vote or levy a tax against said lands for the year 1930. We think the record of said court contradicts appellees in this contention. It recites the following: "On motion of C. E. Quick, seconded by A. F. Porter, a levy of five mills on the taxable property of Johnson county to defray the expenses of the general county expenses for the fiscal years 1930 and 1931 was made." It is argued that the motion of Quick was not submitted to a vote of the members, no vote taken, or the record does not show the motion was carried by a majority or unanimously. See § 2523, Pope's Digest. The record affirmatively shows that the levying court met at the proper time and place with a majority of all the justices of the peace present, and it affirmatively recites that "on the motion of Quick a levy of 5 mills on all taxable property—was made." We think this recitation necessarily implies that a vote was taken with a majority or all of the justices voting for it. Certainly after confirmation of the sale to the state this question is foreclosed against appellees. The same thing is true with reference to the other levies made for bond, road, municipal and school tax.

Another attack made on the sale is that there was included in the amount for which the land was sold to the state an illegal and excessive charge of 10 cents per tract on said lands which renders the sale void under the authority of *Lumsden* v. *Erstine,* 205 Ark. 1004, 172 S. W. 2d 409, 147 A. L. R. 1132. We think the charge is proper under § 13857 of Pope's Digest, and the contention that, because the land was sold to the state instead of to an individual this charge is not proper, is without merit. As said by Judge HEMINGWAY, in *Goodrum* v. *Ayers,* 56 Ark. 93, 19 S. W. 97, with reference to a certain statute cited: "It contemplates that the land shall be offered for an

ascertained and definite amount, including tax, penalty and costs, and that the tract, or a part of it, shall be sold for exactly that sum, either to an individual or the state."

The only other point raised by appellees we deem it necessary to discuss is the alleged failure of the State Land Commissioner to comply with Act 331 of 1939 and that because thereof his deed to Plant is void. This question has given us a great deal of concern. We have definitely reached the conclusion, however, that there was no violation in this case of said Act by the then Land Commissioner. It provides by § 4 for an inspection, classification and appraisal of state-owned land according to its most appropriate use by the Land Use Committee of the State Planning Board, and in § 5, among other things, that "state lands shall be classified as to whether they should be retained in public ownership allocated for agricultural settlement, as provided in § 6, or returned to private ownership through sale or donation" and the classification may be changed, and the commissioner shall make deeds to the lands with this classification "and only lands classified as suitable for return to private ownership shall be subject to sale to private individuals by the Commissioner of State Lands." Said section makes a number of other provisions, among them that the Commissioner "shall offer the land for sale to the highest bidder, provided his bid is at least equal to the appraised value, and thereafter no land shall be sold for less than its appraised value; provided that pending appraisal by the Land Use Committee of the State Planning Board the Commissioner of State Lands is hereby authorized to continue sales of state lands as provided for in § 8631 of Pope's Digest."

The deed to Plant recited that the lands therein conveyed "were on August 29, 1939, classified as agricultural lands suitable for return to private ownership through sale or donation, and appraised by the Land Use Committee of the State Planning Board as provided by § 5 of Act 331 of 1939." It then recited that Plant had applied to purchase same and had paid $557.17, "the amount required by Act No. 129 of 1929, and having otherwise fully complied with the provisions and require-

ments of said act," then follows the conveyance of said lands to Plant. This deed is somewhat self-contradictory in its terms. It first says the lands were classified as agricultural lands and appraised by the Land Use Committee, as provided by § 5 of Act 331 of 1939, but proceeds to sell same in accordance with Act 129 of 1929, as permitted in § 5 of said Act 331, "pending appraisal by the Land Use Committee." This strongly, if not conclusively, shows that there had been no appraisal of said lands by said committee. We think also that there was no appraisal of said lands, or any other state-owned lands, as contemplated by said Act 331, on August 29, 1939, as recited in said deed, as the record of the minutes of the meeting of said committee shows the following: "Mr. C. E. Palmer then made a motion that, effective September 15, all tax forfeited lands, now owned by the state and now subject to sale or donation, be appraised at a minimum of $1 per acre. These appraisals to be subject to revision as specific appraisal reports are filed by the Committee with the State Land Commission." This motion was adopted. Mr. Palmer then pointed out that the committee had a big job ahead to get "these specific appraisals made" and that since there was no money appropriated for salary and travel expenses of inspectors to make appraisals, some other method would have to be devised," etc. We think this conclusively shows there was no inspection or appraisal of these lands as said Act 331 contemplates. No appropriation was made by the legislature for this purpose until 1941 in Act 260 and we think that the deed of the Land Commissioner was not invalid under § 5 of said Act 331 of 1939, but that the proviso therein gave express authority to make the sale under Act 129 of 1929.

The decree will, therefore, be affirmed in part and reversed in part as herein set out and the cause remanded with directions to enter a decree in accordance with this opinion. Each party shall pay one-half the costs in both courts.

HOLT and ROBINS, JJ., dissent.

BOGARD *v.* POWELL.

4-7809 189 S. W. 2d 660

Opinion delivered October 15, 1945.

[redacted]

Abe Collins, for appellant.

Ben Shaver and *Charles A. Maze,* for appellee.

PER CURIAM. The decree appealed from, in respect of which the prevailing parties have petitioned this court for the appointment of a receiver, involves title to 161 acres in Little River county.

In 1933 Dr. John T. Bogard owned the land. He deeded it to a son, John T., Jr., and the latter conveyed to his father and to his mother, Effie E. Bogard—creating, *prima facie,* an estate by the entirety. Effie E. Bogard yielded possession and management to John T., Jr., when her husband died, and in 1944, by deed, conveyed to John T., Jr. It was alleged in the complaint that Dr. Bogard, by conveying to his son, sought to perpetrate a fraud upon creditors and, in particular, to defeat collection under a judgment procured by one who was injured through negligence attributed to Dr. Bogard.

The answer of Effie E. Bogard, John T. Bogard, Jr., and Rose Marie Bogard (the latter being the wife of John T., Jr., who joined in his deed to father and mother) sets out certain defenses; and the cross-complaint alleges affirmative rights that need not be considered in this opinion.

In the decree handed down in July of this year, contention of Mary Bogard Powell and Jewel Bogard Hobson (daughters of Dr. Bogard) were in the main sustained, resulting in cancellation of certain deeds and vesting a fee in the son and two daughters as heirs of the decedent.

Mary Bogard Powell and Jewel Bogard Hobson alleged in their petition for a receiver that John T., Jr., is in exclusive possession and that he is preparing to harvest a crop of papershell pecans estimated at 140,000 pounds, and valued at $25,000. Other allegations essential to an affirmative showing of adverse interests are made. The petitioners did not apply to the chancery court, nor was the decree superseded. The question is argued here upon a point of jurisdiction.

Without holding that this court does not have power to name a receiver, and reserving that point for determination if the circumstances of a particular case and the equities involved should disclose an imperative need, we prefer that the petitioners follow the rule laid down in *Coleman* v. *Fisher,* 66 Ark. 43, 48 S. W. 807. While in the Coleman-Fisher case the parties who lost below were petitioners, and in the instant case those who prevailed are asking relief, it was clearly held by Judge BATTLE that the chancery court did not lose jurisdiction in respect of a receivership when the appeal was filed. See 45 American Jurisprudence, p. 78; 111 A. L. R. 502, annotation.

The petition is denied, with leave to apply to chancery.

TUCKER *v.* LISENBEE.

4-7722 189 S. W. 2d 661

Opinion delivered October 15, 1945.

Oscar Barnett, for appellant.

Gaughan, McClellan & Gaughan, for appellee.

SMITH, J. Appellee brought suit in ejectment to recover possession of certain lands, and for rent thereon, and for damages for timber cut and removed. A jury was impaneled, but after all the testimony had been introduced each party asked an instructed verdict and neither asked any other instructions, whereupon, under the practice frequently approved by this court, the trial judge withdrew the submission and rendered judgment, which judgment was for the plaintiff, for the possession of the land, but awarded no damages, and from that judgment is this appeal.

All of the parties claim the land through J. S. Tucker, who conveyed to appellant, G. C. Tucker, in 1929, who mortgaged the land in 1934 to Gus Hudson. A decree was rendered foreclosing this mortgage, and a sale thereunder was had by the commissioner appointed to make the sale, and through mesne conveyances appellee acquired that title, and this suit is based on it.

Appellant, the mortgagor, was not dispossessed, and remained in possession of the land until the institution and trial of this suit, and in his answer pleaded that he had acquired title by adverse possession. He also alleged that the foreclosure decree was void, as having been rendered without service upon him.

It was discovered that one of the tracts of land here involved had been misdescribed in all the deeds relating

to it, beginning with the deed from J. S. Tucker to appellant, and that this misdescription appeared in the foreclosure decree, and in all the subsequent deeds. Postponement of the trial of the ejectment suit was asked until, by appropriate proceedings, this error could be corrected.

Proper suit for that purpose was filed and a decree was rendered October 2, 1944, reforming the foreclosure decree and the deeds herein referred to, all interested persons having been made parties. Among these were appellant Tucker and his wife, it being recited that they had appeared in this reformatory proceedings in person, and by attorney. This was the time when appellant should have interposed the plea, if true, that the foreclosure decree had been rendered without service, and the reformatory decree is conclusive of that question. This decree was offered in evidence.

The plea of adverse possession after foreclosure was not sustained and judgment was properly rendered for appellee and must be affirmed. It is so ordered.

SLOAN *v.* AYRES.

4-7712 189 S. W. 2d 653

Opinion delivered October 15, 1945.

D. F. Taylor and *Eugene Sloan,* for appellant.

Bruce Ivy, for appellee.

McFaddin, J. In the form in which this cause reaches this court on appeal, it is an ejectment action to determine, as between adjoining riparian landowners, the ownership of approximately five acres of land admitted to be accretions formed on the west bank of Little River. The appellants were plaintiffs, and from an adverse judgment, have prosecuted this appeal.

Eugene Sloan, in about 1926, owned the fractional north half of the northwest quarter of section 3. Sloan conveyed to appellant Keiser Supply Company, who in turn conveyed to appellant, M. R. Sisco, so the appellants are the original, intermediate, and present owners, respectively, of what we refer to herein as the "Sloan land." O. M. Fairley was the original owner of the fractional north half of the northeast quarter of section 3, and executed a mortgage which was foreclosed by the mortgagee, and in September, 1931, the appellee Ayres received a commissioner's deed to the fractional north half of the northeast quarter of section 3, which we refer to herein as the Ayres land.

When the United States Government surveyed section 3 many years ago Little River had not been dredged, and was a much wider stream than it now is. The east and west meander lines of Little River were about 600 feet apart. The Sloan land lacked about 8 acres of being a full 80-acre tract, and was located entirely west of the west meander line of Little River. All the Ayres land was east of the east meander line, except a small triangular tract containing 63/100ths of an acre which was west of the west meander line, and was located in the

extreme northwest corner of the Ayres land. In short, when the government survey was made years ago, Little River was meandered as a stream 600 feet wide, and extending northeasterly, and including part of the east side of the Sloan land, and all of the west boundary of the Ayres land except the 63/100ths of an acre.

Since the government survey, the channel of Little River has been dredged so that now the river is only approximately 100 feet wide and the channel is equidistant from the east and west meander lines, leaving accretions on both sides of the present channel. By reason of these accretions on the west bank of Little River, the Sloan land has become more than 80 acres, and the 63/100ths of an acre of the Ayres land on the west bank of Little River has become more than six acres, and five acres of accretions remain in dispute here.

Appellants filed suit in chancery to have a commissioner appointed to divide the disputed accretions between appellants and appellee as the riparian owners on the west bank of the river; and the appellants claim that the appellee was in permissive possession of some of the appellants' part of these accretions. Appellee denied any permissive possession, and (1) claimed title by adverse possession to the extent of his actual holding; and (2) claimed that the boundary had been determined by agreement between Fairley and Sloan many years ago. When the appellee's answer was filed, the chancery court —on motion of appellee, and without recorded objection by appellants—transferred the cause to the circuit court, where it was tried to a jury as an ejectment action. From a verdict and judgment awarding appellee the land in dispute (approximately five acres), there is this appeal; and the appellants say that the only question is the sufficiency of the evidence to sustain the verdict.

I. *The Instructions Are Not Abstracted,* so it will be conclusively presumed that the case was submitted to the jury under instructions correctly governing all issues of law. *Wilson-Ward Co.* v. *Fleeman,* 169 Ark. 88, 272 S. W. 853; *School District* v. *Gardner,* 142 Ark. 557, 219

S. W. 11; *Karatofsky* v. *Fybush Bros.*, 90 Ark. 230, 118 S. W. 1009.

II. *The Sufficiency of the Evidence.* It seems conceded by both sides: (1) that the disputed land would belong to the appellants, unless appellee sustained his claim of adverse possession or agreed boundaries; (2) that appellee's predecessor in title (Fairley) had been in possession of the disputed lands since about 1929, and delivered uninterrupted possession to appellee; (3) that appellee has been in possession ever since he received his commissioner's deed in September, 1931; and (4) that the present litigation was filed on March 10, 1941. Appellee offered two reasons to justify his holding: (a) adverse possession, and (b) agreed boundary.

A. *Adverse Possession.* To sustain his claim of adverse possession, appellee stated in his pleadings and offered testimony of himself and other witnesses that he had been, for more than ten years, in the actual adverse, notorious, hostile, peaceable and exclusive possession of the land. To attack appellee's claim of adverse possession, appellants showed by Sloan that in October, 1931, Fairley, the former owner who had at that time parted with title to the lands in question, had initiated some correspondence with Sloan to persuade him to leave open a road which it was rumored that Sloan was about to close. In this road matter, Fairley persuaded Ayres to write Sloan a letter under date of October 29, 1941, reading in full as follows:

"Mr. O. M. Fairley gave me your letter he received from you a few days ago in regard to your farm on Little River. I bought the Fairley land and some time when you are here will be glad to go over it with you. Also be glad to cooperate with you as to the lines, roads, etc. Sincerely yours, C. D. Ayres."

At the trial Ayres admitted that by this letter he "agreed the disputed line west from the meander line to the river could be fixed at some time convenient to all parties, and it has never been run"; and that from 1931 to shortly before the filing of this suit, Ayres heard

nothing more from Sloan or any of the appellants to indicate any dissatisfaction about the boundary line. On this admission, appellants bottom their case of permissive possession. That is, they claim that by this letter and by Ayres' testimony, he has admitted that he was holding the disputed land until a survey could be made, and was therefore holding permissively and not adversely; and appellants cite 1 Am. Juris. 919: "Establishment of the Line Tentatively or for Convenience.—There is a substantial agreement in the decided cases that a mere tentative line, made for convenience to await the location of the true line at some future time, or a line established for the convenience of the parties, the position of the true line being recognized, furnishes no basis for adverse possession."

Also, appellants cite *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830, on permissive possession; and *Wilson* v. *Hunter,* 59 Ark. 626, 28 S. W. 419, 43 Am. St. Rep. 63, on possession without intent to hold adversely. On these authorities, and others, appellants claim that Ayres has admitted that his possession of the disputed land was permissive and not adverse.

But the letter of Ayres and his testimony are not conclusive admissions. They constituted circumstances which the jury might consider along with all the other facts and circumstances as to whether it was Ayres' real intention to claim adversely to the extent of his holding. He testified unequivocally that it was his intention to hold adversely, and other witnesses and some circumstances supported him. In the case of *Deweese* v. *Logue,* 208 Ark. 79, 185 S. W. 2d 85, we said:

"It is true, admissions and declarations made by claimant after a title has been acquired by adverse possession cannot operate to defeat it, but they are nevertheless admissible to show the character of possession prior to the lapse of time necessary to give title and bear on the question whether claimant's possession was in fact hostile. See 2 C. J. 272; 2 C. J. S. 'Adverse Possession,' § 221; *Hutt* v. *Smith,* 118 Ark. 10, 175 S. W. 399. In the case of *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456,

this court upon rehearing said: 'Any act or conversation recognizing the claim of the original owner after the seven years' occupancy would tend to show that the possession held during the statutory period was not adverse. Though such testimony is not admissible for the purpose of divesting title out of the adverse occupant and revesting it in the original owner, it is perfectly admissible for the purpose of showing that the possession of the occupant was not adverse, and that the occupant did not acquire title by the possession, which was only permissive. *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444; *Hudson* v. *Stilwell,* 80 Ark. 575, 98 S. W. 356.' "

There is an Annotation in 97 A. L. R. 14 on "Adverse Possession," and the trend of current authorities is given; and our own case of *Etcherson* v. *Hamil,* 131 Ark. 87, 198 S. W. 520, is reviewed and discussed on page 105 of the Annotation.

To detail the testimony of each witness would unduly prolong this opinion. Appellants' contention is answered when we hold—as we do—that the Ayres letter and testimony were not conclusive admissions against him, but were merely evidence of his intent. They were to be considered by the jury along with all the other evidence in determining whether appellee held adversely. There was sufficient evidence to take the case to the jury on the issue of adverse possession.

B. *Agreed Boundary.* The appellee introduced evidence by several witnesses that Sloan and Fairley (the original riparian owners) had agreed on a boundary line by which Fairley received all the land here in dispute, and that Fairley's tenants cultivated to that boundary line, and that appellee has all the time occupied to the extent of that line. Sloan denied all such evidence about an agreed boundary. But, at least, a case was made for the jury on this issue of agreed boundary, because appellee brought his contentions within the rule stated in *Peebles* v. *McDonald,* 208 Ark. 834, 188 S. W. 2d 289: "Where there is a doubt or uncertainty, or a dispute has arisen, as to the true location of a boundary line, the owners of the adjoining lands may, by parol agreement,

fix a line that will be binding upon them, although their possession under such agreement may not continue for the full statutory time."

Thus, on either issue—adverse possession or agreed boundary—there is substantial evidence to sustain the verdict of the jury.

Affirmed.

HUGHES *v.* STATE.

4389 189 S. W. 2d 713

Opinion delivered October 15, 1945.

Denver L. Dudley, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Elbert Hughes has appealed from a judgment that he pay a fine of $100 and serve ten days in jail, the charge having been that he illegally possessed liquor for the purpose of sale.

Sheriff Leon Brown of Craighead County testified that he received a telephone call from the town of Monette the afternoon of February 2, 1945, and in response to information so acquired he went with his deputy, C. D. Wilson, and apprehended Hughes driving toward Jonesboro, and engaged him in conversation. When Hughes was asked what was in the car he replied that he had some fish. This was true; but his further assurance that "that is all" proved to be incorrect. When the sheriff asked for a key to the trunk compartment, Hughes smiled and said, "I guess you've got me." Three cases of whiskey were found in a suitcase. Testimony was that Hughes lived in Jonesboro. Over objections of the defendant the State was permitted to introduce Jonesboro Municipal Court records showing (a) conviction September 13, 1944, on a charge of selling liquor without city license; (b) conviction September 13, 1944, on a charge of selling liquor to a minor; (c) conviction November 20, 1944, on a charge of selling liquor without a city license, and (d) conviction March 8, 1945, on a charge of possessing liquor for sale.[1]

The prosecution, from which this appeal comes, originated in the Court of Marvin Phillips, a Justice of the Peace for Lake City Township, where information, as shown in the footnote, was filed.[2] Other than the three formal grounds ordinarily contained in a motion for a new trial, the defendant insists (a) that the Court erred in holding that "Initiated Act of 1943 for Craighead

[1] There was other testimony.

[2] "Comes James C. Hale, Prosecuting Attorney for the Second Judicial District of the State of Arkansas, by his deputy, Ivie C. Spencer, and accuses Elbert Hughes of the crime of possessing intoxicating liquor for the purpose of sale, committed as follows, to-wit: That the said Defendant, Elbert Hughes, did on the [blank] day of February, 1945, in the Lake City District of Craighead County, Arkansas, unlawfully possess and carry around in a motor vehicle, intoxicating liquor for the purpose of sale in a territory now dry by reason of acting under provisions of Initiated Act No. 1 of 1943; against the peace and dignity of the State of Arkansas."

County is valid"; (b) in admitting as testimony the records of municipal court convictions; (c) in refusing to instruct that it must have been the defendant's intention to sell liquor unlawfully in the Lake City District of Craighead County, as distinguished from the Jonesboro District; (d) in refusing to instruct that "because the defendant lived in Jonesboro or had been convicted of liquor violations in Jonesboro you cannot presume that he was taking the liquor here involved to the Jonesboro District"; (e) in refusing to instruct that "the transportation of whiskey on which State and Federal taxes [have] been paid is not a violation of law, regardless of amount, [and] regardless of the fact that it may be through a dry county"; (f) the Court erred in instructing the jury to consider the case under Par. 2, Sec. 6, Art. 7 of Act 107 of 1935,[3] and (g) the Court erred in failing to instruct "with refernce to the separate and distinct status of the Jonesboro District and the Lake City District of Craighead County," insistence being that the defendant must have possessed liquor in the Lake City District with intent to sell it in that District.

Appellant's first argument is predicated upon the assertion that the information filed with the Justice of the Peace charged that he "unlawfully possessed and carried around intoxicating liquor under Initiative Act No. 1 of 1943."

We do not think the information is susceptible of this construction. What it says is that the defendant "unlawfully possessed and carried around in a motor vehicle intoxicating liquor for the purpose of sale in a territory now dry by reason of acting under provision of Initiative Act No. 1 of 1943, against the peace and dignity of the State of Arkansas." It will be observed that the gravamen of the offense was the unlawful possession and transportation of liquor in dry territory, for the purpose of sale, and that such territory had been made dry because the electors had spoken under authority of the Initiated Act.

[3] The reference obviously was to Act 108, rather than Act 107.

In *Mondier* v. *Medlock,* 207 Ark. 790, 132 S. W. 2d 869, there is reference to "Initiated Act No. 1, adopted November 3, 1943." The headnote to this case mentions Initiated Act No. 1, and correctly states that it was adopted in November, 1942. The reference to 1943 in the text of the opinion was a typographical error brought forward in the Reports. But, as a matter of fact, Section 8 of the Act provides that it shall be in full force and effect on and after January 1, 1943. See *Winfrey* v. *Smith, ante,* p. 63, 189 S. W. 2d 615.

In view of the Court's ruling that the municipal court records were admissible "only for the purpose of showing the nature of the business of the defendant," the objection to their introduction was properly overruled. Mr. Justice Wood, who wrote the Court's opinion in *Casteel* v. *State,* 151 Ark. 69, 235 S. W. 386, said that where the defendant was being tried on a charge of having manufactured intoxicating liquors, it was permissible to prove that whiskey was found in his possession and that he had been convicted of transporting liquor after the indictment on which he was being tried had been returned. The Court in that case, as in the case at bar, told the jury that the testimony objected to could be considered only as tending to show the nature of the business the defendant was shown to have engaged in.

Art. VI, § 7, Act 108 of 1935, provides that in any prosecution or proceeding for any violation of the measure, "the general reputation of the defendant . . . for being engaged in the illicit manufacture of or trade in, intoxicating liquor shall be admissible in evidence against said defendant or defendants." In the case at bar the defendant did not testify, and evidence of the transaction in question was brought into the record by the testimony of the Clerk of the Jonesboro Municipal Court. If it be urged that the facts presumptively disclosed by the judgments did not meet the test required for establishing one's reputation when it is appropriate that such reputation be established, answer is found in the Casteel decision. In the charge being investigated, it was reasonable to infer that the defendant's proclivi-

ties were such as to identify him with the trade. The Court properly instructed that testimony of this character, in order to be admissible, must be comparatively recent. Court records are public, and it was not improper to bring to the attention of the jury matters theoretically generally known, where the purpose for which the infractions might be considered was circumscribed by the Court's instruction.

The only information in the record is the one filed in the J. P. Court. If the defendant was then tried on the different charge, that fact is not affirmatively disclosed; nor can we consider appellant's contention respecting the legal status of the two separate districts of Craighead County under Initiated Act No. 1. Although certain objections were interposed and arguments were made to the trial court, there is no evidence either district voted separately for prohibition or that the county voted for it as a whole. The Court informed the jury in one of its instructions that the defendant was charged with possessing liquor for the purpose of selling it in Craighead County, "a county which is dry under the local option law." There is no finding of any fact disclosing the method by which possession for sale was made illegal. The Court had a right to take judicial notice of the local law. *Crumley* v. *Guthrie,* 207 Ark. 875, 183 S. W. 2d 47. The Court was also correct in refusing to give an instruction on the right of one to transport liquor through a dry territory.

Section 6 of Initiated Act No. 1 of 1942 declares the legislative intent to be that its provisions "be cumulative to the liquor laws now in force." The question determined in *Mondier* v. *Medlock, supra,* was that the formula promulgated in Initiated Act No. 1 was complete in respect of elections, and that requirements of Act 108 as to petitions for an election, etc., had been superseded. The final holding was that no essential constituent of an election is left to intendment.

Thus nothing in the opinion suggesting that the provisions of Act 108 not inconsistent with the Initiated measure were repealed; nor were they.

We cannot say, as a matter of law, that there was no substantial evidence to support the judgment.

Affirmed.

MOSS *v.* CHANDLER.

4-7697 189 S. W. 2d 715

Opinion delivered October 15, 1945.

Oscar Barnett, for appellant.

HOLT, J. This is a suit in ejectment. Appellant (plaintiff below) alleged that he was the owner and entitled to the possession of the northwest quarter of the southwest quarter of section twenty, township 4 south, range sixteen west, containing 40 acres more or less, in Hot Spring county, Arkansas. He further alleged that he claimed title to the land by virtue of a deed to him from the St. Louis, Iron Mountain & Southern R. R. Co., Au-

gust 31, 1901, and that "he fenced said land and went into immediate possession of same on the date of the deed aforesaid; and that he has been in open, notorious, peaceable and lawful possession of same, cultivating said land in crops each and every consecutive year, and all of the time since the date of said deed, up to and including the present year; and that plaintiff is entitled to the uninterrupted and peaceable possession of said land now." . . . "That on the 24th day of August, 1944, the defendant in riotous, wrongful, trespassingly, unlawfully, abusively and in an intimidating manner set posts and wire fence so as to take . . . land into his inclosure which lies east of plaintiff's said land, taking from this plaintiff a strip of his said land 15 feet wide and 600 feet long." He further alleged damages and prayed for possession of this strip of land, that defendant be enjoined from trespassing thereon, and for damages.

Defendant answered with a general denial and claimed title to the strip of land in question "under and by authority of a deed executed to him by one J. Elmo Young and Edna M. Young, his wife, under date of November 24, 1943, in which deed the said land was set out and described by metes and bounds, and also in which deed the said J. Elmo Young and Edna M. Young, his wife, warranted to defend the title to said land against all claims whatsoever," and asked that J. Elmo Young and wife be made parties to the suit, whereupon Young and wife answered with a general denial.

Upon a jury trial, there was a verdict in favor of appellee, Chandler, for the strip of land in question and a denial of damages to appellant. From the judgment comes this appeal. No brief has been filed by appellee.

Appellant asserted title to the strip of land involved here not only by warranty deed from the railroad company in 1901, but also by adverse possession for the statutory period of seven years. This court, in the recent case of *Gingles* v. *Rogers,* 206 Ark. 915, 175 S. W. 2d 192, held: (Headnotes 1 and 2) "One seeking to eject another must bring himself within the rule that, *prima facie,* a

legal right to possession of the realty must be shown. In making out title by the party having the onus, he must do so either by force of the statute of limitations, or by showing claim of title from the government, or at least from a source common to the parties, which implies admission of title to that source, on both sides."

The effect of appellant's allegation in his complaint, *supra*, that he fenced the strip of land here involved and went into immediate possession upon the receipt of his deed from the railroad company and had been in "open, notorious, peaceable and lawful possession of same," and cultivating same each year thereafter down to the present time, sufficiently alleged adverse possession although the word "adverse" was not used. *McKewen* v. *Allen*, 80 Ark. 181, 96 S. W. 392, and in *Hill* v. *Cherokee Construction Company*, 99 Ark. 84, 137 S. W. 553, this court said: "If it appears by plain and reasonable intendment that the defendant asserts as a fact that he has had adverse possession of the land for the statutory period, this, we think, is a sufficient plea of the statute of limitation for the investiture of title by adverse possession and is not subject to a demurrer, *McKewen* v. *Allen*, 80 Ark. 181, 96 S. W. 392."

The undisputed facts are to the following effect. Appellant, Moss, a Negro, 71 years of age, testified that he secured a deed from the railroad company as alleged in his complaint and (quoting from appellant's brief) "I went into immediate possession of this land, worked crops on it every year since, it was fenced then, I have had under my fence all of the time since. There was a rail fence around it; I renewed this with a wire fence; and have had it fenced in my field every year since my deed. The fence is now on the same line it was on the date of my deed. I had this land surveyed by Mr. J. H. Howard, county surveyor, on April 7, 1906, he marked the east line with a 4 x 4 post, my fence is on the line he ran then and it has been all of the time since, here is his certificate, he was county surveyor. The surveyor's certificate is made exhibit to the witness' testimony. In 1944, Mr. Chandler came there and run a fence in my

field taking a strip 15 feet by 600 feet inside my field, he run his fence right down the corn row. My fence on the east side is on the same line that Mr. Howard, Mr. Jo Brown and Mr. Threlkill established there forty years ago and it is on the same line now. Mr. Howard put down a white stob, a piece of four by four. It is right there 'till this day, my fence is right on the same line now.''

It is conceded that appellant had paid the taxes on this land each year since 1901.

Will Jones, Hezikiah Hinson, Joe Lee Jones, Alfred Jones, and Alvin Jones corroborated the testimony of appellant, and testified that they had known him for forty years or more. The testimony of each of these corroborating witnesses is similar in effect to that of Henry Dumas, who testified that he had known Willie Moss, appellant, and the premises on which he lives for 45 years, that the fence on the east side of appellant's land is now on the same location it was 40 years ago, that Willie Moss has had it fenced and in cultivation for 25 years, and never missed a crop, that he knew the strip of land in question here claimed by appellee, and that appellant, Moss, has had it inside of his fence for 25 years.

Appellee introduced in evidence a deed from J. Elmo Young and wife, dated November 24, 1943, conveying to him a part of the northeast quarter of the southwest quarter, section 20, township 4 south, range sixteen west, in Hot Spring county which lies on the north side of highway 270 and west of a road leading from said highway to Gifford, and for 10 acres more or less.

On direct examination, appellee testified in substance (quoting from appellant's brief), ''the fence that Moss had there was an old rail fence. I went to Moss and asked him to let me build a new fence, he would not do this, so I had the county surveyor to run the line. I was hauling logs at the time and he went in and fenced it up. I don't want anything that don't belong to me. All I want is what I bought and paid for. That is the corner I bought it from the railroad iron. I asked Elmo Young if the old fence was on the line, and he told me the old

fence row was over in the piece of land," and on cross-examination, "Mr. Young did not show me the corners, it is supposed to be ten acres more or less. I paid taxes on twelve acres. I am twenty-five years old. I first got acquainted with that property out there in November, 1943. This old man was on it then and had it fenced. He has a new fence, a wire fence where the old fence was. He put the new fence up back in the spring."

At the close of all the testimony, appellant asked the court to instruct the jury "that if they find the plaintiff (appellant) has been in open, notorious and peaceable possession of the land for 40 years, they will find for the plaintiff." The court refused to give this instruction, and appellant insists that in so doing the court erred. We think appellant's contention must be sustained.

The undisputed testimony presented by this record shows that appellant was entitled to the land involved by adverse possession for seven years, and in fact more than thirty years thereafter. The instruction requested placed a greater burden upon appellant than the law required of him in that it was only necessary for appellant to show by a preponderance of the testimony that he had had adverse possession of the land for a period of not less than seven years.* A case quite similar on the facts to the present case is that of *Couch* v. *Adams,* 121 Ark. 230, 180 S. W. 498, and there this court held: (Headnote 1) "appellant will be held to have acquired title by limitation to a portion of a lot of land, when he purchased two lots from his grantor, and taking the boundary lines as given him by his grantor, inclosed with a fence the two lots purchased and a portion of a third, and held possession of the same for the statutory period," and in the body of the opinion, it is said: "We think the undisputed evidence shows that the appellant inclosed the land as his own as soon as he purchased it by putting his fence where he believed the line was and that he claimed and occupied all of the land inclosed as his own for the statutory period. It follows that the court erred in not directing a verdict for the appellant." So here

* NOTE: Pope's Dig., § 8918.

appellant, in 1901, when he purchased the land, inclosed it with a fence where he thought the line was, and has claimed and occupied all the land which he had so fenced, including the strip in question here, for approximately forty years, far beyond the statutory period.

While, as indicated, we think the undisputed testimony would have warranted an instructed verdict in favor of appellant, at the close of all the testimony, it does not appear that any such request was made.

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

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., LTD., *v.* SMITH.

4-7717 189 S. W. 2d 718

Opinion delivered October 15, 1945.

W. J. Jean and *DuVal L. Purkins,* for appellant.

Aubert Martin, for appellee.

McHaney, J. Appellant brought this action against appellee to recover an alleged balance of $1,013.36 due it for premiums on three named liability insurance policies executed by it to appellee in compliance with the Workmen's Compensation Act, No. 319 of 1939. An itemized statement was attached to the complaint showing said balance due, wherein the charges were based on a percentage of the weekly, monthly and annual pay roll of employees of appellee, he being engaged in the sawmill and logging business.

Appellee answered with a general denial and, by way of cross-complaint, alleged that, in order to secure the insurance, he deposited $265 with appellant, and also paid all sums whatsoever due by him to appellant, and that it continues to hold said sum, although demand for its return had been made. Judgment was prayed against appellant for that amount.

During the course of the trial appellant was reading the deposition of Mr. R. H. Gowens, chief accountant for appellant in its Chicago office, to establish the amount due as claimed. It was developed that the rate fixed in the policies for logging operations was $9.82 whereas the rate for logging in the itemized statement was $15.044. The witness testified that the Arkansas Rating Bureau promulgated the latter rate on September 18, 1942, effective as of December 5, 1941, or December 5, 1942. We cannot tell which is correct as the witness said on direct examination it was effective December 5, 1941, which would make it retroactive, and on cross-examination he stated it became effective December 5, 1942. He also testified that a rate of $13.543 was applied on operations after December 5, 1942. Direct interrogatory No. 15 was read, which referred to the itemized statement in which the rate of $15.044 was applied on the logging pay roll, "which seems to be higher than the usual rate on the pay roll of such employees. Can you tell the court why such a rate was charged and by what authority plaintiff had to

make such charges?'' Appellee objected to the question on the ground it was not the best evidence. The court sustained the objection, whereupon appellant requested and was permitted to take a non-suit. The court permitted appellee to continue the action on cross-complaint, which resulted in a verdict and judgment for appellee for $265.

Several questions argued by appellant on this appeal cannot be considered. It is urged that the court erred in holding that appellant could establish the insurance rate only by the records of the Insurance Department and that the judgment should be reversed. Assuming that the court was in error in sustaining said objection and in holding as appellant contends, that question is not before us. Appellant suffered a non-suit at its request and over appellee's objection and exception. Had appellant continued with its case, having properly objected, excepted and preserved same in its motion for a new trial, the matter would be presented to us for decision.

Section 8192 of Pope's Digest provides: ''In any case where a set-off or counterclaim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear.''

The withdrawal of the complaint or the dismissal of the action or a non-suit suffered by the plaintiff leaves the counterclaim pending. *Newlin* v. *Webb,* 150 Ark. 5, 233 S. W. 826; *Dillon* v. *Hawkins,* 147 Ark. 1, 227 S. W. 758; *Church* v. *Jones,* 167 Ark. 326, 268 S. W. 7; *Chalkley* v. *Henley,* 178 Ark. 635, 12 S. W. 2d 18; *Watts* v. *Watts,* 179 Ark. 367, 15 S. W. 2d 977. And the only issue before the court after non-suit taken is that in the cross-complaint. *Dillon* v. *Hawkins, supra.*

Appellant also contends we should take judicial notice of the rates for compensation insurance under the provisions of § 36 (e) (2) of the Workmen's Compensation Law. But neither the rates for such insurance nor the subject-matter of the complaint is before us. That case has not been tried.

On the question of whether appellee should have recovered on his cross-complaint, and that is the only question before us, appellant contends that the payment of the $265, even if made, cannot be recovered because it was made voluntarily. We cannot agree. Appellee's bookkeeper testified that he had up a deposit for the policy and that he had overpaid appellant $1,319.93, and explained how she arrived at that amount from appellant's statements. Her calculation was based on a rate of $9.83, and she stated they were never notified of a higher or changed rate. Mr. Gowens did not deny that a deposit was made, but only that he didn't know anything about it.

We think this evidence sufficient to support the verdict and the judgment is accordingly affirmed.

WILKERSON *v.* STATE.

4394 189 S. W. 2d 800.

Opinion delivered October 15, 1945.

Rehearing denied November 12, 1945.

J. Bruce Streett and *James E. Dodds,* for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

MILLWEE, J. Appellant was convicted of robbery and his punishment assessed by a jury at five years' imprisonment in the penitentiary. For a reversal of the judgment imposing the punishment fixed by the jury, this appeal is prosecuted.

It is first insisted that the evidence is insufficient to justify conviction. When viewed in the light most favorable to the State, the evidence reflects the following facts: Emerson Driskill, the victim of the alleged robbery, testified that he was employed at the ordnance plant near Camden, and went to town on the afternoon of February 9, 1945, to cash his weekly pay check. There he met Jack Albright who was also employed at the plant, and at the latter's suggestion they took a taxicab to the Crickett Club with two other men. At Albright's suggestion, Driskill put two $20 bills in his watch pocket and a $10 bill in his pocketbook. When they arrived at the club, Albright tried to persuade witness to let him take care of the two $20 bills, but Driskill refused. Driskill saw Albright talking with appellant at the club. They remained at the club about an hour and drank some beer. Albright told witness that he knew appellant and that appellant would take them back to their barracks.

Driskill, Albright, and appellant left the club in appellant's Buick automobile. Appellant drove the car two or three miles south of the club and on a dirt road where appellant stopped the car about a half mile from the highway. Albright told Driskill to get out of the car. It was dark and as Driskill stepped out of the car something struck him from his right. Witness was not positive that appellant hit him, but the blow came from his right and appellant was at his right, while Albright was standing in front of him. He became unconscious from the blow and awoke about six o'clock the next morning in some tall grass near the place where he was struck. His head and back were badly bruised and his money was gone. He caught a truck to Camden and notified the sheriff.

R. E. Brown, a member of the State Police, testified that he and a deputy sheriff of Pulaski county arrested appellant at his home in Little Rock on February 10th. They placed appellant in jail that night and upon questioning, he denied that he knew Jack Albright or had any knowledge of the alleged robbery. Witness took appellant to Camden the next day and met Officer Buchanan north of Fordyce. A few miles out of Camden appellant told them he hit Driskill with a beer bottle and his fist and received some of the money. After they arrived at Camden, appellant freely and voluntarily signed a written statement which was introduced in evidence.

In this statement, appellant said he drove to the Cricket Club in his Buick automobile where he drank some beer and met Jack Albright, whom he had known in North Little Rock. Albright asked appellant if he had an automobile, and when he replied in the affirmative, Albright wanted appellant to take him to get some whiskey and pointed to Driskill and said Driskill had some money and intimated he (Albright) wanted to get it. Appellant told Albright he "couldn't do that," but after further insistence agreed to go, knowing that Driskill was to accompany them, but not knowing that Albright intended to take Driskill's money. He drove the car a few miles south and they stopped at another night

club, where they bought three bottles of beer which they took along. They drove further south and turned off at a crossroad and stopped, at Albright's suggestion. Appellant went to the rear of the car and the other two men walked around there.

The statement continues: "I still had my bottle of beer, which was nearly empty, and as the other two walked up Albright said 'Hit 'em.' I didn't understand and asked him what he meant, whereupon Albright told me he wanted to take Driskill's money. I then hit Driskill with the beer bottle in my hand. Driskill did not fall then and Albright fumbled at his pockets trying to find the money and tried to get Driskill to tell him where the money was. I was scared by this time and I hit Driskill with my right fist and did knock him down then. I did not hit Driskill any more and I do not know if Albright hit him. After hitting Driskill with my fist, as above related, I walked off. I saw Albright fumbling in Driskill's pockets after he was knocked to the ground. Albright told me he got some money from Driskill, I do not know how much, and offered to give me some of it, but I refused it. I never have received any part of Driskill's money. After Driskill fell and was searched by Albright we left Driskill laying on the ground and I drove back to the Crickett Club with Albright."

J. H. Porterfield, a member of the State Police, testified that he visited the scene of the alleged robbery on the morning of February 10th, and found a broken beer bottle, blood, and evidence of a struggle in the road.

It is argued that it is incumbent on the State to prove, beyond a reasonable doubt, that appellant "did take, steal, and carry away $48," as alleged in the information, and that there is no proof that appellant obtained any of the money. Officer Brown testified that appellant said he got part of the money, while this is denied in the written confession. However, proof of actual receipt of money by appellant is not necessary to a conviction, if appellant was present, aiding and assisting another in the perpetration of the crime. Section 2937 of Pope's Digest provides: "All persons being present, aiding and abet-

ting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted and punished as such." And under § 3276 of Pope's Digest (§ 25 of Initiated Act No. 3 of 1936) (Acts 1937 p. 1384) the former distinction between principals and accessories was abolished and all accessories before the fact are deemed principal offenders. *Burns* v. *State,* 197 Ark. 918, 125 S. W. 2d 463; *London* v. *State,* 204 Ark. 767, 164 S. W. 2d 988. In 46 Am. Jur. 150 the author says: "Generally, all who are present at the commission of a robbery, rendering it countenance and encouragement, and ready to assist should the necessity arise, are liable as principal actors. To be liable, the accused need not have taken any money from the victim with his own hands, or actually participated in any other act of force or violence, it is sufficient that he came and went with the robbers, was present when the robbery was committed, and acquiesced therein."

Beating one into unconsciousness for the purpose of enabling another to take his money, is certainly rendering material aid and assistance in the commission of a robbery. This, the jury may have found, appellant did from the evidence which was substantial and sufficient to support the verdict and judgment.

It is next urged that the trial court erred in refusing a continuance of the case because of the absence of the witness, Darrell Randall. This motion was made orally, after defendant had announced ready for trial, and near the conclusion of the State's testimony. Both the State and the defendant had requested a subpoena for the witness. Counsel for the defendant had furnished the officers an address in Little Rock where he understood the witness was employed. In attempting to serve this subpoena an officer called this place and was informed by the person in charge that Randall had left there two weeks previously and this person did not know his address. At the conclusion of all of the evidence, appellant renewed his oral motion, stating that if the witness were present he would testify that when appellant and Albright returned to the Crickett Club there was no blood

on appellant, but there was on Albright. There was no abuse of the trial court's broad discretion in refusing to grant the continuance. Due diligence should have prompted appellant to ascertain whether his witnesses had been served with process, or were present, before he announced ready for trial. The oral motion did not comply with the provisions of § 1494, Pope's Digest, which prescribes the requisites of a motion to postpone a trial on account of the absence of evidence. It is not error for the trial court to deny a motion for continuance where the motion fails to set forth the grounds specified in the statute. *Myers* v. *State,* 185 Ark. 892, 50 S. W. 2d 234.

It is next contended that the court erred in refusing to instruct the jury that it must find, beyond a reasonable doubt, that appellant actually took the money, since it was so alleged in the information. No request for instructions was made by either side. Appellant objected to that part of the court's charge which in effect told the jury, if they found from the evidence beyond a reasonable doubt that appellant was present, aiding, abetting and assisting another in the perpetration of a robbery, he would be guilty, regardless of which of the two parties received the money. What we have said in connection with the first assignment of error, regarding the abolition of the former distinction between principals and accessories, is applicable here. This part of the court's charge is not subject to the objection made by appellant, and the trial court fully and fairly presented the issues to the jury in the instructions given.

It is finally insisted that the sentence of five years is grossly excessive. The statute (§ 3036, Pope's Digest) fixes the penalty for robbery at not less than three nor more than twenty-one years. This court has reduced sentences in instances where extreme penalties assessed are not supported by the evidence, or where the punishment prescribed is clearly the result of passion or prejudice. *Hadley* v. *State,* 196 Ark. 307, 117 S. W. 2d 352. Unless there is an abuse of discretion by the trial court or jury in fixing the punishment within limits specified

in the statute, the verdict and judgment will not be disturbed by this court on appeal. A careful appraisal of the evidence fails to disclose an abuse of discretion such as would justify a reduction of the sentence fixed by the jury and imposed by the court.

Finding no error, the judgment is affirmed.

JOHNSON *v.* SWANSON.

4-7709 189 S. W. 2d 803

Opinion delivered October 15, 1945.

Rehearing denied November 12, 1945.

Ben M. McCray, for appellant.

Kenneth C. Coffelt, for appellee.

ROBINS, J. Appellee brought replevin in the lower court against appellant, his divorced wife, to recover from her possession of an automobile which he claimed to own. Appellant defended on the ground that the car belonged to her, claiming to have purchased it and paid for it with her own funds, and on the further ground that appellee's rights, if any, were barred by the divorce decree in her favor. From a judgment, based on verdict of trial jury, in favor of appellee, appellant prosecutes this appeal.

These parties lived together as husband and wife for about twenty years. Appellee testified that he knew nothing about appellant's intention to leave him until, returning home from his work on December 13, 1943, he found that his wife had gone, taking with her the car here involved. She testified that appellee drove her away from home, telling her to take with her any personal property she wanted. Appellee's testimony was to the effect that he bought the car in question from a dealer in Little Rock in 1941, that the bill of sale therefor was made to him as purchaser, and that he paid all of the deferred payments of the purchase money from his earnings. He stated that every two weeks, when he was paid off, he gave his wife the checks, and she made the payments to the automobile agency. He was corroborated as to the form of the bill of sale (which was not produced) by his attorney, who testified that he had seen it. Appellant testified that she bought the automobile and paid for it from her earnings. Her sister, who stayed part of the time with the parties, testified: "Q. During the time you were there, do you know who claimed the automobile, who said it was theirs? A. She felt like it belonged to her. . . . I know she made the payments. . . . She made forty dollars a month besides room and board."

Appellant obtained her divorce on January 20, 1944, in the Pulaski chancery court, and a copy of the decree in her favor was introduced in evidence by appellant. It

contained the following clause: "That all property not disposed of at the commencement of this action which either party hereto obtained from or through the other during the marriage hereby annulled, and in consideration or by reason thereof, be restored to them respectively."

The complaint in the divorce suit was not introduced in evidence, nor was there any proof of its contents, except appellee's testimony—not denied by appellant—that appellant, in the divorce proceeding, asked for a divorce and for no other relief. He further stated that he had no chance to contest the suit because he was in the hospital at the time.

Appellant does not complain of the instructions given by the lower court. Among these were the following:

"If you find from the testimony in this case that the automobile in question was the property of the parties to this suit during the time they were married, and that same was acquired by either of them by reason of said marriage through or from the other, and the same was not disposed of by order of a court of competent jurisdiction, then you are instructed to find for the defendant."

"You are instructed that the divorce decree granted by the chancery court of Pulaski county, Arkansas, between the parties to this action is a legal, valid and final decree of a court of competent jurisdiction and the question of residence of the defendant has no bearing on the case at bar, and you are instructed not to consider any testimony relative to her residence at the time the decree was rendered, or any other testimony relative to any of the proceedings had in that suit as it has been fully adjudicated."

Appellant urges that the lower court was without jurisdiction because the rights of the parties were fully adjudicated in the divorce suit; and that the appellee failed to establish his case by a preponderance of the testimony.

Unless the title of the automobile was settled by the decree in the divorce case, appellee was not precluded

from seeking to recover it in a separate proceeding. The automobile is not mentioned in the divorce decree, but appellant contends that the language of the decree, quoted above, is broad enough to embrace it. This language was evidently used in compliance with the following provisions of § 4393 of Pope's Digest: "In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof. . . ."

But we have held in many cases that this section relates only to property specifically mentioned therein; that is, property "which either party obtained from or through the other during the marriage and in consideration or by reason thereof."

For example, it was held in the case of *McNutt* v. *McNutt,* 78 Ark. 346, 95 S. W. 778, that this statute does not refer to property conveyed by a husband to his wife on a voluntary separation or on a restoration of the marital relation; in *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867, that it did not refer to gifts or advancements by a husband to his wife. Other cases in which the operation of the statute was limited are *Dickson* v. *Dickson,* 102 Ark. 635, 145 S. W. 529; *Price* v. *Price,* 127 Ark. 506, 192 S. W. 893; and *Biddle* v. *Biddle,* 206 Ark. 623, 177 S. W. 2d 32.

This statute was borrowed from the Kentucky code. In the case of *Patrick* v. *Prater,* 144 Ky. 771, 139 S. W. 938, it was invoked as a defense by a divorced husband in a suit by his former wife to recover a one-half interest in certain lands which she claimed should have been con-

veyed to both instead of to the husband alone, as was actually done. In that case the Kentucky Court of Appeals said: "Nor did the proceedings in the divorce suit affect appellee's right to recover this property. It does not appear from the record that this property was in any manner involved in the divorce proceedings, or that the judgment in that action determined in any manner appellee's interest in this property or her right to recover it."

In the case of *Apple* v. *Apple,* 105 Ark. 669, 152 S. W. 296, this court sustained a decree in favor of a former wife against her former husband enforcing (in an action brought by her after the lapse of the term at which the divorce was granted) a verbal agreement between the parties during the marital relation as to division of personal property.

There are numerous decisions holding that, when property rights are not settled in a divorce action, they may be adjusted in a subsequent, separate proceeding. Some of them are: *Judd* v. *Judd* (Mich.), 158 N. W. 948, 160 N. W. 548; *Hicks* v. *Hicks* (Wash.), 125 P. 945; *Coats* v. *Coats,* 160 Cal. 671, 118 P. 441, 36 L. R. A., N. S., 844; *Gray* v. *Thomas* (Tex.), 18 S. W. 721; *Thomas* v. *Thomas,* 27 Okla. 784, 109 P. 825, 113 Pac. 1058, 35 L. R. A., N. S. 124, Ann. Cas. 1912C, 713. The term "property rights," as here used, does not, of course, include the interest, by way of inchoate dower, possessed by the wife in property of her husband, which interest must be determined in the divorce proceeding and is concluded by the decree rendered therein. *Taylor* v. *Taylor,* 153 Ark. 205, 240 S. W. 6.

Under the lower court's instructions the jury must have found that the automobile did not belong in the category of property title of which was settled by the court's decree. As a matter of fact, there was no testimony whatever to support a finding that the car was transferred to either party by reason of or in consideration of the marriage. Appellant claimed that she herself bought and paid for the car. Under her version of the matter, appellee never at any time owned the car; and under appellee's version title to the car was never vested

in appellant. We conclude, therefore, that neither the statute (§ 4393, Pope's Digest) nor the decree of the chancery court, in accordance with the statute, was a bar to appellee's action.

It was not shown that the title to this automobile was put in issue in the divorce case so as to sustain a plea of *res judicata* herein by appellant. The burden of establishing such a plea was on appellant. She failed to introduce a copy of the complaint or to show otherwise that this question was actually presented by the pleadings. Appellee testified that appellant did not ask for the car in the divorce proceeding. Since appellee did not answer or otherwise appear in the divorce proceeding, no issue not tendered in the complaint in that case could be said to be adjudicated by the decree therein. *Reed* v. *First National Bank of Corning,* 141 Ark. 111, 216 S. W. 306; 34 C. J. 191.

In support of her contention that appellee failed to establish his case by a preponderance of the evidence, appellant cites decisions of this court wherein it was said that the testimony of an interested party may not be held to be undisputed, although there is no contradiction thereof in the record. Those cases are not applicable here. In the case at bar appellee's testimony was to some extent corroborated by that of another witness; and it was sharply disputed by appellant, who was in some degree corroborated by her sister. It was peculiarly within the power of the jury to settle this dispute. The jury saw the witnesses and observed their demeanor on the witness stand. The jury's finding, based as it is on substantial evidence, is conclusive.

No error appearing in the record, the judgment of the lower court is affirmed.

BALSER *v.* RAMSEUR.

4-7725 189 S. W. 2d 785

Opinion delivered October 22, 1945.

E. C. Thacker and *Hebert & Dobbs,* for appellant.

Wootton & Land, for appellee.

SMITH, J. Appellee sued and recovered judgment for a broker's commission alleged to have been earned upon the sale of real estate in the city of Hot Springs, owned by appellant. The case was submitted under an instruction which, in effect, directed a verdict for appellee, as the facts upon which it was hypothecated as to conditions under which the commission would be earned are undisputed. The instruction reads in part as follows: ". . . if the jury believe from a preponderance of the evidence that the plaintiff did procure a purchaser for the property, and took him to the property and showed it to him, and that as a result thereof, the purchaser bought the property from the defendant, then the defendant would be due the plaintiff his commission in accordance with their contract."

The facts are undisputed that appellee was given an agency to sell the property. The agency was not exclusive, but it had not been terminated. Appellee contacted one Douglass, and interested him in the purchase of the property, and Douglass subsequently bought it. This apparently makes a *prima facie* case entitling the agent to his commission, and if there were no other facts to be considered, the instruction from which we have quoted would be a correct declaration of law. In other words, a directed verdict would have been proper. But there are other facts which must be taken into account. They are as follows:

Appellee was asked: "Was anything said about bringing a purchaser to him—Balser (appellant)?" Appellee, the agent, answered: "I think what he meant was if I produced a purchaser he would take care of me as to commissions as to a definite price." This testimony refers to the contract under which the agency was created. While this testimony did not mean that appellee would produce and introduce the purchaser to appellant, it did mean that appellee would advise appellant when

he had found a purchaser for the property, or one who was about to purchase.

Appellee testified that he took Douglass to the property to show it. Appellant was not at home (this apparently being the property in question) but his daughter was. Appellee explained to Douglass that his time was limited, as he had an appointment in Little Rock, but that he had time to show the property. When they arrived at the property the daughter stated that her father (appellant) was not at home. It was then about 12:30 p. m. Appellee explained his mission to appellant's daughter, and made an appointment with Douglass to return at 2:00 p. m. and told the daughter that he would return at 3:00 p. m. He left his business card with appellant's daughter. Appellant testified that he knew nothing of this visit. Douglass did not keep this engagement, nor did appellee keep it, at least he did not testify that he had, and appellee apparently did nothing further about the matter until he read a news item stating that the property had been sold, and two weeks after the date of the sale he called on appellant and demanded his commission. This being refused he brought this suit.

Between the time Douglass was shown the property by appellee, and the date of the engagement appellee had made to return at 3:00 p. m., and inspect the property, Douglass contacted appellant. He did not tell appellant that appellee had shown him the property, and appellant testified that he was unaware of that fact. Douglass testified that appellant told him he had given one Ferguson, another real estate agent, the exclusive agency to sell the property, and they went to the office of Ferguson, where the sale was consummated.

Of course, if Ferguson had the exclusive agency to sell the property, for a fixed period of time, he would have been entitled to the commission for a sale made within that time, whether made by himself or some other agent. Appellant was asked if he paid a commission to Ferguson, but an objection to the question was sustained, and it was not answered. But the payment of the commission to Ferguson would not of itself defeat appellee's

right to recover a commission, if he were otherwise entitled to it. An owner might so contract that he would be required to pay more than one commission, and it is insisted that appellant incurred that liability, even though he in fact paid the commission to Ferguson.

Not having given appellee an exclusive agency, appellant had the right to confer an agency upon another broker, in which event it was his duty to stand impartial between these agents, and to pay a commission to appellee if he first produced a purchaser.

Appellant requested an instruction reading as follows: "You are instructed that if you believe from the evidence that it was of interest and importance to the defendant (appellant), Frank Balser, to be notified by the plaintiff (appellee), W. H. Ramseur, that plaintiff had produced or found a probable purchaser for the property in question, in that defendant might suffer injury or loss by reason of not receiving such notice, and the plaintiff failed to so notify the defendant, then it will be your duty to find that the defendant is not liable for any commissions to the plaintiff."

This instruction, and others to the same effect, were refused. We think these instructions should have been given, and that it was error to refuse them.

Notwithstanding the fact that appellee had an agency to sell the property, he had no exclusive right to do so, and appellant could have sold it personally, or through an agent, but he must have done so before appellee made the sale or advised that he was about to close it.

There is a question of fact which we think the record presents, and that is whether appellant was advised that appellee had procured a purchaser prior to closing with Douglass. If appellant had that information he did not stand impartial between his agents. If he was advised that appellee had produced and procured Douglass as a purchaser before permitting another agent to sell, he is liable to appellee for the commission, although he may also have paid or be liable to pay Ferguson a commission under his exclusive agency.

It is admitted that appellee had a contract with appellant authorizing appellee to sell appellant's property, and it is admitted also that the property was sold to the purchaser produced by appellee. This being true, appellant is liable for the commission if he was so advised before permitting Ferguson to make the sale.

Both parties cite and rely upon the case of *Reich* v. *Workman,* 110 Ark. 140, 161 S. W. 180. The headnote in this case reads as follows: "Real Estate Brokers—Right to Commission.—When W. entered into a contract with R. to sell R.'s land, the contract providing that R. might sell the land himself, and W. was to receive a commission only if he was instrumental in making the sale. Held, where W. interested one P. in the purchase of the land, and P. later purchased directly from R. without R. knowing that he had previously negotiated with W., that W. is entitled to his commission on the sale, W. having been instrumental in procuring the sale."

The decision in that case turned upon the correctness of an instruction reading as follows: "The fact that plaintiff did not notify the defendant that he was trying to sell to Potts is not a matter to be considered by you against him. The contract did not require such notification—the only question is, did the plaintiff cause the trade to be made in any way."

Reich was the owner, Potts was the purchaser, and Workman, referred to as the plaintiff, was the agent. The opinion recites that: "The contract between Workman and Reich did not preclude Reich from himself making the sale of the land, but the contract provided that Workman would be entitled to his commission, provided he was instrumental in making the sale." The controlling question of fact in that case was whether Workman, the agent, was instrumental in making the sale, and the effect of that opinion was that if Workman was instrumental in making the sale, he was entitled, under the terms of his agency contract, to his commission, although the agent had not communicated to Reich, the owner, that Potts was the probable purchaser of the land. The opinion states that: "It was not of any in-

terest to him (Reich), the owner, to know that Potts was the probable purchaser of the land; nor can it be said that he even suffered any injury from the fact that Workman did not state to him that Potts was interested in purchasing the land." In other words, the rights of the parties were determinable by the provisions of the contract under which they operated, but the implication of the opinion is that the owner should have been advised that Potts was the probable purchaser, if that information had been of interest to the owner.

Here the information whether appellee had procured the purchaser was of vital interest to appellant. If appellant had that information before closing the deal through Ferguson, he is liable for appellee's commission, although he may have paid, or be liable to pay a commission to Ferguson; otherwise not. Stated otherwise, appellant had the right to sell through his own effort or through the agency of a broker, other than appellee, provided he did so before being advised that appellee had a purchaser ready, willing and able to buy under the terms of the agency contract.

The judgment will, therefore, be reversed and the cause remanded with directions to submit this issue to the jury.

STATE *v.* DIXON.

4388 189 S. W. 2d 787

Opinion delivered October 22, 1945.

Guy E. Williams, Attorney General, *Oscar E. Ellis,* Assistant Attorney General, and *Henry W. Smith,* Prosecuting Attorney, for appellant.

ROBINS, J. Appellees, Dixon, Carter and Robertson, were charged in information filed by the prosecuting attorney with violation of § 3212 of Pope's Digest, which makes unlawful the sale, transfer or disposal of mortgaged chattels with intent to defeat the mortgagee in the collection of his debt. The evidence established that appellee Dixon had mortgaged his cotton crop to the United States of America, to secure a F.S.A. loan, on which a considerable balance remained unpaid at the time of the sale of the cotton referred to in the information; that appellee Dixon procured appellee Carter to haul the cotton to Gould, where appellee Robertson, who had been asked by the other two appellees to accompany them on the trip, had the cotton ginned in his name and sold it for $110.60, Dixon receiving from Robertson $60 out of the proceeds. It was also shown that Dixon failed to pay to the mortgagee any part of the money received for the cotton until after his arrest; but the officials of the

F.S.A. admitted that Dixon had permission from them to sell the cotton in the open market, with the understanding that he should pay over the proceeds to the mortgagee.

At the conclusion of the testimony the trial court, deeming that, under the rule announced in the case of *Lawhorn* v. *State,* 108 Ark. 474, 158 S. W. 113, in which we held that a conviction could not be had in a prosecution for this offense where it was shown that the mortgagee had agreed for the mortgagor to sell the mortgaged property, the state had failed to prove appellees guilty as charged, directed the jury to return a verdict of "not guilty," which was done.

The prosecuting attorney prayed an appeal, prosecuted here by the Attorney General, under the authority of §§ 4253 and 4254 of Pope's Digest, authorizing such an appeal when the Attorney General, from an inspection of the record, determines that the trial court has committed an error, correction of which by the Supreme Court is essential to the proper and uniform administration of the criminal laws of the state. In all such cases, regardless of the decision in this court, the trial had below is a bar to any subsequent trial of the accused for the same offense, the only possible result of the appeal being a ruling by us on questions of law that might serve as a guide in future trials.

This court, in the case of *State* v. *Smith,* 94 Ark. 368, 126 S. W. 1057, said: "The object and purpose of this provision of the statute is to obtain the decision of this court upon questions of the criminal law, so that it may serve to secure the correct and uniform administration thereof. But, if the decision of the question presented by the appeal would not serve such purpose, then it would not be of sufficient importance under this provision of the law to render an opinion thereon, and the appeal should not in such case be entertained. In the case at bar the legal question as to the sufficiency of the indictment was by the lower court decided in favor of the State, from which ruling therefore no appeal has been taken to this court. The appeal is only taken from

the ruling of the court that all the evidence introduced upon the trial was not sufficient to convict the defendant of the crime charged. The ruling was, therefore, rather upon the sufficiency of the testimony than upon a question of law. It is hardly probable that the testimony that is adduced in any two given cases will be so much alike that a decision upon the facts in one case would serve as an authority in the other. The testimony in cases containing similar charges is usually so different, and the inferences that may be drawn from the facts narrated are so varying, and the circumstances of each case are so peculiar to itself, that we do not think that an opinion given by this court upon the evidence adduced in the trial of a charge would serve any useful purpose as an authority in a case founded only on a similar charge. We do not think, therefore, that it is important to the correct and uniform administration of the criminal law that the evidence adduced in this case should be set out in detail, together with the inferences that might legally be drawn therefrom, and our opinion given thereon as to whether or not it was sufficient to warrant a conviction of the crime charged against the defendant."

In the case of *State* v. *Spear and Boyce,* 123 Ark. 449, 185 S. W. 788, in which we refused to entertain the appeal of the state, it was said: "It is clear that appeals in felony cases are not allowed by the State except in cases where it is important to have the court correct errors which prevent the 'uniform administration of the criminal law.' Appeals are not allowed merely to demonstrate the fact that the trial court has erred. The question of the legal sufficiency of the evidence in a given case constitutes a question of law for the decision of the court, but it can not become a precedent for application in another case because of the varying state of facts in different cases, and therefore the decision of that question, even though it be one of law, is not important in the 'uniform administration of the criminal law.' The State has no right to ask for the decision of this court on a question which is purely abstract in its nature, and we are of the opinion that the statute does not contemplate an appeal in a case in which the only error alleged is that the court

incorrectly decided that the evidence was not sufficient to warrant a submission of the issue to the jury."

To the same effect is our holding in the case of *State* v. *Gray,* 160 Ark. 580, 255 S. W. 304, and also in the case of *State* v. *Massey,* 194 Ark. 439, 107 S. W. 2d 527.

The appeal by the State in the case at bar presents no question as to the sufficiency of the information, the admissibility of testimony, the competency of witnesses, the correctness of instructions, or any other question, the determination of which might furnish a precedent that would be "important to the correct and uniform administration of the criminal law." The sole issue presented by this appeal is whether the evidence presented below was sufficient to show guilt of the appellees. It is not probable that there will hereafter be another case in which the facts proved will be so similar to those in the case at bar as to make a decision by us on the question of the sufficiency of the evidence herein of value as a precedent. Therefore, under the rule heretofore announced by us, this appeal is not one which we should entertain.

The application presented by this appeal for a decision by us on this question is denied.

McLELLAN *v.* PLEDGER, COUNTY TREASURER.

4-7714 189 S. W. 2d 789

Opinion delivered October 22, 1945.

Fred A. Isgrig and *Jno. S. Gatewood,* for appellant.

Sam M. Levine, A. F. Triplett, John W. Moncrief and *W. B. Alexander,* for appellee.

McFaddin, J. The appellants, as taxpayers, filed suit in the Jefferson Chancery Court against A. C. Pledger, County Treasurer of Jefferson county; L. T. Sallee, County Clerk of Jefferson county; and Jack Segars, as Court Reporter of the Fourth Chancery District. We copy the complaint in full:

"The petitioner, and plaintiff, James McLellan, is a taxpayer and states that he is a resident of Jefferson county, Arkansas, and that he sues for himself as such taxpayer and for other taxpayers in said county similarly situated and to protect the inhabitants of said county from illegal exactions.

"The defendant, A. C. Pledger, is County Treasurer of said county, and the defendant, L. T. Sallee, is County Clerk of said county and that the defendant, Jack Segars, is court reporter for the Chancery Court of the Fourth Chancery District.

"Prior to March 4, 1943, when Act 139 of the General Assembly of Arkansas was approved, and by virtue of emergency clause attached thereto, became effective, the salary of the County Treasurer of Jefferson county

was $..... per annum; that said Act attempted to raise said salary to $3,600, and in addition thereto made provision for the payment to the said County Treasurer the sum of $1,950 to be used by him 'as his best judgment dictated.' Said Act provided that its provisions should apply only to such counties as were then shown by the last Federal census to have a population of not less than 65,000 and not more than 65,250 and the assessed valuation of real and personal property of which county according to the records in the Arkansas Corporation Commission of not less than $16,000,000 and not more than $16,200,000.

"Petitioners state that Jefferson county is the only county in the State of Arkansas with a population of not less than 65,000 and not more than 65,250 according to the last Federal census, and that it is the only county in the state with an assessed valuation of real and personal property of not less than $16,000,000 and not more than $16,200,000 and that at the time of the passage and approval of said Act by the Arkansas Legislature or General Assembly Jefferson county was the only county in the State having such population and the assessed value of whose property, real and personal, was not less than $16,000,000 and not more than $16,200,000. Petitioner therefore states that said act was local and special and in contravention and in violation of Amendment No. 14 to the Constitution of the State of Arkansas, and is therefore void.

II.

"Petitioner states that defendant, Jack Segars, as court reporter for the Chancery Court of the Fourth Chancery District, prior to approval of Act 65 of the Arkansas Legislature 1943 February 17, 1943, received a salary of $1,800 per annum, $1,200 of which salary was paid by Jefferson county and $600 was payable by other counties in said Chancery District. That under said Act 65 of the 1943 session of the Arkansas Legislature salary of said reporter was raised to $3,000 per annum, of which salary $2,100 is payable by the county of Jefferson. That said Act provided that it should apply only to Chancery

Districts whose largest county had a population of not less than 65,000 and not more than 65,250. That the Fourth Chancery District is the only Chancery District in the State having a county to which such limitations of population apply, and that said Act 65 is special act in contravention and violation of Amendment 14 to the Constitution of the State of Arkansas and void.

"That said two acts were and are void for reasons above alleged, petitioners state that all warrants drawn by the County Clerk of Jefferson county on the Treasury of Jefferson county, since the said void acts took effect for amounts in excess of salaries previously provided for were unauthorized and that the payment of said warrants by said treasurer were unauthorized and contrary to law, and that unless restrained, the county clerk will continue to issue his warrants to the defendants, A. C. Pledger and Jack Segars, for payment of such unlawful salaries and that said Treasurer will continue to pay said unlawful salaries out of funds in his hands belonging to the taxpayers of Jefferson county, and that petitioner and other taxpayers of Jefferson county will suffer irreparable loss and injury thereby; petitioners are without adequate remedy at law.

"Wherefore, premises considered, plaintiff and petitioners pray that the defendant, L. T. Sallee, County Clerk of Jefferson county, be restrained and enjoined from issuing any warrant or other authority to the Treasurer of Jefferson county for the payment of any sum of the defendant, A. C. Pledger, and to the defendant, Jack Segars, in excess of salaries due each of them before the passage of said Acts 139 and 65;

"That the defendant, A. C. Pledger as Treasurer, be restrained and enjoined from paying any voucher, warrant or other authorization issued to the defendants, A. C. Pledger and Jack Segars, for salaries attempted to be created by said two Acts;

"That a temporary restraining order be issued by this court to this effect and that upon final hearing said

injunction be made permanent, and for all other and proper relief."

To this complaint, the defendants filed separate demurrers, claiming:

(1) Chancery was without jurisdiction; and

(2) The facts alleged were insufficient to constitute a cause of action.

The Chancery Court sustained the demurrers, and the plaintiffs elected to stand on the complaint. From final judgment dismissing the complaint there is this appeal:

1. *Chancery Jurisdiction.* Appellees insist that the Chancery Court was without jurisdiction, as the plaintiffs had a remedy at law—*i. e.,* appeal from the County Court order allowing a claim or salary warrant under either of the acts. Appellees cite *Bowman* v. *Frith,* 73 Ark. 523, 84 S. W. 709; and *Sadler* v. *Craven,* 93 Ark. 11, 123 S. W. 365, to sustain their contention. But in *Bowman* v. *Frith* it was pointed out that a taxpayer could not proceed in equity to prevent a county from entering into a contract claimed to be improvident, but could proceed in equity to restrain the county from entering into a void contract. *Fones Hardware Co.* v. *Erb,* 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353, was there cited as authority for such equitable proceeding in the case of a void contract. In the case at bar it was alleged that the legislative acts were *void;* so the Fones case applies, rather than the Bowman case. *Sadler* v. *Craven, supra,* involved an attack on an allegedly improvident contract, and not one claimed to be void. In short, the cases cited on this point by appellees are without application.

Article XVI, § 13 of the Arkansas Constitution says: "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." Under this constitutional provision we held in *Farrell* v. *Oliver,* 146 Ark. 599, 266 S. W. 529, that a taxpayer could maintain a suit

in equity to restrain the State Auditor from drawing warrants on the State Treasury to pay illegal appropriations. Chief Justice McCulloch there said:

"There is eminent authority for holding, even in the absence of an express provision of the Constitution, such as that referred to above, that a remedy is afforded in equity to taxpayers to prevent misapplication of public funds on the theory that the taxpayers are the equitable owners of public funds and that their liability to replenish the funds exhausted by the misapplication entitle them to relief against such misapplication. *Fergus* v. *Russell,* 270 Ill. 20, 110 N. E. 130, Ann. Cas. 1916B, 1120."

This language was quoted with approval in our recent case of *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875. In *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S. W. 282, Mr. Justice Hart, in sustaining the chancery jurisdiction, said: "The taxpayers of a county are the persons from whom the public revenues are obtained and are directly interested in protecting the same. They are proper persons to maintain suits against public officers to prevent or remedy misapplication of the public funds, and in such cases chancery has the power to grant affirmative as well as injunctive relief."

In *Independence County, et al.,* v. *Thompson, et al.,* 207 Ark. 1031, 184 S. W. 2d 63, we sustained the chancery jurisdiction in a suit by a taxpayer to prevent the unlawful expenditure of public funds. That case is ruling here, and it therefore follows that the Chancery Court had jurisdiction in the case at bar.

II. *Constitutional Amendment No. 14.* Appellants insist that the acts here under attack are local acts, and therefore violative of Amendment No. 14 to our State Constitution. This Amendment No. 14 was adopted by the people at the 1926 general election, and reads:

"The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

Many cases involving this amendment have been before this court. We mention only a few: *Webb* v. *Adams,*

180 Ark. 713, 23 S. W. 2d 617; *Smalley* v. *Bushmiaer,* 181 Ark. 874 and 1147, 31 S. W. 2d 292 and 203; *Cannon* v. *May,* 183 Ark. 107, 35 S. W. 2d 70; *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. 2d 991; *State ex rel. Burrow* v. *Jolly,* 207 Ark. 515, 181 S. W. 2d 479. In considering the acts here under attack in the light of Amendment No. 14, we consider each enactment separately.

A. *Act No. 139 of 1943.* This act involves the salary of the Treasurer of Jefferson county, and attempts to be a general act by classifying a county by population and also assessed valuation. The complaint alleges—and the effect of the demurrer is to admit—that even with this classification, the act applies only to Jefferson county. In *Simpson* v. *Matthews, supra,* there was an attempt to disguise a local act by using population as a basis of classification. Mr. Chief Justice HART, in passing on this question, quoted the Supreme Court of Missouri:

" 'The section (act) in question may be a general law in form, but courts of justice cannot permit constitutional prohibitions to be evaded by dressing up special laws in the garb and guise of general statutes.' "

That language applies here, for the assessed valuation is only another guise, in addition to the population figure. The act is local. In *State ex rel. Burrow* v. *Jolly, supra,* there was under consideration an act of the legislature which applies to counties having a population of between 18,300 and 18,350. Randolph county alone was in that classification. The Circuit Court held that the act violated Amendment No. 14, and was therefore void. We affirmed the Circuit Court, saying:

"Restrictions have the inevitable and intended result of excluding other counties.

. . . . .

"If we should reverse the judgment in this case, effect would be to say that the General Assembly, in adopting Act 73 and similar measures, has found a permissible point of penetration into Amendment No. Fourteen.

"Our view is that the so-called 'classification' is but an attempt by technicality to evade what the courts have heretofore said the people meant when by amendment to the Constitution they struck at the evil flowing from local and special laws."

The quoted language applies here. Stripped of its disguises, Act 139 of 1943 is only a local act, and therefore violates Amendment No. 14 and is void.

B. *Act 65 of 1943.* This act relates to the salary of the Court Stenographer of the Fourth Chancery District. The act uses the same disguises as to population as does Act 139 of 1943. The complaint alleges, and the demurrer admits, that the act applies only to the Fourth Chancery District in which Jefferson county is situated. The majority of this court, however, sustains the validity of Act 65 of 1943 under the authority of *Sebastian Bridge District* v. *Lynch,* 200 Ark. 134, 138 S. W. 2d 81, which followed *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S. W. 2d 647; and *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844.

In *Waterman* v. *Hawkins,* Mr. Justice McCulloch said: "Statutes establishing or abolishing separate courts relate to the administration of justice, and are not either local or special in their operation. Though such an act relates to a court exercising jurisdiction over limited territory, it is general in its operation, and affects all citizens coming within the jurisdiction of the court."

In *Buzbee* v. *Hutton,* Mr. Special Justice Lamar Williamson quoted from the rehearing opinion of *Webb* v. *Adams,* 186 Ark. 134, 52 S. W. 2d 648, as follows: " 'In this connection we do not wish to be understood as impairing in the least the force of the decisions in *State* v. *Crawford,* 35 Ark. 237, which holds that a statute settling accounts between the State and certain parties is a general and not a special act; and in *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, holding that statutes establishing or abolishing separate courts relate to the administration of justice, and are not either local or special in

their operation. This is in recognition of that principle of State sovereignty under which the State, through its Legislature, may protect its own interest, and by virtue of it the Legislature may treat every subject of sovereignty as within a class by itself, and bills of that kind are usually held to be general and not local or special laws. There are cases where the State, by its Legislature, commits the discharge of its sovereign political functions to agencies selected by it for that purpose, and such acts have usually been held to be general acts.' "

In *Sebastian Bridge District* v. *Lynch* there was involved, as here, an act fixing the salary of a Chancery Court Stenographer. The act was assailed, as here, on the ground that it was local legislation; but this court, in repelling the attack, said:

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

"It is objected that, inasmuch as Act 181 of the Acts of 1937 relates only to the tenth chancery district, it is void as violative of Amendment No. 14 to the Constitution, prohibiting local legislation. We do not think so. In the case of *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S. W. 2d 647, it was held that an act making the office of the Pulaski chancery clerk appointive, instead of elective, was not unconstitutional as a local or special act, prohibited by Amendment No. 14 to the Constitution. This was there said to be so for the reason that statutes establishing or abolishing separate courts relate to the administration of justice, and are neither local nor special in their operation, and that the clerk is a vital part of the court organization. It is equally true that under modern conditions the court stenographer is also an essential officer in reporting the proceedings of the courts. 60 C. J., chapter, Stenographers, p. 21. Act 181 does not, therefore, offend against Amendment No. 14."

The case of *Sebastian Bridge District* v. *Lynch* is directly in point. In keeping with the holding in that case and the cases on which it is bottomed, the majority of this court has reached the conclusion (in which the writer does not agree) that the Act 65 of 1943 is valid.

It follows that Act 139 of 1943 is void, under the authority of *Burrow* v. *Jolly,* and that Act 65 of 1943 is valid, under the authority of *Sebastian Bridge District* v. *Lynch.* The decree of the Chancery Court is, therefore, affirmed as to Act 65 of 1943. As to Act 139 of 1943, the decree is reversed and the cause remanded, with directions to overrule the demurrer and proceed not inconsistently with this opinion. This being a chancery case, the court adjudges the costs of this court against the appellees.

MEYER *v.* SEISMOGRAPH SERVICE CORPORATION.

4-7715 189 S. W. 2d 797

Opinion delivered October 22, 1945.

Chas. C. Wine and *Alston & Woods,* for appellant.

Shaver, Stewart & Jones, for appellee.

HOLT, J. January 22, 1944, L. J. Meyer of El Dorado, Arkansas, sustained an accidental injury near Smackover, Arkansas, arising out of and in the course of his employment, which resulted in his instant death. He was 34 years of age at the time of his death and unmarried. Appellants, J. J. Meyer, Elizabeth Meyer and Jeanette Meyer, are the father, mother and sister respectively of the deceased, and filed claim for an award of compensation before the Workmen's Compensation Commission (Act 319 of 1939).

Upon a hearing, the Commission denied the claim on the ground that dependency had not been established, and this finding of the Commission was affirmed on appeal to the Union circuit court, second division. This appeal comes from the judgment of the circuit court.

The sole question to be determined here is whether appellants established dependency within the meaning of the Workmen's Compensation Law, *supra.* In other words, was dependency shown at the time of L. J. Meyer's injury and death?

In the recent case of *Crossett Lumber Company* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, we held that the question of dependency is one of fact, and that one is a dependent within the meaning of the act (Headnote 4) "if he relies for support in whole or in part upon the aid of another." The rule is firmly established that the findings of the Commission, which is the trier of the facts, will not be disturbed on appeal to the circuit court if supported by substantial testimony. Act 319 of 1939, § 25b;

Hughes v. *Tapley, Administratrix,* (1944) 206 Ark. 739, 177 S. W. 2d 429; *Baker* v. *Silaz* (1943), 205 Ark. 1069, 172 S. W. 2d 419; *Solid Steel Scissors Co.* v. *Kennedy* (1943), 205 Ark. 958, 171 S. W. 2d 929; *Birchett* v. *Tuf-Nut Garment Mfg. Co.* (1943), 205 Ark. 483, 169 S. W. 2d 574; *Hunter* v. *Summerville* (1943), 205 Ark. 463, 169 S. W. 2d 579; *J. L. Williams & Sons, Inc.,* v. *Smith* (1943), 205 Ark. 604, 170 S. W. 2d 82; *Lundell* v. *Walker* (1942), 204 Ark. 871, 165 S. W. 2d 600.

In one of our most recent cases, that of *Ozan Lumber Company* v. *Garner*, 208 Ark. 645, 187 S. W. 2d 181, we reaffirmed this rule, and there said: "In a long line of decisions since the passage of the act here in question, the rule has been clearly established that the findings of the Commission shall have the same binding force and effect as the verdict of a jury, or of a circuit court sitting as a jury, and when supported by substantial evidence, such findings will not be disturbed by the circuit court on appeal to that court or on appeal to this court."

It will be noted that the act provides (§ 15, subdivision (h)) that "all questions of dependency shall be determined as of the time of the injury." With these controlling rules of law before us, after a careful review of all the testimony, we are unable to say as a matter of law, that there was no substantial testimony presented on which the Commission based its findings. In other words, we cannot say that the undisputed proof shows dependency.

The evidence presented shows that J. J. Meyer (the father) owned a 32-acre tract of land near Walters, Oklahoma, on which he and his wife and daughter resided. This farm produced a small amount of revenue from the sale of milk, eggs and chickens. The family maintained a flock of about 70 chickens, two cows and a span of horses. Until July, 1943, J. J. Meyer was engaged in the carpenter's trade, earning from six to seven dollars per day. In July, 1943, his vision became so impaired that he was unable to continue work and an operation on his eyes became necessary. At the time of the son's death, J. J. Meyer testified: "I wasn't totally broke when he

died, I had something like six or seven hundred dollars,'' and in addition, he had two or three $25 War Bonds. On December 13, 1943, Mrs. Meyer received a $20 check from L. J. Meyer, and the daughter a $10 check, and in addition, he sent his father a check for $193 to defray the expense of the operation upon his eyes. The daughter had not cashed her check at the time of the hearing in this case. In 1940, L. J. Meyer opened a bank account and authorized his father and mother to check on it. Canceled checks were produced in payment of insurance premiums on the life of the deceased, drawn by the father. Shortly after the son's death, J. J. Meyer withdrew the balance in the son's bank account, in the amount of $1,584.31, which he deposited in his own account. The mother, Mrs. Meyer, received $2,000 from the son's insurance, which was deposited in the joint account of herself, the father, J. J. Meyer, and their daughter.

Besides L. J. Meyer, there were four other children, Carl Meyer, manager of the Long-Bell Lumber Company, Walters, Oklahoma; Cletus Meyer, employed by the Sinclair Refining Company; Mrs. Beatrice Brumley, a married daughter, and Alvin, who is in the armed forces.

J. J. Meyer testified: ''Q. What were you doing before July, 1943? A. I was following the carpenter's trade. Q. What did you usually earn, per month, in that trade, Mr. Meyer? A. Well, it is difficult to say; I earned good money, but I could not say exactly how much. Q. Approximately how much? A. While I worked, something like about $6.50 or $7.00 a day. Q. Did you work regularly? A. Pretty steadily. I had all the work I wanted. I didn't work steady, on account of my age; but I always had plenty of work. I worked when I could. I worked enough to keep us going and living anyway. . . . Q. Now, after your eyes went bad in July or August, 1943, and you were unable to work, how much per month, or approximately how much per month, did your deceased son contribute towards your support? A. I can figure it. I can tell you within a dollar what he contributed from September to the time that happened. Q. All right, tell us. A. $193 and $30 would be what? Q. $223. A. Yes, sir, that

is it, within 25 cents, I guess. Q. Then, he contributed approximately $223 for the five or six months? A. No, sir; it wasn't any six months. When did that happen? A. January 22, 1944. A. Well, he didn't contribute anything in January, because he hadn't got his pay. Q. Then to what time? A. We will say, from January 1st. Q. From the time your eyes went bad in July or August, 1943, until January 1, 1943, he had contributed approximately $223? A. Yes, sir." "Mr. Brumley: (interrupting). We have a different time limit (period). He is talking about from November. Claimant: (Witness) No, sir; from the 1st of September to January; and then, during that time; I want to tell you, during that time Mr. Brumley gave us $150; I believe he will substantiate that. Mr. Steward: (continuing) Q. Does that $223 include what he sent to all of you? A. Yes, sir; all of us. Q. In other words, he sent $223 to you and your wife? A. And the daughter. Q. And the invalid daughter; that is, his sister? A. Yes, sir."

It was stipulated that if Elizabeth and Jeanette Meyer were personally present to testify their testimony would be substantially the same as the testimony of the father, J. J. Meyer.

Appellants testified before the Commission that the deceased sent some money to them by wire, and in cash in letters to the mother, other than that sent by the three checks, *supra,* and that the father drew checks on the deceased's bank account besides the insurance checks. The son-in-law, Brumley, and C. T. Meyer, a brother of the deceased, testified that they read letters from the deceased to the family which indicated money was being sent. It was evident, however, that this testimony was not credited by the Commission, as indicated by the statement, contained in its findings of fact, which was to the effect that evidence tending to substantiate these contributions and claim of dependency was not offered, such as canceled checks, amount of cash, records of telegrams, and the letters as the best evidence. The evidence of appellants, since they were interested parties, cannot be held to be undisputed. In *Bridges* v. *Shapleigh Hard-*

ware Company, 186 Ark. 993, 57 S. W. 2d 405, we held: (Headnote 6) "The testimony of an interested party will not be regarded as undisputed in determining the legal sufficiency of his evidence, and in weighing his testimony, his conduct and the attendant circumstances may be considered." See, also, *Davis* v. *Oaks,* 187 Ark. 501, 60 S. W. 2d 922.

The Commission had the right, just as a jury would have had, to believe or disbelieve the testimony of any witness.

Giving to the evidence its strongest probative value in favor of appellees, as we must do, we cannot say that it is not substantial. The evidence was sufficient to warrant a finding by the Commission that the money sent to appellants by the deceased was intended as gifts only and that dependency within the meaning of the act was not shown.

Finding no error, the judgment is affirmed.

ROBINS, J., dissenting. There was no conflict whatever in the testimony in this case. The situation reflected by the record here is this: The deceased was an unmarried man, 34 years old, who had promised to support his parents, and had actually begun to make substantial contributions to them. His father was 67 years old and blind; and his mother was 66 years old. A banker who lived in the same locality, conversant with their financial condition, and who was entirely disinterested, stated that this couple did not have sufficient income to live on. His testimony was nowhere contradicted. The only specific testimony as to the amount of their income showed it to be $10 per month. Their poverty was accentuated by the fact that they were trying to care for a helpless daughter. This father and mother had a right under the laws of this state (§ 7603, Pope's Digest) and under the laws of God (Deuteronomy, chap. 5, 16th verse) to look to this son for support in their old age; and everything in the record indicates that this son, if he had not lost his life as a re-

sult of his employment with appellee, would have done his duty by his parents. If this does not present a picture of dependency I would not know how to draw one.

In the case of *Crossett Lumber Co.* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, it was held that "C. M. Johnson and his wife were dependents of Raymond E. Johnson." The evidence showed C. M. Johnson was working, and that his annual gross income from wages was $1,662.52, and that the deceased, Raymond E. Johnson, his 22-year-old son, who was living at home with his parents, made a contribution of $6 per week and other contributions to the expenses of the family, it not being shown what the board and room enjoyed by Raymond was worth.

In the case of *Arthur Murray Co., Inc., et al.,* v. *Mrs. Agnes M. Cole, ante,* p. 61, 189 S. W. 2d 614, we held that Mrs. Agnes Cole was a dependent of Bobby Cole, deceased. There the evidence showed that Bobby Cole was the sixteen-year-old son of Neal Cole and his wife, Agnes Cole; that Neal Cole was making $100 per month and Mrs. Cole was earning at least $3 a week.

It is urged that these cases are not controlling here, because in both of them the Workmen's Compensation Commission had made an award in which dependency was found to exist. Conceding for the sake of argument that the finding of the commission on a disputed issue of fact is binding on the court, this rule ought not to be extended to cases where, as in the case at bar, there is no dispute as to essential facts.

Since there is no conflict in the testimony, and the testimony shows that the father and mother were at least partially dependent on their son at the time of his death, I think the award of the commission and the judgment of the lower court affirming it ought to be reversed.

4-7720 189 S. W. 2d 797

Opinion delivered October 22, 1945.

Ben C. Henley and *J. Smith Henley,* for appellant.

MILLWEE, J. This is the second appeal of this case. In the former appeal, *Dowell* v. *Dowell,* 207 Ark. 578, 182 S. W. 2d 344, that part of the decree granting appellee a divorce was affirmed, but the cause was remanded for further proceedings in accordance with that opinion relative to a division of property under § 4393, Pope's Digest.

When the original suit was instituted, appellant was the owner in fee of 240 acres of land upon a part of which the "home place" of the parties was located. A finding of the chancery court that these, and other lands in which appellant had an interest, were not susceptible of division in kind was approved by this court on the former appeal. That part of the original order which directed sale of the lands *in solido* was held erroneous and a resale and distribution of the proceeds thereof according to law was directed. On remand of the cause, sale was held in compliance with this court's order and appellant became the purchaser of the 240-acre tract of land for $7,020.

In the decree from which is this appeal the chancellor held appellee entitled to one-third of the proceeds of the sale of these lands, less one-third of the sale costs, under the statute, and appellant has appealed from this part of the decree. Appellant is correct in his contention that the trial court erred in decreeing to appellee one-third of the proceeds of the sale, after deducting her proportionate one-third of the costs thereof. This court so held in *Allen* v. *Allen,* 126 Ark. 164, 189 S. W. 841. In that case, as here, the wife was granted a divorce and the trial court awarded her one-third of the sale proceeds under Kirby's Digest, § 2684, now Pope's Digest, § 4393. Chief Justice McCULLOCH, speaking for the court, said: "The statute, it will be noted, only gives the wife who is granted a divorce one-third of the real estate for life, and the effect of the court's decree was to give her an absolute interest in the property by turning over to her one-third of the gross amount of the proceeds. It is true the statute further provides that if the real estate cannot be divided without prejudice to the parties, the court shall order a sale thereof by a commissioner and that 'the proceeds

of every such sale after deducting the cost and expenses of the same, including the fee allowed said commissioner by said court for his services, shall be paid into said court and by the court divided among the parties in proportion to their respective rights in the premises.' Kirby's Digest, § 2684. The fact that the wife is only allowed an estate for life in the lands set apart to her precludes the idea that she is to have the total amount of the proceeds arising from the sale of that interest, but it is the duty of the court in cases of sale to ascertain the present value of the interest and order it to be paid over to her, or otherwise protect her in the enjoyment of her interests."

Since it was the duty of the trial court to determine the present value of appellee's interest, the question of the manner of ascertaining such value is presented. The interest which a wife takes in her husband's real estate upon obtaining a divorce under the statute (§ 4393, *supra*) has been discussed in many cases. In *Beene* v. *Beene,* 64 Ark. 518, 43 S. W. 968, the court described such interest as being "exactly or substantially the same as would be her dower interest in case of the death of her husband. . . ." In *Lance* v. *Mason,* 151 Ark. 114, 235 S. W. 394, the court cited *Crosser* v. *Crosser,* 121 Ark. 64, 180 S. W. 337, and described the interest acquired under the statute as being "analogous to the interest she would have taken in the estate of her husband had he died." In the case of *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6, the award to the wife under the statute was said to be "in the nature of dower." The effect of the statute, therefore, is to give the wife obtaining a divorce a vested life estate in one-third of the husband's lands.

The courts have employed a variety of methods in determining the present value of such life estate where the lands are sold because such interest cannot be allotted in kind. Some courts in this country have followed the English or common-law rule which considers an estate for life as equal in value to one-third of the fee. *McCommon* v. *Johnson,* 123 Pa. Superior 581, 187 A. 445. This method was rejected by this court in the case of *Allen* v. *Allen, supra.* As stated in 33 Am. Jur. 770, "At the pres-

ent time the usual practice as to cases in which it is necessary to ascertain the present value in gross of a life tenant's interest in the proceeds of property upon sale seems to be to estimate the value of a life estate with reference to the life tenant's expectancy of life as shown by recognized mortality tables."

It is appellant's contention that the present value of appellee's interest should be based upon the expected net profits which might accrue to the life tenant. Testimony was introduced tending to show that the 240-acre tract of land had an annual rental value of only $150 although the property sold for $7,020, has a good residence and barn located on a part of it, and much of it is good land subject to cultivation. When calculated upon this basis, the present value of appellee's life estate is fixed at $565. We do not approve this method of computation. The prevailing practice is to calculate a life tenant's share of the proceeds of the sale with reference to the interest which such proceeds would produce if invested, rather than with reference to the value of the use of the property. 30 Am. Jur. 771; 102 A. L. R. 993. We think the latter method is not only more definite and less speculative, but one that is likely to result in a more accurate and equitable adjustment of the life tenant's interest.

Some courts hold that the amount to be paid according to the annuity tables is subject to variation on account of the habits and unusual vigor or frailty of health of the life tenant. *McLaughlin* v. *McLaughlin,* 20 N. J. Eq. 190. We think, however, that an attempt to improve on the averages given in the tables by guessing at the probabilities of a single life in the determination of such value is too fanciful and conjectural. It was so held by the Michigan court in *Brown* v. *Bronson,* 35 Mich. 415.

We conclude, therefore, that the present value of appellee's interest should be computed by use of legally recognized life and annuity tables on the basis of appellee's age at the time of the sale, and on the basis of the proceeds realized by the sale after deducting her proportionate part of the costs of the sale. Since there is no

proof of the prevailing interest rate in the locality affected, the legal rate of six per centum should be used. Such present value may be readily ascertained by use of the tables found in the appendices to Volume II, Scribner on "Dower," Second Edition, and pages 10-15 of "Dower and Curtesy Tables" by Giauque and McClure. Use of these tables was approved by this court in the recent case of *Rockamore* v. *Pembroke,* 208 Ark. 995, 188 S. W. 2d 616. By use of tables F and G at pages 818-819 of the work by Scribner, and before deduction of appellee's share of the sale costs, a present value of $1,428.57 is established. This amount will be slightly reduced by the amount of appellee's proportionate share of the costs of sale which is not shown in the record.

An appeal is also prosecuted from that part of the decree which granted appellee judgment for the sum of $118.37 as her interest in a part of the cattle owned by appellant and his son jointly. These cattle were sold under an execution issued by the circuit court in satisfaction of a fine imposed upon appellant. This execution was issued, and the property sold, prior to the institution of the original suit for divorce. Appellant contends that, the cattle having been disposed of prior to the institution of the original suit, appellee was not entitled to claim an interest therein under § 4393, Pope's Digest, and we think this contention should be sustained.

It is true that in the former appeal it was held that the interest of the son in these cattle could not be charged with the satisfaction of the fine imposed upon appellant. The sale of the cattle by the sheriff under the execution was not shown to be an attempt by appellant to defraud appellee in the collection of her one-third interest in his personal property. This is not a case of a voluntary conveyance by a husband in anticipation of his wife's suit for divorce nor was any attempt made to set such sale aside.

In the early case of *Arnett* v. *Arnett, et al.,* 14 Ark. 57, this court held that, where the personal property of a husband was levied upon and taken into possession by the sheriff under an execution before the husband's death,

the widow's right of dower in said property was cut off, even though the execution sale was held after the death of the husband. The statute provides for restoration of "all property not disposed of at the commencement of the action. . . ." While the statute entitles appellee to a one-third interest in the personalty, exclusive of the debts of her husband, it does not apply to property which was disposed of and debts paid, prior to institution of the suit, in the absence of fraud. It follows that the trial court erred in holding the property sold on execution subject to the claim of appellee, and the decree will be modified to eliminate the item of $118.37.

The decree is accordingly reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion, the costs of this appeal to be shared equally by the parties.

HALL *v.* STATE.

4393 189 S. W. 2d 917

Opinion delivered October 22, 1945.

Rehearing denied November 19, 1945.

M. V. Moody, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

McHaney, J. Appellant was, on March 26, 1945, charged by information with the crime of murder in the first degree for the killing, on September 14, 1944, of his wife, Fayrene Clemmons Hall, "by some means, instruments and weapons to the prosecuting attorney unknown." Trial was begun on May 7, 1945, after a plea by appellant of not guilty and also a plea of not guilty by reason of insanity. Prior thereto, on March 29, 1945, on his petition filed on said date, he was committed to the State Hospital for Nervous Diseases for observation and investigation of his mental condition, and to make a written report thereof within 30 days. On May 9, after an exhaustive trial, he was by the jury found guilty of murder in the first degree as charged in the information and he was by the court, on May 14, sentenced to death by electrocution. Thereafter, in apt time, an appeal was prayed, and was granted by the Chief Justice to this court.

For a reversal of the judgment and sentence against him appellant makes four contentions: 1, that the con-

fessions made by him were not admissible against him; 2, that he is insane; 3, that the *corpus delicti* was not established; and 4, that Dr. Kolb, superintendent of the State Hospital for Nervous Diseases, was permitted to testify, over his objections, to a confession made by him when his sanity was being inquired into.

Before discussing these assignments of error, we think it may be helpful to recite the facts or some of them in the light most favorable to the State, most of which are undisputed. Appellant did not testify in the case, except in chambers and out of the presence and hearing of the jury, and then only in connection with the admissibility of his confession. A number of witnesses, including some physicians, testified in his behalf in relation to his sanity.

Fayrene Clemmons Hall, wife of appellant, disappeared Thursday night, September 14, 1944. She attended a dance at Rainbow Garden on that night with appellant and Mrs. Clyde Green. They all left the dance at midnight and appellant and his wife had a quarrel. She said she was going to leave him. They took Mrs. Green home in a car, and left her there. Fayrene has never been seen or heard from by any witness in the case since that night. Mrs. Green knew the kind of dress Fayrene had on that night—a red dress with peculiar buttons on it, of a kind she had never seen before, "with little chains with a thing on the end that looks like a nail and that fastens in that manner" (indicating). She identified the remains of a dress found at the scene of the alleged crime by its color and the buttons. A number of other witnesses, including her father and mother and a number of close friends, testified to her disappearance on or about the same time, none of whom have ever seen or heard from her since her disappearance.

Appellant was arrested in Little Rock on March 15, 1945, locked up, and, on the following night, was taken to the state police headquarters, where he was questioned. Without any threats, coercion, abuse on the part of those present, which included city police, state police, newspaper reporters and possibly others, and without any

promise of leniency or hope of reward being offered, he confessed to the killing of his wife. Detective Harold Judd of the city police testified as follows: "Q. What did he say, Mr. Judd, with reference to what happened to his wife? A. He started off by telling about being at the Rainbow Garden on a night in September, he didn't know what date it was, to a dance. After he left there, he took a girl home by the name of Katy Bryant. He went out the river road by Pulaski Station down close to the river, and that is where he killed her and left her body. Q. Did he say he killed her there? A. He did. Q. Did he say he left her body there? A. Yes, sir. Q. What did he say with reference to taking you where the body was? A. He said he would take us the next day. He didn't think he could find it that night because he never had been down there before. Q. Did he say how he killed her? A. He said he killed her with his hands. Q. Mr. Judd, later on did he take you where the remains were? A. He did. Q. Did he point out the place where he killed her and left the body? A. Where to stop the car, and he got out and walked down to where he left the body? Q. There's where it was found? A. Yes, sir. Q. These exhibits introduced in evidence, the shoes, hair, jawbone, dress and other bones were found there? A. Yes, sir. Q. Up to the time he told you where he killed her and left her, did you have any idea of where the remains were? A. We didn't until he took us and showed us."

The Katy Bryant referred to by Judd is the maiden name of Mrs. Clyde Green who testified as above noted.

Several other police officers, both city and state, and a reporter for the Gazette, who was present, testified to substantially the same facts with reference to appellant's confession, regarding its free and voluntary nature, the killing of his wife, the place of concealment of the body, his directing them to the scene of the crime next day, and the finding of the remains at or near the place pointed out by him—a human skull which had previously been found at the scene by Cecil Foster who lives nearby on the farm on which the crime was committed and who brought it to the officers when he saw them there search-

ing for something and who pointed out the hole in the ground where he found it; also a human jawbone, a pair of ladies shoes, wisps of human hair, pieces of a red dress with buttons of the kind described by the witness, Mrs. Clyde Green, and some other human bones.

The jawbone found had a tooth overlapping another and appellant stated to Agnes Watson, a reporter for the Arkansas Democrat, and others, that he knew the jawbone was that of his wife because of the overlapping tooth. Several witnesses, including the father and mother of deceased, identified the jawbone in like manner, also the dress and shoes as being hers and the hair as being the color of hers.

Considering now the assignments of error argued for a reversal, it is first said that the confession was inadmissible under the authority of *McNabb* v. *United States,* 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819. That case was distinguished in *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77, and what was there said need not be repeated here. Counsel for appellant conceded in oral argument that, if we adhere to the case of *State* v. *Browning,* the confession here was properly admitted in evidence, and we do adhere to and expressly reaffirm the holding there made.

Secondly, it is argued that appellant is insane and that he should have been acquitted by reason of his insanity. There was ample testimony to support the jury's finding that he was and is sane. The court submitted this question to the jury under correct and proper instructions, first that he was presumed to be sane and the burden was upon him to prove by a preponderance of the evidence that, at the móment the act was committed, he was insane as defined in another instruction. This is a correct declaration of the law as we have held in many cases. *Kelly* v. *State,* 154 Ark. 246, 242 S. W. 572, and cases there cited. In another instruction the court told the jury that the defense of insanity "cannot avail unless it appears from a preponderance of the evidence that at the time of the act the defendant was under such a defect of reason from disease of the mind: First, as not to know

the nature and quality of the act he was doing; or second, if he knew it, that he was doing wrong; or third, if he knew the nature and quality of the act and knew it was wrong he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done and unable, because of the disease to resist the doing of the wrong act, which was the result solely of his mental disease." This instruction is a copy of one approved by this court in *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186, and found on p. 553, where it was said by Judge WOOD for the court: "These tests are in accord with the great weight of modern authority."

Dr. Kolb testified positively that he was sane, knew right from wrong, and can refrain from doing wrong if he so desires. His testimony and report to the court reveal an exhaustive and painstaking examination of appellant, which was made at his request through his counsel and under the order of the court by authority of Initiated Act No. 3, found in the Acts of 1937, p. 1384. A number of physicians and lay witnesses testified in his behalf which tended to show that he had a psychopathic personality or that there was insanity in his family and that he acted strangely at times, but after all it was a question for the jury, and by its verdict he was found to be sane, and being supported by substantial evidence it must be permitted to stand.

Next it is argued that the state failed to prove the *corpus delicti,* which in this case involves, first, proof of the death of Fayrene Clemmons Hall; and second, that her death was caused by the criminal agency of some one. In *Edmonds* v. *State,* 34 Ark. 720, on p. 744, Chief Justice ENGLISH quoted from Burill on Circumstantial Evidence with approval the following: "In cases of alleged homicide, the proof of a *corpus delicti* involves the following points or general facts: First, the fact of death, particularly as shown by the discovery of the body, or its remains; secondly, the identification of such body, or remains, as those of the person charged to have been killed; and, thirdly, the criminal agency of another, as the cause of death."

The fact of Fayrene's death and the identification of the remains found as hers appear to us to have been abundantly established. In addition to instructions on circumstantial evidence, the court gave, at appellant's request, instruction No. 4, as follows: "The court charges you that the mere fact that the skeleton and remains of a dead woman were found raises no presumption that such woman was murdered by the defendant, nor does it raise any presumption that she was murdered at all by anyone. Before you can convict the defendant, you must be convinced beyond a reasonable doubt, first, that the remains found and testified about are the remains of Fayrene Clemmons Hall; second, that she was in fact murdered; third, that it was done by defendant. If you are not convinced beyond a reasonable doubt that all three of these elements exist, it will be your duty to return a verdict of 'not guilty.' " It is undisputed that Fayrene disappeared on the night of September 14, 1944, after a quarrel with her husband and has not been seen or heard from since; that she was wearing a red dress with unusual buttons; that she took nothing with her when she left except what she was wearing; that she was young and in good health; that appellant told her neighbors, close friends and parents different and conflicting stories regarding her disappearance; that he made no report to the police regarding her disappearance, but such a report was made by her half-sister and her mother; that, after appellant was arrested, he confessed and that he had killed her with his hands on the bank of the Arkansas River and led the officers and reporters to the scene of the crime where all the remains above detailed were found and identified as the remains of Fayrene Clemmons Hall. The third element of the *corpus delicti* is, did appellant kill his wife, Fayrene? He answers that question himself by his confession, which, not being made in open court, is what is called an extrajudicial confession.

Our statute, § 4018 of Pope's Digest, provides: "A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed." In *Bell and Swain* v. *State,* 177 Ark. 1034, 9 S. W. 2d 238, the late

Chief Justice HART, speaking for the court, said: "This court has uniformly held that, under our statute, to warrant a conviction from an extrajudicial confession of the accused, there must be independent evidence to establish that the crime has been actually perpetrated by some one." Citing cases. It was there held that, outside of the confessions of Bell and Swain, which were not made in open court, there was no evidence sufficient to show that McCollum and Thomas were drowned by anyone.

Here, however, the evidence is not only ample, but conclusive to show that Fayrene Clemmons Hall was murdered by some one, which meets the requirements of said statute regarding extrajudicial confessions. Therefore, the confession, accompanied as it is by other proof that such offense was committed, satisfied the rule by which the *corpus delicti* may be established, and justified the jury's verdict. As said in *Edmonds* v. *State, supra,* "there was some proof of the *corpus delicti,* and its weight and sufficiency were properly left to the jury."

It is finally argued that it was error to permit Dr. Kolb to testify, over his objections, that appellant confessed to him that he killed his wife. As we understand the contention, it is not based on the existence of the relation of physician and patient, and within the provisions of § 5159 of Pope's Digest, but that he was sent to the state hospital to be examined and his mental condition determined under the provisions of §§ 11 and 12 of said Initiated Act 3, and not to obtain a confession or other statement against his interest from him, and then to so testify in court. Said act provides in § 11 that the judge shall in certain cases order the superintendent to direct some competent physician employed by the state hospital "to conduct observations and investigations of the mental condition of the defendant, and to prepare a written report thereof." This was done by Dr. Kolb. By § 12, the physician who prepared the report shall be called to testify by either party and may be examined by either party. The act does not prohibit the use of a confession, if one is obtained by the physician, and we see no valid objection to its use in this case, for in the

first place, it is merely cumulative to his confession to many others; and in the second place, the doctor asked him if he killed his wife, which he admitted, for the purpose of asking him the further question, whether he had any remorse of conscience for having killed her. These and many other questions and answers, stenographic report of which was made at the time, were asked for the purpose of determining his sanity.

In *Burris* v. *State,* 168 Ark. 1145, 273 S. W. 19, two physicians who had practiced for Burris and his family were permitted to testify as to his sanity for the State on his trial on a charge of murder. Their opinions were based on mere observation of Burris during their attendance as family physician and by observing him on the witness stand, but not from information received for the purpose of treating him, and this court held their testimony competent and not privileged as being within said § 5159 of the Digest. This is the general rule. 70 C. J., p. 440; 28 R. C. L., p. 539. While it is true under the provisions of said Act 3, the primary object is to determine the sanity of the person so committed and a report to the court of the findings of the physician in this respect, (and that is all the report showed in this case) still, it is further provided in § 12 that the physician making the report may be called to testify by the court or either party and examined in open court, and the act does not limit the scope of the inquiry so as to exclude voluntary statements made by the person examined to the physician.

We conclude, therefore, that no error was committed on the assignments argued, or any others in the record, and that appellant has received the benefit of all the provisions of law. The trial court fully protected all his rights by instructions on presumption of innocence, burden of proof, reasonable doubt, insanity and circumstantial evidence. He was found guilty by a jury of his peers and the form of the verdict required the court to sentence him to death for the heinous crime he committed, and the judgment must be and is affirmed.

COOK, COMMISSIONER OF REVENUES, *v.* GLAZER'S WHOLESALE DRUG COMPANY OF ARKANSAS.

4-7761 189 S. W. 2d 897

COOK, COMMISSIONER OF REVENUES, *v.* LAWRENCE C. AUTEN, JUDGE; No. 4-7746.
(Consolidated)

OTHO A. COOK, COMMISSIONER OF REVENUES, *v.* BOWLES, MARKS, MEADOWS AND PRICE, Nos. 4-7784, 4-7785, 4-7786 and 4-7787.
Opinion delivered October 22, 1945.

Rehearing denied November 19, 1945.

Herrn Northcutt, in Glazer's cases, for appellant.

R. S. Wilson and *O. T. Ward,* in Bowles cases, for appellant.

E. B. Dillon, Arthur L. Adams and *Owens, Ehrman & McHaney,* for Glazer's-appellee.

U. A. Gentry, Harrell Harper, Harvey G. Combs, Andrew Henry and *D. K. Hawthorne,* for appellees Bowles, *et al.*

Griffin Smith, Chief Justice. The cases involve a construction of Act 108 of 1935, and question power of the Commissioner of Revenues to withhold or cancel liquor permits.

Glazer's Wholesale Drug Company of Arkansas procured a domestic charter December 20, 1944. Its right to conduct a wholesale liquor business was cancelled April 27, 1945. On appeal to Chancery Court the order of revocation was reversed.

Irrespective of the cancellation order, Glazer's permit expired by operation of law June 30th. The Company, having been informed that renewal would be denied, sought relief both at law and in equity. It procured from Pulaski Circuit Court, Second Division, a writ of certiorari; and that Court, upon hearing, directed that the permit be issued. The Commissioner has appealed. The Commissioner also appealed from the Chancery order reversing cancellation. In the meantime, Glazer's petitioned Pulaski Chancery Court for leave to appeal from the Commissioner's action in refusing to renew the permit. It also sought to enjoin the Commissioner from interfering with its business. The prayer was denied on the ground that at the time of hearing

the Circuit Court's jurisdiction had been invoked through the petition for certiorari.

The Commissioner has also appealed from four Circuit Court orders directing that permits be issued to retail liquor dealers whose rights expired June 30th. The cases were consolidated and are docketed as No. 7784, *Commissioner* v. *James Bowles*; No. 7785, *Commissioner* v. *A. M. Marks,* doing business as G & M Liquor Company; No. 7786, *Commissioner* v. *R. S. Meadows*; and No. 7787, *Commissioner* v. *E. A. Price.*

Numerous motions, petitions, and procedural transactions, both in Circuit and Chancery Court, are incidental to the final issues, which are:

(1) If a wholesale liquor dealer has been granted a permit to do business in Arkansas, and the Commissioner elects to revoke for cause, what course must the official pursue? (2) When the Commissioner's act of cancellation is tested in the Court having jurisdiction, what proof is required to sustain the Commissioner, and (a) must he state what the reasons are? (3) Do wholesalers and retailers occupy different positions regarding renewal of permits? (4) Does one holding a permit (either wholesale or retail), against whom no accusation of illegal conduct has been made, and who applies for renewal, occupy a preferential status in derogation of one who applies, but who has not formerly held such permit? (a) Stated differently, does the Commissioner's original act in granting a permit and good conduct of the permittee vest any property rights or superior equities that a court will enforce? (5) May the Commissioner's action in refusing to renew either a wholesale or retail permit be controlled by the judicial process?

First.—Section 13, art. III, of Act 108 of 1935 provides that permits *may* be revoked for cause. It then enumerates conditions under which they *must* be. Section 14, Article 3, of the Act, authorizes the Chancery Court for Pulaski County to "review" action of the Commissioner in case of revocation. The second sentence of the section tells how "an appeal" may be taken. Context of the

measure as a whole clearly discloses a legislative intent to distinguish between cancellation of a permit, and first issuance, or reissuance.

Before a permit can be revoked a reasonable cause must exist. This, seemingly, was thought to be appropriate because one who engages in the liquor business, either as a wholesaler or a retailer, has the State's assurance (subject to the General Assembly's power to change the law) that the authority to operate shall be coextensive with the permit; hence, the business will not be disturbed unless some conduct of the permit-holder absolves the State. We think the legislature's attempt to vest the Chancery Court with jurisdiction was not in excess of its power. *Blum* v. *Ford, Commissioner of* Revenues, 194 Ark. 393, 107 S. W. 2d 340. While the petition in that case asked for injunctive relief and the question of jurisdiction was not expressly raised, this Court apparently treated the issue as one properly triable by the Court wherein it originated. In the opinion there is the statement that "Act 108 . . . provided that the dealer may appeal to the Chancery Court, and that is what the appellant did in this case." It was then stated what the Court's duty was—that is, "to hear the evidence."

The "cause" for which a permit may be revoked at the Commissioner's discretion, as distinguished from the mandatory grounds set out in the Act, must be substantial and have some reasonable relation to the business and the public. This, of course, would exclude arbitrary, capricious, personal, or punitive conduct by the Commissioner. The privileges conditionally extended with the permit cannot be terminated nor abridged at the whim of an administrator who might conclude that his legal sovereignty was such that a merely fanciful cause would suffice. We do not, in the instant case, decide whether the Commissioner erred in issuing his order of April 27th. This is so because his refusal to renew the permit when it expired June 30th terminated the Company's rights. The issue raised in respect of attempted cancellation is not one for which the alleged wrong could

be compensated in damages. Under the Chancery Court decree Glazer's continued to operate during the full permit period; and, as a matter of fact, it is still operating under the Circuit Court's mandate. The questions might not be moot if we should adopt the Commissioner's assigned reason for not renewing the permit—that one whose rights have been cancelled for cause is not eligible to reconsideration for a period of two years. In that event we would determine whether the Chancery Court was correct in finding that no cause existed. Since it was not necessary for the Commissioner to assign a reason for refusing to renew, and since existing rights of Glazer's are referable to the Commissioner's refusal to renew as of July 1, it follows that the April 27th transaction has ceased to be important.

Second.—Chancery Court does not have jurisdiction to review the Commissioner's action in refusing to issue a permit in the first instance, or in declining to renew an existing permit. In a proper case relief would be available in Circuit Court through writ of certiorari directed to the Commissioner, commanding him to send up any existing records relating to the matters complained of. But inasmuch as reasons within the official knowledge of a Commissioner may exist, and there is no requirement that these reasons be assigned, certiorari would ordinarily be futile. Proof necessary to sustain the official act would be that the application or petition, or request for issuance or reissuance, had been brought to the Commissioner's attention, and that he had acted on it.

As to the retail trade a very broad discretion rests with the Commissioner. He is not required to write a brief in support of the action taken. The law presumes his understanding of the Alcoholic Control Act, its purpose, and its limitations. Section 1, Article III, declares it to be the State's policy that ". . . the number of permits . . . 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 decreas-

ing 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; . . . to determine the location thereof, and the person or persons to whom they shall be issued."

Certainly this language does not indicate a purpose to subject the Commissioner to a judicial inquest at the instance of every person who is denied a permit, or whose permit was not renewed. The Commissioner is given the discretion to determine "the person or persons" who may dispense liquor, and he must have due regard—not primarily for the desire of a particular individual or a designated corporation, but that public convenience and advantage will be promoted. The only rights given an applicant or petitioner are stated in the Act. He may apply to the Commissioner and he may insist that his request be considered, acted upon, and that he be notified of the result. When that is done mandatory provisions of the law have been complied with, and beyond that realm judicial coercion does not lie.

Third.—There is nothing in the Act showing a purpose to accord different treatment to the application of a wholesaler, and the petition of a retailer.[1] It is true that the retailer, in a particular community, may come into contact with the public to a greater extent than does a wholesaler; but as to each the Commissioner is given the power to issue or withhold, and when that power is exercised he is not, in the absence of fraud, required to satisfy the applicant, or a Court, that he has done what the law presumes.

Fourth.—It is urged that when a permit, either retail or wholesale, has once been issued, and the permittee enters into business, some peculiar equity or right the Court should enforce has thereby been created—that as between one who has not heretofore been favored, and

[1] The terms "application" and "petition" are used interchangeably, and such use has no legal significance.

one who has in fact been permitted to sell, the latter stands upon a preferential basis. Support for this argument is said to be found in Article III, § 9 (f), where the Commissioner is authorized to dispense with certain formalities when the question is whether a permit shall be renewed. We think this language merely broadens the already comprehensive discretion of the Commissioner, and allows him to rely upon facts then on file, supplemented by such data as he may properly require. There can be little doubt that the Legislature intended to invest the Commissioner with plenary powers in all matters at issue in the reviews here considered. This statement appears in 30 American Jurisprudence, p. 322, § 123: "The refusal to renew a liquor license violates no one's vested or inalienable rights. The same discretion as that vested in the licensing authority with respect to the original granting of a liquor license exists with reference to renewals." The legislation (§ 8) was to be known as "The Arkansas Alcoholic Control Act." To give emphasis, the words were printed in capitals. An industry formerly outlawed was being legalized on condition, and almost the first thought was one of control—or, as the printed Act discloses, CONTROL!

Fifth.—As we have formerly stated, Act 108 does not provide for an appeal from action of the Commissioner in denying an application. The sale of intoxicating liquors is not a matter of right protected by constitutional guarantees. It is only a privilege, to be exercised under the police power. The General Assembly, in legalizing the traffic, can impose such restrictions as it deems appropriate. It may—and this was done by Act 108—authorize a designated individual to administer all purely executive matters pertaining to the business, and it may tell such administrator that it is his duty, in order to promote public convenience and advantage, to restrict the issuance of permits.

When the Commissioner, whose good faith is presumed, has examined and acted upon an application, the unsuccessful applicant has been accorded the process provided by law. The Commissioner's conclusions may

not be those that a judge would have reached; his silence in explaining the mental processes by or through which the result was arrived at may produce in the losing party a feeling that he has been discriminated against, that the Commissioner is unreasonable, and that the official does not appreciate the so-called public need. Even so, the business he is engaged in, or the traffic he proposes to conduct, is not a matter of common right; hence, being a mere privilege, the Legislature may prescribe the conditions that must prevail.

As applied to the transactions in question, certiorari is an appropriate remedy to require the Commissioner to produce the records pertaining to a designated transaction. Such writ should be issued by the Circuit Court if allegations bring the petitioner within the rules herein approved. In other words, the Commissioner may be compelled to perform his official duties; but his duties, in their relation to the subject matter of these reviews, are those prescribed by Act 108.[2]

There is nothing in the record of any of the cases disclosing fraudulent conduct upon the part of the Commissioner; nor are there mutual mistakes, such as Chancery might correct if property rights were involved. On the contrary, the issue is merely this: Glazer's Company, as a wholesaler, insists that because a former Commissioner authorized it to do business, and because it has valuable investments in the State, its permit should, as a matter of course, be renewed, a stipulation being that it has not violated the law. But the Commissioner has decided otherwise, and the General Assembly gave him that power. To take these cases, and review the administrative action in the multitude of cases certain to arise if we should permit the judiciary to be substituted for the person designated by Act 108, would have the effect of substituting the Court's discretion for that of the Commissioner.

[2] We do not consider the effect of Act 352 of 1939. Those seeking privileges have not brought themselves within its terms by any affirmative showing. Nor do we decide whether the Act was validly passed. See *Matthews* v. *Bailey, Governor*, 198 Ark. 830, 131 S. W. 2d 425.

In Cause No. 7786—*Cook* v. *Meadows*—the facts are somewhat different from those in the other retail controversies. In response to Meadows' application a certificate of renewal was written and designated as No. 395. It was retained in the Commissioner's files. Wholesalers who asked at the Department of Revenues whether Meadows had procured a 1945-46 license were assured that he had. The Commissioner subsequently made a personal inspection and, for cause he regarded as satisfactory, refused to deliver the certificate, and notified Meadows that his permit would not be renewed. The writer of this opinion thinks there was a valid issuance and that the Commissioner's recourse was a proceeding to cancel. A majority of the Court, however, takes the view that there had not been an issuance within the meaning of Act 108. Attention is directed to § 20, Art. 3, where it is provided that "Before commencing or doing any business for the time for which a permit has been issued, said permit shall be enclosed in a suitable wood or metal frame having a clear glass space, [etc.] . . ." The intent appears to be that the permit holder shall have physical possession of the certificate and display it as the statute provides.

We conclude that the Circuit Court was in error in all four of the retail cases; that Circuit Court erred in Glazer's cases; that questions raised by the Commissioner and by Glazer's in the Chancery cases are moot, and that the Commissioner should be, and he hereby is, relieved from the compulsory processes of both Courts in all of the proceedings.

Smith, J., dissenting. The practical effect of the majority opinion is to hold that a permittee, whose permit is not renewed, has a remedy, and that that remedy is by certiorari; but the remedy is unavailing when the Commissioner has refused to renew the permit. "The word of promise is kept to the ears of the permittees, but is broken to their hopes."

The majority have not seen proper to recite the facts in any of the cases save one only, and not fully so

in that case. We are, therefore, left in doubt as to the extent of the Commissioner's discretion. The majority do not say that this discretion is absolute and arbitrary and without limitation, and Act 108 has not made it so, yet that is the effect of the majority opinion.

This act confers wide discretion upon the Commissioner. He is permitted in certain cases to revoke a permit, and is required to do so in other cases. He may grant or refuse to grant permits, and may refuse to renew permits. Section 1 of art. III of Act 108 confers upon the Commissioner the power to determine whether public convenience and advantage will be promoted by increasing or decreasing the number of permits outstanding, and this power authorizes him to choose between the holders of outstanding permits. He has other powers. But when and under what conditions may they be exercised? This question the majority do not decide.

In the case of *Hardin, Commissioner of Revenues* v. *Spiers,* 202 Ark. 804, 152 S. W. 2d 1010, we had occasion to consider certain rules and regulations of the Commissioner of Revenues in regard to transporting liquors into, through and out of the state, promulgated under the authority of Acts 108 and 109 of the Acts of 1935, which are related acts. We said that the Commissioner had the power to make and promulgate these rules and regulations, but that ". . . this power must be exercised in a reasonable—and not in an arbitrary—manner." So, with all of the other powers conferred upon the Commissioner by this regulatory legislation.

Unquestionably, the Commissioner has been given very great powers under Act 108. He—and he, alone—may grant or refuse permits to wholesale dealers or to retail dealers, without which neither could legally engage in the sale of intoxicating liquors. But is this power absolute and is its exercise beyond review? If so, he has been given power dangerous to the public weal for any person to possess. It requires no great power of imagination to visualize the possibilities of the possession of that power; and no reflection on the Commissioner is intended by saying so.

It is proper, however, to consider these possibilities in arriving at the legislative intent. For instance, would any one say that the Commissioner may refuse to issue a permit to any one and thereby render the sale of liquor unlawful throughout the state? That power might have been given; but it is certain that it was not given him.

It is true, as the majority say, that the privilege of engaging in the liquor traffic is not a natural right, but is one which may be given or withheld. But that question has been settled by Act 108, which declares that permits may be issued under the conditions there stated. The sale of liquor may, therefore, become and be a legal business and be entitled to the protection of the law as such.

It was said in the case of *Hardin, Commissioner of Revenues* v. *Cassinelli,* 204 Ark. 1016, 1022, 166 S. W. 2d 258, that "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. (Citing cases)."

It will be observed, however, that the Commissioner must exercise discretion; but, when exercised, his discretion will not be controlled by the courts; but his power is not absolute and beyond review.

No hearings were had when these permits were refused, and the law does not require that there should have been. The Commissioner may act upon information obtained as a result of personal investigation, without hearing testimony of any kind. But, whatever the reason may be for refusing to issue or renew a permit, he should state that reason for his action upon the application, to the end that it may be determined whether he has acted arbitrarily or capriciously.

Here, the applicants were advised only that their permits would not be renewed, and the only reason as-

signed by the Commissioner for the refusal was that he had acted pursuant to the authority conferred upon him by Act 108. Apparently, under the majority opinion, this was sufficient, as no other reason is recited in any of these cases. If this is sufficient, it must necessarily follow that the Commissioner's power is absolute and unlimited.

If the Commissioner accords no hearing, and refuses the permit without a hearing, and does not give the reason for his action, how may it be reviewed? The majority say in the cases here involved, where no hearing was had, that "it was not necessary for the Commissioner to assign a reason for refusing to renew." Yet, they also say: "In a proper case relief would be available in circuit court through a writ of certiorari directed to the Commissioner, commanding him to send up any existing records relating to the matters complained of." It is not explained how, in any case, as in the cases here under review, where no hearing was had or record made or reason assigned, how the Commissioner might be required to "send up" non-existent records.

The majority also say: "Proof necessary to sustain the official act (of the refusing the renewal of a permit) would be that the application or petition or request for issuance or reissuance had been brought to the Commissioner's attention, and that he had acted upon it." If this, and nothing else, is all that is required, then, indeed, is the Commissioner's power absolute and beyond review.

In none of the cases here involved, save one, and in that one only partly so, have the majority recited the testimony offered in the court below in the trials from which are these appeals; and we shall not attempt to differentiate them. It would be futile to do so, as the majority hold that none of the permits should be renewed, which the court below had ordered done.

Defining the rights of an applicant to have a permit issued or renewed the majority say: "He may apply to the Commissioner, and he may insist that his request be considered and acted upon, and that he be notified of the

result. When this has been done, mandatory provisions of the law have been complied with, and beyond that realm judicial coercion does not lie."

If these are all the rights the applicant has, then he has no rights which the Commissioner must respect. The Commissioner need only open the door to his office and say to the applicant, who is expectantly waiting on the outside, that his application has been considered and refused, and there would be no remedy by certiorari or otherwise.

It was once the law of this state that the county court of any county had the discretion to grant or entirely refuse licenses to sell liquor at all in the county, or in any township or ward of the county, although the township, ward or county may have voted at the preceding election in favor of issuing licenses. It was so held in the case of *Levy, Ex Parte,* 43 Ark. 42, 51 Am. Rep. 550. But it was there also held that, if the court granted license to some, it could not arbitrarily refuse other applicants who were of good moral character and had complied with the other requirements of the statute in that behalf, and, further, that when some were refused the court should give its reason for the refusal, so that the appellate court might see whether a sound legal discretion had been exercised. In other words, the county court was given a power which must have been exercised with discretion. So, also, here the Revenue Commissioner has been given powers which may not be exercised arbitrarily, but which must be exercised with discretion.

In the chapter on Intoxicating Liquors in 15 R. C. L., § 63, p. 306, under the sub-title of "General Power and Discretion of Officers or Boards," in granting or refusing to grant or renew liquor permits, it is said: "But power of the officers in this respect is not unlimited; their rejection of an application must be made, not arbitrarily or capriciously, but in the exercise of a sound discretion. The term 'discretion' as used in this connection has a legal meaning with safe limitations. The intendment of the law which grants it, whether expressly or

by implication, is that the discretionary decision shall be the outcome of examination and consideration; in other words, that it shall constitute a discharge of official duty and not a mere expression of personal will. An arbitrary refusal of a license, without an examination of relevant facts, and expressing nothing but the mood of the officer, would not be, in contemplation of law, an exercise of the power granted."

Here, the Commissioner has exercised no discretion which may be reviewed. He has only exercised what he conceives to be his powers under Act 108 to refuse permits, and this the majority apparently approved.

I, therefore, dissent; and am authorized to say that Justices McHaney and McFaddin concur in the views here expressed.

HORNE *v.* HOWE LUMBER COMPANY.

4-7571 190 S. W. 2d 7

Opinion delivered October 29, 1945.

Robert A. Zebold and *E. W. Brockman,* for appellant.

Rowell, Rowell & Dickey, for interveners.

Daggett & Daggett, for appellee.

SMITH, J. Appellant commenced this suit by filing a petition for an order restraining appellee, Howe Lumber Company, hereinafter referred to as Lumber Company, from cutting the timber on northwest quarter, northwest quarter; southeast quarter, southwest quarter, and southwest quarter, northwest quarter, section 14, township 7 south, range 5 west, Jefferson county, Arkansas. In response to a motion that the petition be made more specific, it was alleged that appellant had title to the timber on these lands under a timber deed executed to him by Mrs. Dora Dean, who had obtained a deed from the State Land Commissioner for these lands, based upon a forfeiture and sale thereof to the State for the non-

payment of the general taxes due thereon for the years 1925 and 1927. In the final decree, from which is this appeal, this tax sale was adjudged to be void for the reason that excessive costs had been charged, and that finding appears to be fully sustained.

Appellant says, however, that appellee should not be permitted to question the validity of the Land Commissioner's deed, for the reason that appellee claims no interest in the lands which the deed describes, and he quotes the provisions of § 13874, Pope's Digest, to sustain that contention. This section provides that, "But no person shall be permitted to question the title acquired by a deed of the clerk of the county court, without first showing that he, or the person under whom he claims title to the property, had title thereto at the time of the sale, or that title was obtained from the United States or this State after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid."

It was held, however, in the case of *St. Louis Refrigerator Co.* v. *Thornton,* 74 Ark. 383, 86 S. W. 852, that this statute was limited in its operation to deeds made by the county clerk, and does not embrace deeds made by the Commissioner of State Lands to lands forfeited for taxes, and that the legislature had not seen fit to protect the deeds of the Land Commissioner in the manner it had protected the deeds of the county clerks.

This ruling did not dispose of the litigation, however, for the reason that the lumber company filed an answer and cross-complaint in which it was alleged that the timber in question had not been cut from lands in section 14, township 7 south, range 5 west, but had, in fact, been cut from accretions to fractional section 30, township 7 south, range 4 west. This fractional section 30 is also referred to by the witnesses as Island No. 30 and as Billings Island.

It very clearly appears that the timber was cut from accreted land, and the controlling question in the case is the one of fact, to what land did the accretions form? The

court found the fact to be "that the land in controversy is not, as a matter of fact, section 14, township 7 south, range 5 west, north of the Arkansas River in Jefferson county, Arkansas, but, to the contrary, is accretions to section 30, township 7 south, range 4 west, Lincoln county, Arkansas; section 14, township 7 south, range 5 west, Jefferson county, Arkansas, having been washed away and destroyed by a gradual change in the Arkansas River sometime subsequent to the year 1825."

The date 1825 is the time when the government survey was made and the land was divided into sections by that survey. The map or plat of the original survey of 1825 shows Billings Island to be a small carrot-shaped tract lying in the Arkansas River, and surveyed as fractional section 30, township 7 south, range 4 west, 49.30 acres, plus 1.62 acres on its western tip in section 25, township 7 south, range 5 west, and .68 acres in section 31, township 7 south, range 4 west. It shows the main channel of the river north of the island, with the southern chute of the river nearly blocked by a bar or tow-head. This is especially important as the next map of the survey of this area, made in 1886, shows the chute to have been completely filled up, and Billings Island to have become completely attached to section 31, and is a part of the south bank of the Arkansas River.

The record is very voluminous. Four surveyors testified in the case, and maps of these surveys are in the record, together with maps of the geodetic survey made by the federal government. In addition numerous lay witnesses testified. The trial judge summarized the testimony with a statement that, "While the testimony is in a state of hopeless irreconcilability, I am convinced that the preponderance thereof shows this land, the land in litigation, and from which the timber was cut, to be accretions formed to section 30, township 7 south, range 4 west, Lincoln county, Arkansas, by a gradual change in the Arkansas River, beginning sometime subsequent to the year 1825. I am strongly persuaded that this opinion is correct by reason of the government plats that have been introduced in the record as exhibits to the testimony of various witnesses who testified."

It is difficult to understand the testimony in this case even with the aid of the numerous maps, with reference to which the witnesses testified, and impossible to follow without their use. It is said in Holy Writ, "That the wind bloweth where it listeth," and it may also be said that the Arkansas River, in the *locus in quo,* runs in the same direction. In the more than a century since the original government survey, the river has changed its course many times, and in addition to many accretions there have also been several avulsions.

We repeat that it is difficult to understand the testimony and find it impossible to reconcile it, as much of it relates to the vagaries of the river at times beyond the memory of living witnesses. There is, however, certain testimony which largely influences our conclusion that the finding of the court is not contrary to the preponderance of the evidence. First, the plat of the original survey made by the federal government in 1825. Also certain geodetic surveys made by corps of engineers of the War Department. These government surveys were objected to upon the ground that they were not properly authenticated, and are at best only hearsay evidence.

We do not agree. These surveys were prepared by the War Department and were admissible in testimony without other proof of their accuracy. It was held in the case of *City of Los Angeles* v. *Duncan,* 130 Cal. App. 11, 19 Pac. 2d 289, that: "Such maps are *prima facie* evidence of the facts shown thereon, but the weight and effect to be given thereto is a question of fact for the court."

In the case of *Bost* v. *United States,* 103 Fed. 2d 717, a headnote reads as follows: "Printed maps prepared by the United States Department of Agriculture Forest Service and United States Geological Survey were admissible to show nonexistence of topographic features alleged by defendant to exist, under exception to hearsay rule applicable in cases of necessity and circumstantial guaranty of trustworthiness."

The case of *United States* v. *Romaine,* 255 Fed. 253, recites that the trial court said of certain hydrographic

maps made by the United States Coast and Geodetic Survey, "I do not think that the hydrographic maps are of any weight in this testimony in contradiction to the evidence that is presented." It was said by the court of appeals, Ninth Circuit, on the appeal of that case, "We think the maps should be given full credence, and should be taken as absolutely establishing the truth of all that they purport to show." We do not consider the weight or effect to be given these maps, but we do hold that they were competent evidence.

Other testimony highly persuasive was that given by I. Bankston, who made a survey and map of this area before any controversy arose between the parties to this litigation. His survey was made to settle the lines between Weeks Bros. who intervened in the case, Mr. Sloan and Mrs. Dean, through whom appellant claims. Bankston's testimony is corroborative of that of H. S. Nelson, a member of the firm of Howe Lumber Company, appellee, who was himself a graduate civil engineer, concerning the maps offered in evidence.

The finding by the court that the timber was cut from lands now a part of section 30, township 7 north, range 4 west, cannot be said to be contrary to the preponderance of the evidence, at least we do not find it to be so. But appellant says that if this is true, the enlargement of Billings Island resulted from two changes in the course of the river, not from slow and imperceptible accretions, but by sudden and plainly visible avulsions, and this is another way to state the disputed and controlling question of fact.

The law of this phase of the case is not in dispute and is stated as follows in the case of *Kansas City Fibre Box Co.* v. *F. Burkart Mfg. Co.*, 184 Ark. 704, 44 S. W. 2d 325:

"As was said in the case of *Nix* v. *Pfeifer, infra*: 'The law governing the case is clearly established and entirely free from difficulty, and we need search no further than the decisions of this court to determine the rights of riparian landowners so far as the questions involved in this suit are concerned.

" 'Land formed by gradual and imperceptible accretion or by gradual recession of the water, belongs to the owner of the contiguous land to which the addition is made. The river line is the natural boundary, and its gradual advance or retreat carries the owners' line with it, except in case of an avulsion, or sudden or perceptible change in the water course, in which latter case the line remains at the old water line, and becomes fixed by it, not subject to further change by the caprice of the river.' *Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951."

Under this statement of the law, we think, as was found by the court below, that the timber was cut from accretions to section 30, township 7 north, range 4 west.

As has been said, this suit was begun by appellant Horne, seeking a restraining order against the lumber company. The answer filed by the lumber company made no claim to the land on which they were cutting timber, but claimed only the timber 14 inches and over in diameter standing thereon. This claim is based upon a timber deed from R. G. and Pleas Weeks, sons and sole heirs at law of R. G. Weeks, Sr. The Weeks brothers filed an intervention and adopted the allegations of the answer filed by the lumber company, and pray judgment for the value of timber 13 inches and under cut on the land. The court made an order August 16, 1943, that plaintiff, Horne, should cut the timber and account to the court for the stumpage at the rate of $10 per 1,000 feet.

In the intervention of Weeks Bros. damages to the lands were claimed, but as we understand the effect of their subsequent pleading, this demand was abandoned, and only the stumpage value of the timber was sued for. At any rate, this is what the judgment was rendered for, it being that the lumber company and Weeks Bros. "do have and recover of and from the plaintiff, J. M. Horne, the sum of $1,760.70 together with all their costs," which judgment was later amended to include interest from the date of the rendition of the judgment.

The judgment does not declare what part of this recovery shall be for the benefit of the lumber company,

or for the interveners, but they do not complain of that fact, and appellant is in no position to do so. It is insisted that the title to the land was not sufficiently proved to sustain this judgment, but we think it was. By an unbroken chain of conveyances, title was deraigned from the United States to the ancestor of Weeks Bros. But if this be not true, it was shown that the ancestor of Weeks Bros. died in possession of Billings Island, claiming title thereto, and that this possession had continued for a period of more than 40 years. Appellee R. G. Weeks testified that he and his brother had been in continuous possession of this property since 1904, and that the only adverse claim ever made by anyone related to the boundary line on the east side, with Mrs. Dora Dean, which was settled by the Bankston survey; that the property had been continuously fenced on three sides, with the river as the north boundary, since 1914, and that he had personally sold three or four crops of timber off of this same property.

After selecting the chancery court of Jefferson county as the forum in which to try the case, appellant now says that the finding of the court that the land in question is an accretion to section 30, township 7 north, range 4 west, Lincoln county, defeats the jurisdiction of the Jefferson chancery court. Pretermitting any discussion of the right of one to deny the jurisdiction of a court whose aid he had invoked, a sufficient answer to that contention is that appellees disclaim any damages to the land, but seek to recover only the value of the timber which appellant cut under the order of the court permitting him to do so. In other words, appellant was permitted by the order of the court to cut the timber under an agreement to respond in damages if it were found that he was not the owner. This makes the action for damages transitory, one which could be brought against appellant in any jurisdiction where service upon him could be had.

The decisions of this court distinguishing local from transitory actions in suits of this character are reviewed in the case of *Western Union Tel. Co.* v. *Bush,* 191 Ark.

1085, 89 S. W. 2d 723, 102 A. L. R. 367, where it was said: "It seems to us that the owner of this timber would have his right or election to sue for damage to the real estate, or for the conversion of whatever timber was taken away. Certainly, if he sued for damage to the real estate, he must sue in the county in which it was located and in the proper court. If he sued for a conversion of the timber, his suit could be filed and maintained as other transitory cause of action. That is the distinction made in the case of *Jacks* v. *Moore,* 33 Ark. 31, and *Emerson* v. *Turner,* 95 Ark. 597, 130 S. W. 538."

The court found that under its consent order appellant had cut and removed 176,070 feet of timber, and the judgment was based upon that finding. Appellees have appealed from that finding, it being their contention that a much larger quantity of timber was cut. In the opinion prepared by the court below, upon which the decree is based, appears this statement: "Now, as to the damages, the witness, I. G. Lockhart, on behalf of the defendant, testified that before any cutting was indulged in there were 320,000 feet of standing timber, 14 inches and up, on the land. The plaintiff, J. M. Horne, testified that he only cut 176,070 feet, and I accept his statement of the timber cut and removed from this land by him as being the more accurate of the two for the reason that parties other than himself might have cut timber from this particular land, even if there were 320,000 feet of standing timber, 14 inches and up, thereon at the beginning, or before the plaintiff cut any timber whatever from the land in litigation; and, as it was stipulated between counsel for all parties that the value of the timber was $10 per thousand, the defendant, Howe Lumber Company, and the interveners, R. G. and Pleas Weeks, will be awarded judgment against the plaintiff in the amount of $1,760.70."

Being unable to say that this finding is contrary to the preponderance of the evidence, it too is affirmed.

A number of other questions are raised and discussed in the briefs of opposing counsel and have been

considered, but we think their decision is not necessary to dispose of this appeal. The decree is, therefore, affirmed, both on the direct and cross-appeal.

WHEATLEY *v.* DRENNEN.

4-7724 189 S. W. 2d 926

Opinion delivered October 29, 1945.

Murphy & Wood, for appellant.

Leo P. McLaughlin and *Jay M. Rowland,* for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether the obligation of a written contract to sell real property was discharged by substitution; and (a) if the answer is that it was not, what is payable to compensate damage?

On the 24th of June, 1944, Mrs. C. T. Drennen acknowledged in writing that she had received $500 "as a deposit and binder" on designated property, including furniture. The balance of $6,250 was payable when an examination of the abstract should show good title, at which time the deed was to be executed.

Mrs. Drennen had been away from Hot Springs for quite a while. Upon returning she was approached by H. A. Wheatley, who offered to buy the property in question—her residence. Wheatley called upon Mrs. Drennen and together they discussed the proposed purchase and sale. Mrs. Drennen's version of her discussion with Wheatley is in part shown in the footnote.[1]

Wheatley's visit occurred on Saturday. The following Monday Mrs. Drennen went into town and talked with some of her friends and became dissatisfied. When she met Wheatley on a street she tried to return the check, but he refused. She then went home and enclosed it with a letter, sent special delivery. That afternoon Wheatley called upon Mrs. Drennen, with the following results, as testified to by her:

[1] "I had been out of town for two years and a half and had been back about two weeks. Mr. Wheatley came to me and said, 'You want to sell that property?' I told him I did, and he said, 'I want to buy.' He asked me how much I would take and I said, 'Ten thousand dollars,' and he said, 'The man I want to buy it for won't give you $10,000.00. I want to buy this property for somebody else and he won't give you $10,000.00.' He then said he would give me $7,000.00 and take out his commission. Then he said he would let $100.00 go off of that commission. That made it $6,750.00.

"After he had told me that the house was practically rotted and fallen down, and that the roof had to be fixed and the porch had to be fixed, and that the house had to be painted and decorations inside had to be done and everything, I thought my house was about to fall down, and I told him, I thought I ought not to consider that at all, but he insisted that the man was going to buy another piece of property if I didn't sell him this piece of property at this moment, and he gave me $500.00 in a check, and I gave him what I thought was a binder or option on that deal until I could consider the matter."

"We talked it over and talked it over; and finally, he said, 'Well, I will be willing to let you have the commission and give you $7,000.' We talked quite a bit about it, and as he went down the steps, he said, 'Mrs. Drennen, if you change your mind, let me know,' and I said, 'If you change your mind, Mr. Wheatley, let me know.' I then thought that the whole transaction was finished. It never occurred to me or any of my friends who were business men down the street that I had any contract. Except for Sunday, it wasn't six hours before I sent him back his money. It was just twelve hours before I sent him back his money."

About a month later, Mrs. Drennen, by separate warranty deeds, conveyed part of the property to Louie A. Brandon and the rest to Dr. and Mrs. J. C. Cheney, the considerations aggregating $10,000. Of this amount $7,000 was paid in cash and three notes for $1,000 each, due one, two, and three years from date, were executed by Louie A. Brandon. Mrs. Drennen placed these notes with Arkansas Trust Company for collection—a fact disclosed by the Bank's answer as garnishee. Suit was brought by Wheatley praying (a) specific performance, and (b) that in the alternative he be awarded damages. Subsequent developments convinced the plaintiff that Mrs. Drennen's grantees were innocent purchasers and as to them there were dismissals. The Chancellor found that the writing signed by Mrs. Drennen satisfied the statute of frauds, and "created a valid and binding contract." Thus, inferentially, it was held that the contract was not fraudulently procured. There was the further finding, however, that Wheatley and Mrs. Drennen, in their subsequent negotiations and conversations, treated the first contract as having been discharged, emphasis being placed upon Wheatley's proposal to waive the so-called commission and to allow Mrs. Drennen to collect a month's rental, amounting to $100.

Since Mrs. Drennen has not appealed from the Chancellor's finding that the original contract was not vitiated by proof of the conduct she alleged, we do not consider her contentions that Wheatley, as a large owner of real

property, was in better position than she to know what the actual values were, and that she was imposed upon by his impetuous attitude and the persistent way in which he urged that the agreement be immediately consummated. Mrs. Drennen concedes that as between them there was no confidential status and that Wheatley did not occupy a fiduciary relationship.[2]

We think the conversations between Mrs. Drennen and Wheatley fall short of an agreement to rescind. Whatever Mrs. Drennen's construction may have been, the evidence discloses an entire want of mutuality. Wheatley, at most, only proposed to forego certain relatively minor advantages. The proposal to waive a commission and to permit Mrs. Drennen to collect a month's rental was obviously for the purpose of persuading her to abide the original contract, ameliorated by the concessions amounting to $350. Under any rational construction of the testimony—material portions of which are not in dispute—Wheatley at all times insisted that he had a binding contract, while Mrs. Drennen maintained that she did not understand the nature of the writing—believing, as she expressed it, that an option had been extended. Her own words were: "I didn't know what a 'binder' was. I thought I was taking it under consideration."

Whatever Mrs. Drennen's conception may have been in respect of the writing and its nature, she knew (before making deeds to others) how Wheatley regarded it; and, while her position as a woman without extensive experience, dealing with a man who knew real property and the ways of business, calls for close scrutiny of the transaction, legal effect must be given a writing that is unambiguous; nor are we at liberty, in circumstances such as those before us, to translate protests of the dis-

[2] Typical of Mrs. Drennen's reactions to Wheatley's representations is the following, taken from her testimony: Q. "You knew, as a matter of fact, that the house wasn't about to fall down, and [that it was not] in such terribly bad condition, didn't you?" A. "Well, I didn't believe all he said, but I thought some of it might be true." Q. "You stated in your testimony that he told you that your house was practically rotting down, and about to fall. You knew that was an extravagant statement, didn't you?" A. "Yes, just like polishing the face of the moon." [Mrs. Drennen had also testified that certain substantial repairs were to be made].

appointed signatory to a contract in such manner that relief may flow to one of the contracting parties at the expense of the other.

No rule is better established than that a contract cannot be rescinded except by mutual consent. *J. L. Metz Furniture Company* v. *Thane Lumber Company,* 298 Fed. 91. Abandonment, being generally a mixed question of law and fact, it follows that when the issue is whether a written contract has been abrogated by a subsequent oral agreement, it is necessary to show that it was the intention of all parties to the original contract to abandon it by entering into the subsequent oral agreement. *Vogler* v. *Dyer,* 149 Ark. 670, 234 S. W. 540. It was said in *Duty* v. *Keith,* 191 Ark. 575, 87 S. W. 2d 15, that to abrogate or modify a prior contract it was necessary that minds of the parties should have met by an offer and acceptance regarding the new terms.

Since mutuality was essential in order that Mrs. Drennen be relieved of her written obligations, result is that before she can be discharged it must have been shown that Wheatley not only intended to substitute the modified offer for the writing, (or carelessly misled Mrs. Drennen) but that his purpose was, in the event she refused the counter proposal, to abandon the transaction in its entirety. The evidence is not susceptible of this construction.

The decree is reversed, with directions that the trial court enter judgment for Wheatley for $3,000. It is conceded by appellant that no greater sum than the difference between his offer and the amount for which Mrs. Drennen sold can be collected. The Chancellor should further decree that the garnishee bank act as trustee in holding for collection the three $1,000 notes, and that from proceeds Wheatley be paid the net amount due him. It is so ordered.

MARSHALL *v.* SNYDER.

4-7683 190 S. W. 2d 291

Opinion delivered October 29, 1945.

Rehearing denied December 3, 1945.

[redacted]

Appellant *pro se.*

C. M. Martin, for appellee.

HOLT, J. Appellant, Mrs. L. Marshall, secured a default judgment against appellee, Maudell Snyder, in a court of a justice of the peace, for $137, as balance alleged to be due appellant on tuition for a business course. Appellee in apt time appealed. She contended that she had paid appellant $128, which was all that was due her. Upon a jury trial, a verdict was returned in favor of appellee, and this appeal followed.

Appellant, in her motion for a new trial, assigned errors as follows: "1. That the verdict of the jury is contrary to law. 2. That the verdict of the jury is contrary to the evidence. 3. That the verdict of the jury is contrary to the law and evidence." No error was alleged as to any of the instructions.

The issue presented was one of fact for the jury's determination and it is our duty to affirm the judgment on the jury's verdict if we find any substantial evidence when viewed most favorably to appellee to sustain the jury's finding (*Arkansas Motor Coaches, Ltd.,* v. *Williams,* 196 Ark. 48, 116 S. W. 2d 585).

After reviewing all of the testimony, we find it to be in irreconcilable conflict and no useful purpose would be

served in detailing it here. Appellant testified that under her oral agreement with appellee, appellee owed the amount sued for, and appellee testified that she had paid appellant all that was due. The jury has accepted appellee's version of the matter, and since her testimony was substantial, the judgment is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* HOUSTON.

4-7690 189 S. W. 2d 904

Opinion delivered October 29, 1945.

Thos. S. Buzbee and *A. S. Buzbee,* for appellant.

Jeptha A. Evans, for appellee.

MILLWEE, J. Appellee brought this action for recovery of damages on account of personal injuries sustained by operation of a switch engine in the yards of appellant railway company at Booneville, Arkansas, in the early hours of March 19, 1944. Appellant railway company, its trustees, and K. R. Briggs, engineer, were made party defendants. The complaint alleged that appellee's injury resulted from the negligence of appellants in failing to maintain a proper lookout and failure to exercise ordinary care to avoid injury to appellee after his perilous position on the right-of-way was discovered, or should have been discovered by the exercise of such care.

The answer of appellants contained a general denial and alleged that appellee's injuries, if any, were the result of his own negligence. Trial resulted in a verdict and judgment in favor of appellee for $13,750. Appellants urge two grounds for reversal of the judgment: (1) A verdict should have been instructed for appellants. (2) The verdict is excessive. Under our well settled rule, the first contention must be overruled, if there was any substantial evidence viewed in the light most favorable to appellee to support the verdict.

Appellee was the only witness in his behalf. According to his testimony he was walking home about 1:30

a.m. along the railway tracks, which were frequently used by people living in his section of town. It had been raining and the streets were muddy. The railway tracks run east and west at a point where Owen Street crosses the tracks, the street running north and south. Appellee was traveling west and as he reached the Owen Street crossing he observed the switch engine with a car attached to the front traveling east, and saw Ray Bentley near the switch which was situated a few feet north of the tracks on the west side of Owen Street. He talked to the switchman and started west up the tracks. When he had gone a short distance he felt a vibration and upon turning around found the engine almost upon him. The light on the rear of the locomotive blinded him. He jumped and his foot was caught in a frog. He grabbed at the train and was unable to free his foot from the frog before the engine passed over his right leg, after first striking his left hip. The engine and car attached to the east end was backing west about five or six miles per hour at the time he was run over, and no alarm signals were given by the train. He was taken to St. Edward's Hospital where his leg was amputated about four inches below the knee and he remained in the hospital thirteen or fourteen days.

Appellee further testified that during the course of the evening before he started home he had drunk four or five bottles of beer, but was not intoxicated. He had been fined for drunkenness seven or eight times within a twenty months period immediately prior to his injury. He denied making any attempt to board the train.

Appellants say that all of the testimony other than that of appellee contradicts him, and they rely strongly on the case of *Missouri Pacific Railroad Co.* v. *Hancock,* 195 Ark. 414, 113 S. W. 2d 489. In that case this court said: "When a jury has returned a verdict on conflicting testimony, and the testimony supporting such verdict is of a substantial nature, this court will not set it aside because the justices would have reached a different conclusion; nor will it be set aside on account of the number of witnesses testifying against the successful party, or on account of the character of the witnesses, unless they

are wholly discredited; nor because the only testimony in favor of the successful plaintiff or defendant was that of the party or parties to the complaint, they being interested. These general principles have been often repeated."

Following the above statement is an exhaustive review of the cases which tend to support it, but it was further stated by the court in the opinion: "Even though juries are the 'sole judges,' etc., their verdicts, in order to be sustained, must be based upon *substantial* evidence, and while as a general rule any *reasonable* evidence will be regarded as substantial, yet 'Where personal testimony is at variance with physical facts, and such repugnance is material, and is also self-evident, improbable conclusions drawn in favor of a party litigant through the sanction of a jury's verdict will not, on appeal, be looked upon as inviolate if in conflict with recognized elements of time, mathematics, and the accepted laws of physics.' *Magnolia Petroleum Co.* v. *Saunders,* 193 Ark. 1080, 104 S. W. 2d 1062. See, also, *St. Louis S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768."

It is insisted that the physical facts are at variance with appellee's testimony to the effect that the engine first struck him on his left hip. It is said that if appellee had turned around, he would be facing the engine and his right side would be the one closest to the engine and it would have been impossible for the engine to strike him on his left side. This would depend upon whether appellee turned to his left or his right, and whether he made a complete turn. It might also depend upon whether he fell backward or forward from the tracks when his foot was caught in the frog. Since these details were not developed in the testimony, it cannot be said that appellee's version of the incident so varied with the physical facts as to make his testimony impossible or unbelievable.

It is true, the testimony of the employees of the railway company who were in charge of the switching operation contradicted that of appellee on several points. Ray Bentley testified that appellee spoke to him at the Owen Street crossing; that the engine had stopped and he was

throwing the switch at that time. Bentley then gave the signal to back up and boarded the engine on the south side while it was still standing at the crossing. He did not see appellee again until after the accident when he found the heel of appellee's shoe in the frog which is a part of the switch west of the one the witness was operating. The fireman testified that he was in the north side of the cab adjacent to the switch operated by Bentley and was keeping a lookout. He did not see Bentley at the switch or appellee talking to Bentley. The first time he saw appellee "he was lying by the frog where we hit him." The foreman of the switch crew testified that he was riding on the south side of the front or east end of the engine as it was backing west and saw appellee try to board the train from the north side opposite the point where the witness was riding.

An attempt to detail all the evidence would only emphasize the sharp conflict between the testimony of appellee and that of the employees of the railway company on certain points. The finding of the shoe heel of appellee in the frog where he was injured is a circumstance strongly corroborative of the fact that his foot was caught in the frog. Whether this fact and appellee's injury occurred as a result of the conditions as testified to by appellee, or from his attempt to board the locomotive as related by one of the trainmen, was a question of fact which was submitted to the jury under proper instructions of the trial court. The issue thus presented is analogous to the question before this court in the case of *St. Louis Southwestern Railway Company* v. *Ellenwood, supra,* where Mr. Justice HART, speaking for the court, said: "Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics. So where there are undisputed facts shown in the evidence, and by applying to them the well known laws of nature, of mathematics and the like, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict. In the case at bar the conditions surrounding the plaintiff, as testified to by the

defendant's witnesses, furnish a very strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. It can not be said that the testimony of the plaintiff is contradicted by the physical facts or is opposed to any unquestioned law of nature. His testimony related to matters, situations and conditions which might or might not have existed, and his right to recover depended wholly upon the truth or falsity of his testimony. His testimony was, therefore, evidence of a substantial character and if believed by the jury, was sufficient to warrant a recovery in this case."

It is also argued that appellee's condition of intoxication rendered him unworthy of belief. The jury had the benefit of full information on appellee's drinking and state of intoxication during the evening preceding his injury and for two years prior thereto. A short time before his injury appellee drank some coffee at a cafe. According to one of the cafe employees on duty at the time, appellee acted like he was intoxicated. Another employee present at the same time could not say whether appellee was drunk or sober. Appellee admitted that he had drunk four or five bottles of beer during the night preceding the injury. It was proper for the jury to hear the testimony offered on this issue, not only for the purpose of determining the credibility of appellee as a witness, but also to determine whether or not his intoxication contributed to his injury. The fact that a person is intoxicated when injured does not, of itself, show such contributory negligence as will defeat his recovery for such injury, but is a circumstance which may be considered in determining whether he was contributorily negligent. *K. C. S. Ry. Co.* v. *Davis,* 83 Ark. 217, 103 S. W. 603; *American Bauxite Co.* v. *Dunn,* 120 Ark. 1, 178 S. W. 934, Ann. Cas. 1917C, 625; *Mills* v. *Silbernagel & Co.,* 204 Ark. 734, 164 S. W. 2d 893. The court gave an instruction to the jury which embodies this well settled rule. It was within the province of the jury to judge the credibility of appellee as a witness under all the facts and circumstances, and we cannot say as a matter of law that the evidence, when considered in its most favorable light to appellee, was not sufficient to support the verdict.

In their contention that the verdict is excessive appellants say there was much evidence of contributory negligence on the part of appellee which the jury could not have taken into consideration in arriving at the amount of the verdict. The case was tried under the comparative negligence statute (§ 11153, Pope's Digest) which provides: "In all suits against railroads, for personal injury or death, caused by the running of trains in this state, contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of less degree than the negligence of the officers, agents or employees of the railroad causing the damage complained of; provided, that where such contributory negligence is shown on the part of the person injured or killed, the amount of recovery shall be diminished in proportion to such contributory negligence."

The only instruction requested by appellants under the statute was given by the court as follows: "You are instructed that even though you find from the testimony that defendants' employees were guilty of negligence contributing to the injuries received by plaintiff, but you further find that plaintiff was himself negligent and that his negligence was greater in degree than the negligence of the defendants' employees, then plaintiff is not entitled to recover and your verdict should be for the defendants."

It will be noted that this instruction did not tell the jury that the amount of the recovery should be diminished in proportion to the contributory negligence of appellee, in accordance with the last proviso of the statute. Since this is true, the jury might have failed to give proper consideration to the contributory negligence of appellee in fixing the amount of damages. But it was the duty of appellants to request an instruction on this issue and they cannot be heard to complain in the absence of such request.

Appellee was 37 years of age at the time of his injury, with a life expectancy of 30.35 years. He had been employed as a carpenter and in construction work earning 50 cents an hour prior to his injury. He received a

severe injury resulting in the amputation of his leg and suffered such pain as might be expected from this type of injury. In determining whether a verdict is excessive each case must rest upon its own peculiar facts. *Phillips Petroleum Co.* v. *Jenkins,* 190 Ark. 964, 82 S. W. 2d 264. In fixing the damages we cannot say that the amount arrived at shows such passion and prejudice on the part of the jury as to warrant a reversal of the case.

We find no error, and the judgment is affirmed.

SANTEE *v.* BRADY.

4-7719 189 S. W. 2d 907

Opinion delivered October 29, 1945.

Ward Martin, for appellant.

Ed E. Ashbaugh, for appellee.

McFaddin, J. This appeal involves a permit issued by the Arkansas Corporation Commission on October 24, 1944, to appellant, E. L. Santee, to operate as a commercial carrier of passengers, light express and mail, from Vilonia to Mount Vernon and Rosebud. The appellees are competitors of Santee on part of the route.

We detail the routes and locations involved, to assist in an understanding of the issues. From Little Rock: U. S. highway 65 runs northwesterly to Conway 32 miles; State highway 5 runs north to Vilonia approximately 25 miles; and U. S. highway 67 runs northeasterly to Beebe, 35 miles and on to Searcy (51 miles from Little Rock). U. S. highway 64 runs easterly from Conway via Bryant's store, Vilonia, and El Paso to Beebe (45 miles from Conway). From Bryant's store on U. S. highway 64 (8.2 miles east of Conway) State highway 36 runs northeasterly to Mount Vernon and Rosebud (26.4 miles from Bryant's store); and thence easterly 22 miles from Rosebud

to Searcy. Heber Springs is 12 miles north of Rosebud on State highways 5 and 25. Vilonia (reached from Little Rock by State highway 5 and other public roads) is located on U. S. highway 64, 10.2 miles east of Bryant's store (which is at the intersection of U. S. highway 64 and State highway 36, and is 8.2 miles east of Conway). Mount Vernon is located on State highway 36, 16.4 miles northeast of Bryant's store. Rosebud is located on State highway 36, 10 miles northeast of Mount Vernon. Rosebud is also located on State highway 5, and is 12 miles south of Heber Springs.

Santee had a permit, not here under attack, to operate as a commercial carrier from Little Rock to Vilonia and return, on State highway 5, and connecting public roads, and serving intermediate points. Santee was operating under this permit, and on July 6, 1944, he filed an application to extend his service from Vilonia to Heber Springs, traveling U. S. highway 64 from Vilonia to Bryant's store and State highway 36 from Bryant's store to Mount Vernon and Rosebud, and State highways 5 and 25 from Rosebud to Heber Springs, with certain provisions as to "closed doors," (which expression will be discussed later). This extension permit is the issue now before this court.

The appellees here were the remonstrants before the Commission. They are: (1) Mrs. Carl Brady, who operates a bus line between Conway and Naylor (a point on State highway 36 several miles south of Mount Vernon); (2) Mrs. J. A. Harrison, who operates a bus line from Mount Vernon to Conway on State highway 36 and U. S. highway 64, and also a bus line from Mount Vernon to Searcy on parts of State highway 36; (3) C. M. Mays, who operates a bus line from Rosebud to Searcy on State highway 36; and (4) R. C. Anthony, who operates a bus line between El Paso and Conway on U. S. highway 64.

On August 24, 1944, the Arkansas Corporation Commission granted Santee the extension, not as requested, but only from Vilonia to Rosebud, and with provision for "closed doors" from Vilonia to Mount Vernon and Rosebud; and permitted only through passengers from and to

Little Rock over the extended route from Vilonia to Rosebud. The Commission refused the application from Rosebud to Heber Springs. Since Santee has not appealed from that refusal, we disregard so much of the evidence as concerns availability of transportation to and from Heber Springs.

When the Arkansas Corporation Commission granted the extension permit to Santee under date of August 24, 1944, the remonstrants (appellees) appealed to the Pulaski circuit court, which reversed the order of the Commission and denied Santee the extension. Santee has appealed to this court, and seeks to have the circuit court judgment reversed and the extension permit restored, as granted by the Commission.

The act in effect at the time of the hearing before the Arkansas Corporation Commission was Act 367 of the General Assembly of 1941. 1945 legislation concerning the Arkansas Corporation Commission is not involved in this opinion. The law governing such a case as this one has been fairly well charted, as is shown by the following cases: *Mo. P. R. Co.* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644; *Potashnick Truck Service, Inc.,* v. *Missouri & Arkansas Transportation Co.,* 203 Ark. 506, 157 S. W. 2d 512; *Taylor* v. *Black Motor Lines,* 204 Ark. 1, 160 S. W. 2d 859; *Potashnick Local Truck System, Inc.,* v. *Fikes,* 204 Ark. 924, 165 S. W. 2d 615; *Mo. Pac. Transportation Co.* v. *Gray,* 205 Ark. 62, 167 S. W. 2d 636. From these cases we mention a few guiding principles:

A. This court tries this case *de novo,* and renders such judgment as appears to be warranted and required by the testimony. Such is the provision in § 2020, Pope's Digest, and the holding in *Mo. Pac. Rd. Co.* v. *Williams,* and also in *Potashnick Truck Service* v. *Mo. & Ark. Transportation Co.*

B. "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." Such is the rule stated in *Mo. Pac. Rd. Co.* v. *Williams,* and followed in the later cases, and restated in *Potashnick Local Truck Service* v. *Fikes.*

With these points in mind, we proceed to the facts as disclosed by the record in this case. The Commission allowed Santee to extend his operations from Vilonia to Mount Vernon and Rosebud. Twelve or more witnesses from these last two mentioned localities appeared in support of Santee's application. They testified, and the record abundantly supports them, to the effect that persons living in Rosebud or Mount Vernon have no way to get to Little Rock and transact business and get home the same day, because of the inadequacy of the present service offered by the remonstrants and the connecting lines. Furthermore, the present routes are longer and the fares more expensive than the route proposed by Santee. The extension sought by Santee would allow Mount Vernon and Rosebud citizens to leave home at 7:30 or 8:00 a.m. and travel direct and without transfer to Little Rock, arriving at 10:00 a.m.; and then to leave Little Rock at 3:30 p.m. and reach Mount Vernon and Rosebud at 5:30 or 6:00 p.m. of the same day. No such service is now available to them. The full Santee service, as covered by the extension permit granted by the Commission, would be 7 days a week as follows: Leave Rosebud 7:30 a.m. and 3:30 p.m. (Mount Vernon thirty minutes later in each instance) and arrive in Little Rock at 10:00 a.m. and 6:00 p.m., respectively. Leave Little Rock 7:30 a.m. and 3:30 p.m., and arrive in Rosebud 10:00 a.m. and 6:00 p.m., respectively, (Mount Vernon thirty minutes earlier). Santee would use two new buses for this extension, with a capacity of 28 persons for each bus.

I. *Public Convenience and Necessity.* Should the people of these communities—Rosebud and Mount Vernon—have the benefit of this Santee service, or is the present service ample and satisfactory for all practical purposes? In Pond on "Public Utilities," 4th Edition, § 913, the rule is stated:

"In granting certificates, the public convenience and necessity should be the first consideration, and the interest of public utilities already serving the territory secondary, while the desire of a new applicant for a certificate is relatively a minor matter for the consideration of the commission."

And in 42 C. J. 687, in discussing the determination of public convenience and necessity, the rule is stated:

"The convenience and necessity which the law requires to support the public service commission's order for the establishment or extension of motor vehicle transportation service is the convenience and necessity of the public as distinguished from that of an individual or any number of individuals, and this is the primary matter to be considered in determining what constitutes such public convenience and necessity in a particular case, and the propriety of granting a certificate to that effect. The necessity for the proposed service must be considered as well as the added convenience thereof, although the word 'necessity' is not used in this connection in the sense of being essential or absolutely indispensable, but in the sense that the motor vehicle service would be such an improvement of the existing mode of transportation as to justify or warrant the expense of making the improvement."

At present the people in Rosebud and Mount Vernon, to get to Little Rock, must travel by bus to either Conway or Searcy, and then transfer to another conveyance to reach Little Rock. The remonstrants say this is sufficient service, but the record shows otherwise.

First, let us take the situation of the Mount Vernon people. If they desire to go to Little Rock via Conway, then they must use the service of either the Harrison bus line, or the Brady bus line. The former consists of one bus operated by Mrs. Harrison between Mount Vernon and Conway. On Tuesdays, Thursdays, and Saturdays the bus starts from Mount Vernon at 9:30 a.m. and arrives in Conway at 11:00 a.m., and leaves Conway at 2:30 p.m., and arrives in Mount Vernon at 4:00 p.m. In

the summer months the bus does not operate on Thursdays. On Saturdays the bus makes an additional trip, which leaves Mount Vernon about 5:00 p.m., and arrives in Conway about 6:30 p.m., and leaves Conway at about 10:00 p.m. and arrives in Mount Vernon at 11:30 p.m. There is no service from Mount Vernon to Conway on Mondays, Wednesdays, Fridays and Sundays. Anyone in Mount Vernon using the Harrison bus line on Tuesdays or Thursdays would arrive in Conway at 11:00 a.m., and have to transfer from station to station to secure a conveyance to Little Rock. In order to make a round trip in one day, there would be less than an hour allowed in Little Rock. There is no other bus line shown from Mount Vernon to Conway. The Brady bus line operates from Naylor, which is a point on State highway 36 several miles south of Mount Vernon, so Mount Vernon persons desiring to use the Brady bus line to Conway would have to secure independent transportation to Naylor.

Next, let us take the situation of Mount Vernon people seeking to go to Little Rock via Searcy. The Harrison bus line leaves Mount Vernon at 9:00 a.m. on Mondays, Wednesdays and Fridays, and arrives in Searcy at 10:15 a.m. Returning, it leaves Searcy at 3:15 p.m., and arrives in Mount Vernon at 4:30 p.m. There is no service on the Harrison bus line from Mount Vernon to Searcy on Tuesdays, Thursdays, Saturdays and Sundays. Even on Mondays, Wednesdays and Fridays, Mount Vernon people going to Little Rock via Searcy cannot return home the same day under the present schedule.

Next, we consider the transportation facilities available to the people of Rosebud. There is no service from Rosebud to Little Rock via Conway. There is service from Rosebud to Little Rock via Searcy, because C. M. Mays operates a bus line from Rosebud to Searcy, leaving Rosebud at 9:00 a.m., arriving Searcy 10:28 a.m.; leaving Searcy 3:00 p.m., arriving Rosebud 4:28 p.m. People of Rosebud desiring to go to Little Rock, if they make perfect connection in Searcy, would have only ten minutes in Little Rock before returning to Searcy, or else would be required to be away from home overnight. The

Mays bus line is the only service shown from Rosebud to Searcy.

Such, in brief, is the bus service now furnished by the remonstrants, and connecting carriers. The remonstrants were supported by witnesses high in the praise of the present service. But opposed to them were more than twelve witnesses from Mount Vernon and Rosebud, claiming to speak for themselves and others, and urging the Santee extension as a direct line to Little Rock, whereby Rosebud and Mount Vernon people could leave home of a morning and have from 10:00 a.m. to 3:30 p.m. to transact business in Little Rock, and still return home by 5:30 or 6:00 p.m. of the same day. No such service is now available to the people of Rosebud and Mount Vernon. If—as stated by Pond, *supra*—the first consideration is the public convenience and necessity, then certainly a case was made here for the granting of the permit, because—even though there is existing service in operation—still, (1) the existing service is inadequate; and (2) additional service would benefit the general public. Under either of these showings (*i.e.*, inadequacy of present service, or benefit from additional service) the permit should be granted under the rule stated in *Mo. Pac. Rd. Co.* v. *Williams, supra.*

II. *Rights of Existing Carriers.* The remonstrants claim that since they are existing carriers, they are entitled to an opportunity to furnish additional and improved service before any permit should be granted to Santee to operate in competition to them. They say:

"The appellees herein testified, as disclosed by the record, that no complaints have been made to them or to the Corporation Commission that the bus service rendered by them is inadequate or inconvenient or does not meet the public requirements. The appellees testified in their own behalf that they are ready and willing at this time to rearrange their schedules or put on additional schedules if so requested by their patrons if the Commission found there is a public need for such additional service."

There are two answers to this argument: one is legal, and the other is factual. On the law question, the appellees misunderstand the rule stated in *Mo. Pac. Rd. Co.* v. *Williams,* which rule is:

"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." (Italics our own.)

The opportunity to the existing carriers is in the disjunctive sense of "or" rather than the conjunctive "and." In other words, the certificate may issue if public convenience and necessity be shown, even if there be already existing service, provided the Commission finds either:

a. that the present service is inadequate; or

b. that additional service would benefit the general public; or

c. that the existing carrier has been given an opportunity to furnish additional service as may be required.

In 37 Am. Juris. 530, in discussing the issuance of a certificate of public convenience and necessity where service is already in operation on the same route, the rule is stated disjunctively, 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 the public desires a different means of transportation, or unless the existing carrier has been given an opportunity to furnish such additional service as may be required."

But even if the law were as the appellees contend on this matter of preferred opportunity to existing carriers to forestall any new competition—and the law is not as the appellees contend, as we have just demonstrated—

still, under the facts in the case at bar, the previously operating carriers (appellees) have made no showing that they ever could give the people of Mount Vernon or Rosebud service equal to that which Santee is offering. The Santee route is from 10 to 20 per cent. shorter in mileage and cheaper in fare than any possible computation of mileage and fare based on traveling via Conway or Searcy. Furthermore, if the appellees (Harrison, Brady and Mays) should change their schedules and services and fares to Conway and Searcy, and offer daily schedules, still the appellees make no showing that they could compel the connecting carriers at Conway and Searcy likewise to rearrange their schedules, services and fares to correspond with the revisions made by these appellees. So, on the facts, the appellees have failed to show that they could render a service as cheap or as convenient as that offered by Santee under the extension permit issued by the Commission.

There remains the contention of the other appellee, R. C. Anthony (remonstrant below), which we now discuss. Anthony operates a bus line between El Paso (located on U. S. highway 64 east of Vilonia) through Vilonia to Conway. The basis of the Anthony protest was that if Santee should be granted the extension to Vilonia and Rosebud, then Santee might carry passengers from Vilonia to Bryant's store (10.2 miles distance) in competition to Anthony. The order of the Commission in granting Santee's extension directed that he operate with "closed doors" between Vilonia and Mount Vernon. The expression "closed doors" when used by regulatory authorities in connection with the operation of motor carriers is generally defined as meaning: the operation of a common carrier motor vehicle between designated points or over designated routes without receiving or discharging passengers between such points or over such routes. Applied to this case, the expression "closed doors" means that Santee could pick up no passengers between Vilonia and Mount Vernon, or between Vilonia and Rosebud. This order of the Commission regarding closed doors completely answers Anthony's protest. If Santee should not obey this order and should open the

doors of his buses and pick up passengers in competition with Anthony, then Anthony could secure relief before the Commission.

It follows from what has been herein stated that the Commission was correct in granting the permit for extension to Santee under the provisions and restrictions as made by the Commission; and that the circuit court was in error in reversing the order of the Commission. The judgment of the circuit court is reversed, and the cause remanded to that court with directions to affirm the order of the Commission granting the Santee extension.

Mr. Justice ROBINS did not participate in the consideration or decision of this case.

EVANS *v.* HUNTER.

4-7779 189 S. W. 2d 913

Opinion delivered October 29, 1945.

W. F. Reeves, for appellant.

Opie Rogers, for appellee.

MCHANEY, J. This is an appeal from the order and judgment of the circuit court, affirming the order of the county court which called a local option election in Van Buren county to vote upon the question whether intoxicating liquors, as defined by § 1 of Initiated Act No. 1, adopted by a vote of the people at the general election in

November, 1942, and printed in Acts of 1943 at p. 998, should be manufactured or sold in Van Buren county.

The single question presented for our determination, as stated by appellant is: "Was the judgment and order of the court responsive to the demands set out in the petitions?"

The petitions, of which there were a number of duplicates, prayed the court to call an election "to determine whether or not license shall be granted for the manufacture or sale, or the bartering, loaning or giving away, intoxicating liquors within Van Buren county," etc. The order of the county court, as also that of the circuit court on appeal, omitted the word "manufacture" as set out in said petition, but in that part of both orders giving directions to the election commissioners as to the preparation of ballots to be used at said election, both courts said: "The said election commissioners have printed upon said ballots the following: 'For the manufacture or sale of intoxicating liquors. Against the manufacture or sale of intoxicating liquors.' "

When we consider the whole order or judgment of each court, we think there was a substantial, if not a literal compliance with said act and was responsive to said petition. In other words, that there was no variance between the orders as a whole and the petition.

Furthermore, appellant is a retailer of liquor and not a manufacturer and there might be some doubt as to his right to question the orders, which, in the first instance omitted the word "manufacture" as one of the questions to be submitted to a vote, since it does not affect him. Be that as it may, the court orders were responsive to the prayer of the petition.

The judgment is, therefore, affirmed.

ARKANSAS BAPTIST STATE CONVENTION *v.* BOARD OF TRUSTEES, BAPTIST STATE HOSPITAL.

4-7718 189 S. W. 2d 913

Opinion delivered October 29, 1945.

House, Moses & Holmes and *W. H. Jewell,* for appellant.

June P. Wooten, W. F. Norrell, Homer T. Rogers, Henry T. Spitzberg and *Guy E. Williams,* Attorney General, for appellees.

Frank S. Quinn, amicus curiae.

ROBINS, J. Appellees, Board of Trustees of the Baptist State Hospital, made application to the chancery court for instruction as to their duties and powers in relation to a request from appellant, Arkansas Baptist State Convention, for a $30,000 contribution from the hospital, to be used by the convention in partial payment of certain indebtedness of the convention, previously discharged by bankruptcy proceedings.

Their petition set forth that the hospital is a corporation organized for public charity under provisions of § 2252 of Pope's Digest of the laws of Arkansas, duly chartered by order of the Pulaski circuit court on February 16, 1921; that as trustees the petitioners have control of the property and administer the business of the hospital, which was established for the hospitalization of the indigent sick, regardless of race, color or religious belief; that it has no capital stock and no one is entitled to any gain from its operation; that the Arkansas Baptist State Convention was incorporated by special act of the General Assembly of Arkansas, approved February 12, 1859, its affairs being managed by an executive board elected by the convention from the membership of the Baptist churches of Arkansas; that the convention has sponsored and caused to be set up the hospital and certain other institutions, each of which was a separate corporate entity; that the original board of trustees of the hospital was appointed by the convention, and that under the charter of the hospital the convention was empowered to continue to appoint these trustees; that in 1937 the convention and its sponsored institutions, including the hospital, owed $1,200,000, of which the hospital owed $475,000; that, for the purpose of adjusting this indebtedness, the convention filed proceedings in bankruptcy, which

terminated in a settlement, approved by the bankruptcy court, of all of this indebtedness, for thirty-five cents on the dollar thereof; that at the annual meeting in November, 1943, the convention adopted a resolution asserting that the amount of the above indebtedness, which had been discharged by the bankruptcy proceedings, nevertheless remained the moral obligation of the convention and calling on the hospital to pay $30,000 toward the liquidation of the unpaid portion of the debt; that some of the hospital's trustees desired to comply with the convention's directive, but others were opposed thereto, for the reason, as they asserted, that the debt sought to be paid was not a legal debt of the convention or of the hospital; that the trustees were concerned as to whether this $30,000 payment would be a wrongful diversion of trust funds, such as might render the trustees personally liable therefor and such as might change the status of the hospital from a charitable organization into a private business institution, subject to every form of taxation.

The petition concluded with a prayer that the court "construe their power and supervise their actions in the premises so as to insure legal and faithful performance of their duties as trustees, secure petitioner, Baptist State Hospital, against an improvident and illegal misappropriation of its funds, and to save petitioner trustees harmless in their persons and estates from the consequences of an unwarranted or illegal compliance with the orders and directions of the Arkansas Baptist State Convention."

The State of Arkansas, through its Attorney General, filed in the proceedings an intervention, in which the allegations of the petition were adopted, and it was asserted that, unless enjoined by the court, the trustees of the hospital would make payment of said sum of $30,000, thereby violating their duties and causing an impairment of a trust fund established exclusively for the benefit of indigent persons within the State of Arkansas; and an injunction against the proposed contribution was prayed.

The Baptist State Convention also filed an intervention, alleging that the convention and the hospital were not separate entities but that the relation of creator and creature, or of parent and child, existed between them; that the hospital originated with the convention and was a convention institution—a mere agency through which the convention conducted a hospital activity; that the convention had appointed a commission directing it to take out a charter for the hospital, which was done; and that similarly the convention had caused to be created other charitable and educational institutions; that in 1937 the convention had incurred obligations for the use and benefit of the hospital in the aggregate sum of $616,191.16, which, along with the convention's other indebtedness, was settled in the bankruptcy proceedings at thirty-five cents on the dollar; that of the amount required to effect this settlement ($333,350.37) the hospital contributed $150,000, which would leave a balance of $466,191.16 of the hospital debt still in existence, though its enforcement was barred by the order of the bankruptcy court; that the convention, realizing that its debts had not in fact been paid and that the federal court order did not discharge it from its moral obligation to pay its debts, had called on the trustees of the hospital to make from its surplus funds the $30,000 contribution toward the discharge of this moral obligation. The prayer of the convention was that the court find that the hospital is the creature and institution of the convention, that the convention has a legal right to pay the balance of its debt and to call on the trustees of the hospital to contribute thereto, and that the hospital trustees have a legal right to make a contribution for that purpose out of its surplus funds.

After hearing testimony the lower court decreed that payment of the $30,000 contribution by the trustees of the hospital would "be in contravention of its by-laws and of the purpose for which said hospital was incorporated and, therefore, unauthorized," and the making of such contribution was enjoined. The intervener, Arkansas Baptist State Convention, has appealed.

The pleadings of the parties in this proceeding did not present any important dispute as to the fact situation underlying the controversy; nor was there any such dispute shown by the testimony. It is admitted that the convention borrowed a large sum of money to pay its debts and those of some of its fostered institutions, including the hospital, and that the trustees of the hospital joined in the execution of a mortgage, by which all property of the hospital and said other institutions was conveyed to secure this loan. It was recited in this mortgage that, of the proceeds of the bond issue ($900,000 in all) the hospital received $420,000, of which $242,000 was used to retire the hospital's existing mortgage indebtedness. The hospital contributed $150,000 of the total amount required to liquidate the debts of the convention, the hospital and the other church institutions, under the terms of the order of the bankruptcy court. To this contribution by the hospital should be added $31,000, the face amount of bonds issued by the convention, purchased by the hospital and surrendered by it as a part of the settlement. It is apparent that, if the payment ($181,000 in all) made by the hospital toward the amount used to obtain the composition is deducted from the amount (not less than $420,000) which the hospital obtained out of the proceeds of the bond issue, there would remain a balance of at least $239,000 as the hospital's part of the obligation canceled under the bankruptcy order, but not paid in full, and the unpaid balance of which, according to the contention of the convention, has continued as a moral obligation.

While other questions are raised in the briefs and arguments, in reality the only question properly raised by the pleadings is that posed by the petition: May the trustees of the hospital make the requested $30,000 contribution without violating their duties?

Trustees, when in doubt as to the extent of their powers, may ask a court of equity for, and such court may give, instruction as to the extent of the powers of the trustees and as to the proper manner to exercise such powers. *Morris* v. *Boyd,* 110 Ark. 468, 162 S. W. 69, Ann. Cas. 1916A, 1004; 65 C. J. 680. "Where the duty of a

trustee is a matter of doubt, he is entitled to the aid and direction of a court of equity, in order that he may be safe in proceeding to execute the trust. . . . The rule entitling trustees to the aid of this court applies with full force to the trustees of a public charity." *Trustees of Princeton University* v. *Wilson,* 78 N. J. Eq. 1, 78 Atl. 393. Therefore, the trustees of the hospital had the right to ask the chancery court for instruction as to their powers and duties in the situation that had arisen, and the chancery court had jurisdiction to give such instruction.

It is well established that discharge in bankruptcy does not destroy the debt, but only bars the legal remedy for collecting it. There remains a moral obligation resting on the debtor to pay all he owes, and this moral obligation is a valid consideration for a new promise on the part of the debtor to pay his discharged debt. *Fonville* v. *Wichita State Bank & Trust Co.,* 161 Ark. 93, 255 S. W. 561, 33 A. L. R. 125; 8 C. J. S., Bankruptcy, § 583, p. 1570; *Zavelo* v. *Reeves, et al.,* 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664; *Livesay* v. *First National Bank of Lockney, Tex.,* 57 S. W. 2d 86, 91 A. L. R. 873; *American Improvement Co.* v. *Lilienthal, et al.,* 43 Cal. App. 80, 184 Pac. 692.

Appellees argue that this rule, that the debt, and the moral obligation to pay it, remain in existence after discharge of the debtor in bankruptcy, does not apply here because the creditors and the convention agreed upon a settlement and the order of the bankruptcy court was merely to effectuate this agreement. In support of this contention they cite cases which hold that, where a composition with creditors is made out of court, the moral obligation to pay the part of the debt forgiven does not abide. But the composition here involved was a judicially sanctioned one; and the weight of authority supports the holding that such a composition has the same effect as a discharge in bankruptcy and does not extinguish the moral obligation to pay in full.

The United States Circuit Court of Appeals, Second Circuit, in the case of In re *Kornbluth,* 65 F. 2d 400, thus

stated the rule: "But a moral obligation to pay in full survives a discharge in bankruptcy, and a subsequent promise to pay the balance of the debt is enforceable. *Zavelo* v. *Reeves,* 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664; *Dusenbury* v. *Hoyt,* 53 N. Y. 521, 13 Am. Rep. 543; *Christie* v. *Bridgman,* 51 N. J. Eq. 331, 25 A. 939, 30 A. 429; *Livesay* v. *First Nat'l Bank of Lockney* (Tex. Com. App.), 57 S. W. 2d 86, 91 A. L. R. 873. And the rule is the same in the case of a discharge by confirmation of a composition, the courts again recognizing its essential similarity to the orthodox discharge. *Spann* v. *Read Phosphate Co.* (C.C.A.), 238 F. 338; In re *Merriman,* Fed. Cas. No. 9, 479; *Shively* v. *Globe Mfg. Co.,* 205 Iowa 1233, 219 N. W. 266; *Schuman Bros.* v. *First Nat'l Bank of Skiatook,* 115 Okla. 23, 240 P. 647; *Higgins* v. *Dale,* 28 Minn. 126, 9 N. W. 583; *Herrington* v. *Davitt,* 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700; *Cohen* v. *Lachenmaier,* 147 Wis. 649, 133 N. W. 1099. See *McClintic-Marshall Co.* v. *New Bedford,* 239 Mass. 216, at page 223, 131 N. E. 444; cf. *Zavelo* v. *Reeves,* 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664. Contra: *Taylor* v. *Skiles,* 113 Tenn. 288, 81 S. W. 1258."

The moral obligation on the part of the convention to pay the unpaid balance of the debt remained after the bankruptcy proceedings. Its action in recognizing this moral obligation and determining to discharge it was nothing more than might be expected from a great, militant organization dedicated to promoting a religion whose cardinal principle is found in the commandment: "As ye would that men should do to you, do ye also to them likewise."

In addition to the high moral reason that might actuate a debtor to recognize and pay his obligations after the law has relieved him thereof, there is the very practical consideration that credit is a valuable asset and that there is no better way to have good credit than to evince a disposition to pay honest debts even though enforced collection thereof is prevented by technicality of law. So, the action of the convention, while based solely on ethical grounds, may, throughout the years to come,

be of great pecuniary value to the denomination and its institutions.

Now, more than $30,000 of this composed but unpaid debt was the debt of the hospital, secured by a mortgage on its property and incurred in order to discharge a prior mortgage on its property. Therefore, no breach of duty could be imputed to the trustees for recognizing the moral obligation of the unpaid debt to the extent requested. Certainly it cannot be said that for trustees, in dealing with the affairs of the *cestui que trust,* to pursue a policy dictated by honesty and fair dealing, would in any case amount to a breach of fiduciary duty.

The petition, filing of which began this action, did not present for answer by the court the question as to whether the convention might compel the trustees of the hospital to make the contribution in controversy here; and, while it was asserted on behalf of the convention that such authority existed, counsel for the convention expressly disavow intention to ask decision of this question.

The decree of the chancery court is reversed and the injunction granted by it is set aside; and this answer is made to the question propounded in the petition: That the trustees of the hospital may, if they deem proper, make, out of any surplus funds of the hospital, the requested $30,000 contribution to the convention, to be used in payment on the outstanding balance of the indebtedness composed in the bankruptcy proceedings, without any breach of their duties as trustees, without making any diversion of trust funds, and without affecting in any way the status of the hospital as a charitable institution.

McFaddin, J., concurring. Stripped of all extraneous matters, the question here posed is:

"Do the trustees of a public charitable trust have the power to use, in their discretion, a part of the surplus, arising from operations of the trust, to discharge moral obligations originally contractual?"

I think the trustees have such power. I concur to emphasize that the holding in the case at bar is limited to an affirmative answer to that question.

KINARD *v.* SHACKLEFORD.

4-7731 190 S. W. 2d 12

Opinion delivered November 5, 1945.

John M. Shackleford, for appellant.

A. D. Pope and *George E. Pike,* for appellee.

ROBINS, J. Appellee brought suit in the lower court to recover on a promissory note for $2,000, executed and delivered to him by appellant and secured by a chattel mortgage on certain machinery and equipment. Appellant admitted execution of the note and mortgage, but defended on the ground that liability on the note was discharged under the following clause in the mortgage: "The party of the first part [appellant] is to drill a well SE¼ NE¼, section 15 twp. 17 S range, 14 west. If said well is completed as a commercial well, party of the second part [appellee] is to release said mortgage, for his original ⅛th of oil and gas lease, which has been given. If said well is not a commercial well party of the first part shall pay to the party of the second part the two thousand dollars plus interest from date." Appellant,

at the time the note sued on was executed, assigned to appellee a one-eighth interest in appellant's oil and gas lease covering the land whereon the well was located, and the parties apparently contemplated that, in event appellant should bring in a producing oil well, appellee would receive sufficient return from his interest in the lease to recompense him for the amount loaned.

Appellant alleged that he complied with the requirement by drilling an oil well on the described land which was "a commercial producer."

It is undisputed that appellant did drill a well on this land, and the only issue in the case is whether the well which was brought in by him was a "commercial well" within the meaning of the phrase as used in the mortgage. The lower court found that the well drilled by appellant on the said land was not a "commercial well" and rendered decree for debt and foreclosure in favor of appellee. To reverse that decree appellant prosecutes this appeal.

One of appellant's associates in the drilling of the well testified that the well "blew in" about December 21, 1940; that "they shot it around eight in the morning, and about nine o'clock the oil was blowing over the top. . . . It was making heads at first, then a few hours after that it was a steady blow, and it blew from about 9 o'clock a. m. to 6 o'clock p. m. on the same day . . ."

This witness bought out appellant's interest in the well and tried without success to get the well to producing. He stated that it was not a commercial well at any time; that "when it pays a profit that is a commercial well. . . . The grade has to go down to where it shows less than 2%." He also testified that after he took the well over he operated it for a few days and abandoned it because it was making only about five barrels a day, and "it was just a white elephant."

An oil worker who assisted in bringing the well in testified for appellant: "The hinderlite wouldn't function. Got seven or eight joints into the hole in trying to

stab the hinderlite, the fluid was coming by intervals and it started coming by heads . . . the well blew out, and in trying to kill the water I think there was part of the tubing fell in the well. . . . I would say it was a commercial well . . . Salt water showed up about 10:00 or 11:00 o'clock, and it increased until there was about 90% of water . . . Q. That is your idea about it being a commercial well, it would have been if it had continued the way it came in? A. Yes. Q. You don't know whether any oil was sold off of it? A. Not to my knowledge, but there was a good deal of oil."

A geologist, witness for appellant, testified: "It was a wild well. . . . It was estimated as flowing 800 barrels of fluid, 5% oil and five million cubic feet of gas per twenty-four hour day. . . . My record covers only the first twenty-four hours completion."

In answer to a hypothetical question describing the well the chairman of the Arkansas Oil Commission testified: "I would say it was not an oil well." His definition of a commercial well is a well that produces oil and gas in sufficient quantities to pay the cost of drilling and operating cost.

Section 10494 of Pope's Digest provides: "A commercial well is hereby defined as a well that produces one hundred barrels of forty-two gallons each of oil each day of twenty-four hours for a period of thirty successive days." This section, however, is a part of Act 201 of the General Assembly of 1935, which was "An Act to Provide for the Payment of a Bonus for the Location of New Oil Fields or Horizons and Making Appropriation Therefor." The first section of that Act provides for the payment by the state of a bonus for "the first commercial oil well" in new producing areas; and it might be held that the definition provided by the Act was designed by the legislature only as a basis for governing the payment of the bonus offered by the state to encourage drilling in new and unproved territory, rather than as a general definition intended to govern in all future transactions in the state.

We do not find it necessary to decide whether, under the rule that "the law existing at the time and place of making a contract is a part of the contract; as much so as the stipulations expressed in the agreement" (headnote 3, *Parsel* v. *Barnes & Bro.*, 25 Ark. 261), the legislative definition controls here. Whether the rights of the parties are determined in the light of the above quoted definition or in the light of the construction placed on the term by those engaged in the oil industry, the evidence in the case at bar clearly showed that the well was not at any time a commercial oil well. It was never possible to save from the well commercial oil in paying quantities, and it was abandoned for that reason a short time after it was completed. *United Central Oil Corporation* v. *Helm*, 11 F. 2d 760; *Helm* v. *United Central Oil Corporation*, 271 U. S. 686, 70 L. Ed. 1151, 46 S. Ct. 638.

The decree of the lower court was correct and it is in all things affirmed.

McFaddin, J., not participating.

Nahay *v.* Arkansas Irrigation Company.

4-7066 190 S. W. 2d 965

Opinion delivered November 5, 1945.

Rehearing denied January 7, 1946.

Coleman, Mann, McCulloch & Goodwin, for appellant.

A. G. Meehan, John W. Moncrief, J. D. Thweatt and *Owens, Ehrman & McHaney,* for appellee.

Henry M. Armistead, Jr., amicus curiae.

GRIFFIN SMITH, Chief Justice. Because lands designated in the complaint would be overflowed by a dam it had constructed across Bayou La Grue, Arkansas Irrigation Company sought to condemn. Separate suits were consolidated when answers and cross complaints were filed. Prairie County Irrigation Company intervened, asserting it had previously acquired easements in respect of the property involved.

The Chancellor found (a) that Arkansas Irrigation Company, a corporation, had power of eminent domain; (b) under the Company's prospectus waters would be impounded in the bayou to a maximum depth of 207 feet above sea level;[1] (c) the claimed rights of Prairie County Irrigation Company were subordinate to those of the petitioner, having been subsequently asserted; (d) maps had been filed according to law showing the proposed improvement, and (e) damages should be awarded according to the several judgments rendered.

[1] In *Smith* v. *Arkansas Irrigation Co.,* 200 Ark. 1022, 142 S. W. 509, condemnation appears to have been predicated upon a maximum elevation of 205 feet above sea level. In the present appeal there are references to an elevation of 207 feet. We do not, in this opinion, adjudicate any controversy respecting this difference, if in fact the elevation has been raised.

Appellants state the issues to be: (1) Legal authority to construct the dam was lacking. (2) Act 87 of 1909 does not confer the rights claimed by appellee; but, (a) if the right exists, appellee has not brought itself within the legislative requirement. (3) The case of *Smith* v. *Arkansas Irrigation Company,* 200 Ark. 1022, 142 S. W. 2d 509, has no application. (4) There was a prior dedication of the lands to public use. (5) Appellee has not complied with the provisions of Act 324 of 1935, and therefore it cannot exercise any of the powers granted to a public utility.

Attention is directed to §§ 4944-4970 of Pope's Digest, brought forward from Chapter 98 of the Revised Statutes, the Act having been approved February 20, 1838. Insistence is that the measure deals exclusively with the construction of dams across non-navigable watercourses. Under this Act proceedings must be filed in Circuit Court, stating that the petitioner is the owner in fee simple of land on which the dam is to be constructed. Another section governs where the petitioner owns land on one side of the watercourse and a part of the bed "at the point where he proposes to erect a dam." In either case the proceeding is similar, and was not followed by appellee in the litigation at bar.

This Act, it is insisted, does not grant the right to build mills or other agencies for utilization of the water. Its sole purpose, say appellants, is to prescribe an exclusive method by which dams may be constructed across non-navigable waters, and failure to follow the prescribed procedure is fatal. The primary reference to mills, say appellants, is in connection with venue, and has nothing to do with substantive rights.

We think the Act is somewhat broader. Its language clearly shows that the lawmaking body thought of dams as a means for providing mill power. In the fourth section where venue is treated the introductory words are, "If a mill or other dam be proposed." By § 5 the petitioner is not only required to describe the land, show *prima facie* title, and state the dam's height; but he

must also [set forth] "the kind of mill and other machinery which he proposes to connect with the dam." If, as in the Act's second section, the petitioner does not own land on both sides of the watercourse, he must [set forth] "on what side he proposes to erect his mill or other machinery." Other sections speak of "the dam and mill," using the words interchangeably.

We are asked to adopt appellants' viewpoint: that is, "The statute covers the whole field of the construction of dams across non-navigable streams, except dams for certain specific purposes, such as hydroelectric plants. . . . It is the legislative declaration that the construction of dams across non-navigable streams involves the public health, and that no such dam shall be constructed until a judicial investigation of its possible effect on the health of the neighborhood is conducted by the Circuit Court and an express finding is made that the dam will not endanger the public health by stagnant waters."

When the Act in its entirety is read, and when it is considered in the light of conditions prevailing in 1838, as emphasized by repeated references to "the mill," "the machinery," "his mill," and words of like import, there is the compelling thought that mill dams were the primary subjects of legislative concern.

It is contended that appellee has not brought itself within Act 324 of 1935.[2] The term "public utility" is there defined. It includes persons, corporations, etc., engaged (1) in producing, generating, transmitting, delivering, or furnishing gas, electricity, steam or other agency for the production of light, heat or power to, or for, the public for compensation; (2) diverting, developing, pumping, impounding, distributing, or furnishing water to, or for, the public for compensation. In order to exercise the rights covered by Act 324, the agency proposing to so function must procure from the Department of

[2] This is an Act "providing for the better regulation of certain public utilities in the State of Arkansas and for other purposes."

Public Utilities[3] a certificate of convenience and necessity.

The cause from which this appeal comes was transferred from Circuit to Chancery Court on petition of appellants, a contention being that Prairie County Irrigation Company, as intervener, should have its prior rights declared in equity. If successful this would have denied Arkansas Irrigation Company the power to condemn the additional lands it now claims are necessary to the project. But other than the claimed priority the intervener, in its original pleadings, asserted no higher legal right to construct a dam and overflow privately-owned lands than was shown by appellee. The allegation was that Prairie County Irrigation Company is a corporation organized pursuant to the provisions of Act No. 87 of 1909 ". . . [and that it] has formulated plans for the construction of a reservoir to impound water for irrigation purposes." It was then stated that [evidence of the procurement of easements described in the complaint] was duly filed in the office of the Recorder for the Southern District of Prairie County. Thus, says the intervention, by such conduct it acquired in good faith a paramount easement in the land for use as a reservoir, such rights being referable to Act 87.

It is now contended that whatever rights may have accrued through the processes adopted by appellee, power to condemn was lacking because a certificate of convenience and necessity was not procured under the provisions of Act 324.

Smith v. *Arkansas Irrigation Company,* 200 Ark. 1022, 142 S. W. 2d 509, presented the question whether land sought to be condemned (as to which there had been judgment for the Irrigation Company) was taken for a public purpose. Our holding was that in view of the provisions of Act 87, and "because of the peculiar situation of rice farmers and their entire dependence upon water," the taking was for a public purpose, and the easement

[3] The Department of Public Utilities and the Arkansas Corporation Commission were consolidated by Act 40—approved February 12, 1945. The new agency is Arkansas Public Service Commission.

was properly acquired. Act 324 was not pleaded in the Smith case; nor were its requirements originally assigned in the current litigation as grounds for holding that the condemnation proceedings were illegal.

Section 41 of Act 324, in part is: "No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the [Department of Public Utilities] a certificate that public convenience and necessity require, or will require, such construction or operation." Section 42 is an interdiction against the act of a public utility in exercising any rights or privileges "under any franchise or permit hereafter granted."

If it be conceded that before new construction can take place, or before any equipment or facilities may be used in supplying a public service, it is mandatory that the certificate in question be procured, answer is that condemnation is a constitutional concession, to be exercised under appropriate legislative sanction and is distinct from rate-making. In respect of operation, § 43 (a) of Act 324 provides that before a certificate may be procured, certain requirements shall be complied with, including evidence satisfactory to the [Department of Public Utilities] that the applicant has received the consent, franchise, permit, ordinance, vote, or other authority of the proper municipality, "or other public authority if required."

Section 42 of Act 324 deals with franchise and permits. Clearly the 1909 enactment intended to give irrigation companies the power to condemn lands—a right that will be sustained by courts when the showing is that the legislative purpose was being served. In the case before us there is no municipality to which the applicants could apply for a franchise or permit, and there is no express provision designating another public authority. It must be held, therefore, that even though the present Public Service Commission might have the power to regulate rates and require equitable distribution of water, etc., (a matter we do not decide) failure to procure a certificate

of convenience and necessity was not fatal to the organization; nor did it avoid the rights adjudicated in its favor.

The Chancellor held against appellants' argument that appellee's intentions were merely colorable and that there was no sincere purpose to use the dam for public irrigation purposes. Testimony of C. B. Bailey, engineer for those who sought to halt the work, is to the effect that when he went on the premises to survey for Prairie County Irrigation Company, Arkansas Irrigation was already on the ground with laborers and equipment. There was an effort to show that the reservoir was intended to attract wild ducks, and that it was in the nature of a private game preserve. This was not substantiated. On the whole we think the Chancellor correctly decided the controlling issues.

Affirmed.

RAEF, COUNTY CLERK, *v.* RADIO BROADCASTING, INC.

4-7726 190 S. W. 2d 1

Opinion delivered November 5, 1945.

Jay M. Rowland, for appellant.

William Bronson and *Wootton & Land,* for appellee.

McFADDIN, J. This present appeal and the case of *Jensen* v. *Radio Broadcasting, Inc.,* 208 Ark. 517, 186 S. W. 2d 981, both, stem from the efforts of Radio Broadcasting, Inc., to settle its property tax liability for 1942, 1943 and 1944 on its own valuation figures. We refer to the present case as the "Racf Case," and the previous case as the "Jensen Case," and the appellee as "Radio."

In the Jensen case a complaint was filed in the Garland chancery court on November 17, 1944, for an injunction against Jensen, as delinquent tax collector of Garland county, to prevent him from seeking to collect from Radio $3,713.60 as 1942 taxes, which Radio alleged to be erroneous and void. Jensen contented himself with filing a motion to dismiss. No proof was offered. The chancery court granted a temporary restraining order when Radio made a $5,000 bond. Jensen appealed from the order granting the temporary injunction, and this court affirmed the chancery court in an opinion which concluded with this language:

"The chancellor's action in granting a temporary injunction upon the uncontroverted allegations of the complaint is sustained. The interests of the State and its political subdivisions pending a final hearing of the suit were adequately protected by a bond."

According to the unchallenged allegations in the briefs in the present case, the Jensen case is still pending in the Garland chancery court, to be tried on its merits.

Notwithstanding the pendency of the Jensen case, Radio filed in the Garland chancery court on December 14, 1944, a complaint in this Raef case, out of which comes this present appeal. In this Raef case the sole defendant was "Roy C. Raef, as County Clerk of Garland county, Arkansas." Radio alleged that Raef, as County Clerk, had custody and control of the tax books of Garland county for the years 1942, 1943 and 1944; that for each of these years Radio had personal property in Garland county of the value of $6,000, and had assessed the same at the figure of $2,000, and had paid 1942 taxes of $73.54, and 1943 taxes of $73.54; and would in due time pay 1944 taxes of $73.54; Radio also alleged that due to error the tax books disclosed an unpaid tax for 1942 in excess of $3,000, and that, due to a mistake, there was entered on the tax books for 1943 an erroneous valuation of $68,570 against the property of Radio (which would make a tax in excess of $3,300); and for 1944 there was an erroneous valuation of $50,000 against the property of Radio; and that Roy C. Raef, as County Clerk, should be authorized and directed to correct said erroneous valuations; and that in all such instances, the plaintiff did not receive any notice of any change in its assessment of $2,000; and that the plaintiff has no adequate remedy at law, and offered to do equity. There was no allegation as to *when* the entries were made of which Radio complained.

On January 3, 1945, Raef filed his motion to dismiss, in which he said, *inter alia,* "that he is the County Clerk of Garland county, and that he is not the proper person to change the tax records of Garland county. Defendant further states that this court is without jurisdiction in this matter; and that the plaintiff has an adequate remedy at law." The Garland chancery court evidently treated this as an answer, because Radio's evidence was heard on February 7, 1945.

Radio presented two witnesses, Kellam, the local manager of Radio, and McCormack, the president of Radio. Kellam testified that Radio took over station

KTHS on June 21, 1942, and that no investigation of taxes was made at that time; that on April 10, 1943, Kellam went to the assessor's office, and was advised that Radio's property was already assessed at $687.50 valuation, and the tax would be approximately $22, and would be payable in October, 1943. Kellam said that he signed an assessment sheet showing this valuation of $687.50. This is the 1943 assessment that now appears in the tax books to be $68,750 as the valuation. Kellam testified that in October or November, 1943, he received a notice from Jensen, the Delinquent Tax Collector, that the tax for *1942* was delinquent in an amount in excess of $3,700; and that Kellam immediately contacted the tax assessor and arranged for a conference between the tax assessor and Kellam and McCormack. McCormack and Kellam both testified that they had a conference with Gillenwater, the Tax Assessor, in November, 1943, about this 1942 tax, and that Wilson, the Tax Collector, was present and took part in this conference. (We interpolate here to point out that nobody even intimated that Jensen, the Delinquent Tax Collector, was ever notified of this conference, which was obviously being held for the purpose of defeating Jensen's efforts to collect the alleged delinquent tax.) McCormack and Kellam testified that they informed the Tax Assessor that the property was assessed for 1943 at a valuation of $687.50, and they offered to pay a 1942 tax based on a "fair valuation." The Tax Assessor had read in the newspaper that Radio had paid $225,000 for the KTHS station; and the assessor was desirous of basing an assessment on that figure. But Kellam and McCormack convinced the Tax Assessor that only the actual personal property of Radio was taxable, and that the full value of this personal property was $6,000; and on that basis, the assessed valuation was placed at $2,000, and agreed to by the Assessor and a check for $73.54 for 1942 personal property taxes was paid to Wilson, the Tax Collector, the same day of the conference, November 26, 1943. (We again interpolate to point out that personal property should be assessed at 50% of actual value under

§ 2038(c), Pope's Digest, and the certificate of the Commission empowered by that section.)

The witnesses testified that in this same conference the assessment for 1943 was made by Radio at a valuation of $2,000, and this was approved and signed by the Assessor. (We further interpolate to point out that the previous 1943 assessment of $687.50, according to Kellam, seems to have been overlooked or forgotten by the parties in this conference.) Kellam and McCormack further testified that the 1943 tax of $73.50 was paid, based on this $2,000 valuation, and that on March 22, 1944, Kellam assessed Radio's property at $2,000, and this was agreed to by the Assessor, and that no notice of any change had ever been received by anyone for Radio. Kellam testified that it was not until November 13, 1944 (evidently after Jensen had served the 1942 delinquent tax notice on Radio), that Kellam and his attorney checked the tax books and discovered, then for the first time, that the tax books reflected an unpaid 1942 *tax* in excess of $3,000, and a 1943 *valuation* of $68,750, and a 1944 *valuation* of $50,000.

Such was the evidence. Radio evidently treated the conference between Kellam and McCormack, on the one hand, and Gillenwater, the Tax Assessor, on the other, as a bargaining process whereby the value of $2,000 was determined; because, in the testimony, the attorney for Radio, explaining one of his objections to the cross-examination, said: ". . . we are not here on the question now of the court reassessing values; we are here to seek a carrying out of the agreements as to the acts that had been previously performed rather than asking the court to reappraise the station, and I don't believe matters relating to values are competent. . . . I might state, we are trying to have a specific performance of the contract, . . ."

On the evidence as hereinbefore detailed, the Garland chancery court on February 8, 1945, rendered a decree finding that Radio had paid its full tax liability for 1942 and 1943, and that the $2,000 assessed for 1944

was a correct assessment, and that upon paying the tax based on the $2,000 valuation, Radio would be discharged from all further tax obligations for 1944. Regarding the 1943 valuation of $68,750, the court found "that the Assessor without authority in law illegally entered upon the assessment roll the sum of $68,750 as the taxable value of the plaintiff's property, and that said assessment was increased by the Assessor from the sum of $687.50 without notice to or knowledge of such property owner or his agent; and that said increase in valuation by the said assessor was unlawful and void." Regarding the 1944 assessment of $50,000 the court found that the said Assessor "without authority in law and without notice to or knowledge of the plaintiff illegally entered upon the assessment roll the sum of $50,000 as the taxable value of the plaintiff's property, and that said assessment was increased by the Assessor from $2,000, without delivering to the property owner" any notice of the increase.

The court decreed that Radio be discharged from all liability for 1942 and 1943 taxes, and that the increased valuations for 1943 and 1944 should be expunged from the tax records by Raef, by attaching a copy of the decree to the records. From that decree Raef prosecutes this appeal.

I. *Absence of Necessary Parties.* At the outset we point out that only Raef was a defendant in the present case, and that only Jensen was a defendant in the Jensen case. If the decree in this present Raef case be sustained, then there is no tax assessment of record on which Jensen might proceed to a trial in his case, because the decree in this Raef case destroys all tax liability on which Jensen could proceed in his case for 1942 taxes. The statement of this fact demonstrates most clearly that the chancery court should have deferred any relief to Radio on this Raef case concerning 1942 taxes until Radio caused all necessary parties to appear before the court in the Raef case. In the Jensen case Radio alleged that, as Delinquent Tax Collector, Jensen had

served a notice on Radio that he was about to proceed to collect a tax of $3,070.15 for 1942. That suit is pending in the Garland chancery court, and Jensen is halted by a temporary restraining order and forced to await final trial. In the Raef case, Radio sought and secured a decree to the effect that Radio was free of any tax liability for 1942. This was the same issue involved in the Jensen case. Certainly, Jensen should have been a party in this Raef case, and the effect of Raef's motion to dismiss was to raise this issue of defect of parties. In 19 Am. Juris. 126, the rule is stated:

"Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; decide all issues which are involved by the subject matter of the dispute between the litigants; award relief which is complete and finally disposes of the litigation so as to make performance of the court's decree perfectly safe to those who may be compelled to obey it; accomplish full justice between the parties litigant; and prevent future litigation. All persons who are interested in the subject matter of dispute will be brought before the court in order that there may be entered and enforced a complete and effective decree which will finally adjust the rights of all concerned."

In *Stirman* v. *Cravens,* 33 Ark. 376, this court held that whenever it is discovered in the progress of a cause that the rights of the parties already before the court cannot be finally determined without other parties, they *must* be brought in. From a public policy point of view, Jensen, as Delinquent Tax Collector, was a necessary party to the Raef case, and since he was not a party in this case, the decree herein must be reversed and the cause remanded. There is some uncertainty as to who are all the necessary parties in a suit like this one. Certainly Jensen, as the Delinquent Tax Collector, was a necessary party concerning the delinquent taxes. The Tax Collector would be a necessary party concerning the current taxes. The decree finds that the Tax Assessor had illegally increased the assessment, so the Assessor might be a necessary party.

There seems to be a paucity of authorities on this question. In *Colorado, etc., Ry. Co.* v. *City of Crowley,* 134 La. 180, 63 So. 868, the Supreme Court of Louisiana, in discussing necessary parties in a suit involving an assessment, said: "The assessment had passed from the Board of Appraisers and had become final and could not be set aside contradictorily with that board alone without making the collector or the one in charge of the collection of the license tax a party to the suit."

Likewise, in *Millsaps* v. *Traylor,* 128 La. 1068, 55 So. 677, the Supreme Court of Louisiana held that when the complaint alleged that a tax assessing agency had acted illegally, then that agency should be permitted to be a party to the suit. In *McKay Radio Co.* v. *Town of Cushing,* 131 Me. 333, 162 Atl. 783, the Supreme Court of Maine, in considering the question of necessary parties in a suit involving municipal tax assessment, held that a suit against the town alone lacked proper parties, because the tax assessors were necessary parties. These cases from other jurisdictions are, of course, based on statutory proceedings (for review of assessments) quite different from our own statutes, but they indicate the general idea as to the necessary parties in suits concerning tax assessments. At all events, there was an absence of necessary parties in this Raef case, and for that reason the decree is reversed, and the cause remanded with the directions stated in the concluding paragraph of this opinion.

II. *Jurisdiction of Equity.* In his motion to dismiss, Raef challenged the jurisdiction of equity. This is not a suit against the Clerk to correct an error he might have made in extending the taxes (in performing his duty set forth in § 13758, Pope's Digest); but, rather, this is a suit to challenge or expunge an increased assessment made by the Assessor; and there is no allegation that this assessment increase was made other than during the period of time when the Assessor could have made such an increase by law. We mention this to clearly distinguish the holding in the case at bar from the holding in *Jensen* v. *Dierks Lumber & Coal Co., infra,* p. 262,

190 S. W. 2d 5 (case No. 7727), in which an opinion is delivered this day.

In *Arlington Hotel Co.* v. *Buchanan,* 110 Ark. 34, 160 S. W. 895, this court held that where the only issue is the alleged error of the County Assessor in assessing a valuation on the property—on that mere allegation—then equity has no jurisdiction to entertain a suit to review the action of an assessor. We there quoted with approval the language of Mr. Justice RIDDICK, in *Wells Fargo* v. *Crawford County,* 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371: " 'The assessment of the property of this express company having been committed by law to the board of railroad commissioners, a complaint for relief in equity is insufficient which only alleges that the valuation by the board is excessive; for, in the absence of fraud, intentional wrong or error in the method of assessment, the finding by the board cannot be overturned by evidence going only to show an error of judgment in the valuation of the property.' "

In 61 C. J. 894, in discussing equitable jurisdiction in the cases alleging over-assessment or discrimination, the rule is stated: "Since it is not the province of a court of equity to review or correct the proceedings of officers intrusted with the assessment of property, injunction will not ordinarily lie for excessive valuation in assessments where the taxpayer was either heard or given an opportunity to be heard, unless the assessment be palpably arbitrary, purposely prejudicial, and resulting from corrupt, malicious or illegal motives, or simply so grossly out of proportion to actual values as either to indicate dishonesty, or amount to constructive fraud."

When allegations in a complaint are *prima facie* sufficient to give equity jurisdiction under the rule above stated, the plaintiff must on hearing show the real value of the property involved, and come with open hands to pay the correct taxes. He cannot base his suit (as was here intimated in the evidence) on a claim that he is entitled to specific performance of an assessment made by agreement with the Assessor. Assessing is not a bar-

gaining process. When a taxpayer comes into equity on proper grounds and seeks relief against taxation, "he must make a full, fair, and complete disclosure of his property subject to taxation. He must show clearly that he has paid, or is willing to pay, all that he justly owes towards the public burden. 'He must come, not only with clean, but with open, hands.' " Such is the language used by the Kentucky Court of Appeals in *City of Georgetown* v. *Graves,* 165 Ky. 676, 178 S. W. 1035.

The Supreme Court of Oklahoma in *Rogers* v. *Bass,* 64 Okla. 321, 168 Pac. 212, quoted this language from *City of Collinsville* v. *Ward,* 64 Okla. 30, 165 Pac. 1145: " 'A party who seeks equitable relief against an assessment of which he complains must himself offer to do equity. He must offer to pay the amount of taxes which the facts show would be properly chargeable against him under a proper assessment.' "

Since the decree in the case at bar is reversed because of the absence of necessary parties, we need not decide whether the complaint here alleged a cause of action for equitable jurisdiction. What is said in *Jensen* v. *Dierks Lumber & Coal Co.* (case No. 7727) is clearly distinguishable from the question of equitable jurisdiction in the case at bar.

The decree of the chancery court is reversed, and the cause is remanded with directions to dismiss the complaint unless the plaintiff brings into court all necessary parties on a complaint which shows grounds for equitable jurisdiction.

JENSEN *v.* DIERKS LUMBER & COAL COMPANY.

4-7727 190 S. W. 2d 5

Opinion delivered November 5, 1945.

Jay M. Rowland, for appellant.

Elbert Cook, Wootton & Land and *Carl Enggas,* for appellee.

McHaney, J. Appellee brought this action against appellant, individually and as delinquent tax collector for Garland county, to enjoin appellant from attempting to collect from it alleged delinquent personal taxes for the years 1940, 1941 and 1942, which had been demanded by appellant in the total sum of $15,216.72. The complaint alleged that on November 6, 1944, appellant had served on it a "Notice Before Writ of Garnishment or Attachment" demanding said sum; and that on November 13, 1944, he had served a writ of garnishment on the Arkansas National Bank of Hot Springs, Arkansas, which alleged that appellee was indebted for said delinquent taxes and penalties in said sum, and commanding said bank to answer to him, as delinquent tax collector within ten days, what goods, chattels, monies, etc., were in its hands or possession belonging to appellee, and propounding the statutory interrogatories to the garnishee. Appellee further alleged that no tax is due or owing by it for any of the years aforesaid, and none due either the state, Garland county, or any of its subdivisions. It was further alleged that the actions taken by appellant were without authority. It prayed a temporary writ and finally a permanent writ of injunction.

Notice was served on appellant that on November 17, at 10 a.m. it would apply to the court for a temporary

restraining order. On said date appellant filed a motion to dismiss on the ground the court was without jurisdiction to restrain him from collecting delinquent taxes which appear as unpaid on the tax books of Garland county, or, in the alternative, appellee should make bond in the sum of $20,000. The temporary writ was granted as prayed, and bond in said sum was given.

Thereafter, appellee filed an amendment to its complaint alleging that on November 20, 1944, after issuance of the temporary writ as above, as of November 20, the county assessor made certain entries in the personal tax books of said county for the year 1942, purporting to list against appellee an additional assessment for 1940 in the amount of $121,250; for 1941, $119,000, and for 1942, $115,000; that on the same date, November 20, the collector, without authority, entered on said personal tax books for 1942, the following notation: "Assessment made by tax collector November, 1944, not charged to tax collector. No collection made." That on the same day, November 20, 1944, the county clerk extended the taxes on the assessment made by the assessor, in the total sum of $12,575.85. Similar allegations of illegality of said attempted assessment and a similar prayer were made. Appellant filed no further pleading.

The case was tried on a stipulation as to the facts and the testimony of Jess Rutledge, plant superintendent for appellee, given in the circuit court on November 7, 1944, in a suit by appellee against the Garland County Equalization Board, admitted in evidence by the trial court over appellee's objections.

Trial resulted in a decree permanently enjoining appellant from attempting to collect said additional taxes. The court found that the said entries upon the personal tax books of 1942, were unlawfully made and were void, and that appellee had assessed and paid taxes on all property, both real and personal, for 1940, 1941 and 1942, and has no further tax liability. This appeal followed.

Appellant questions the jurisdiction of the court. What we have said in the case of *Raef, County Clerk,* v.

Radio Broadcasting, Inc., ante, p. 253, 190 S. W. 2d 1, is not controlling here, as the facts are not similar. Nor is the rule laid down in *Wells Fargo & Co.,* v. *Crawford County,* 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371, and followed in *Arlington Hotel Co.* v. *Buchanan,* 110 Ark. 34, 160 S. W. 895, controlling. It was held in the Arlington Hotel case that, "when the only issue is an alleged error of a county assessor in fixing the valuation of property, there being a statutory remedy for the property owner to pursue by appearance before the county board of equalization or the county court, and the property owner, having neglected to pursue this remedy, a court of equity has no jurisdiction to review the action of the assessor." This because he had a plain and adequate remedy at law. Here, however, appellee had no remedy at law. The attempted assessment was made in November, 1944, long after assessing time and collection time when the taxes assessed had been paid, and, as was alleged, without any authority of law therefor. We think the chancery court had jurisdiction.

Stipulation No. 3 of the stipulation of facts is: "That Dierks Lumber & Coal Company assessed its property, real and personal, situated in Garland county, Arkansas, for the years 1940, 1941 and 1942 with the assessor of Garland county, Arkansas, within the time prescribed by law, and that said taxes were duly extended by said assessor on the real and personal tax books of said county; that said values as so declared were equalized by the equalization board as provided by law and within the time prescribed by law said taxes were paid by Dierks Lumber & Coal Company to the collector of Garland county, Arkansas, and an official receipt issued by the collector to Dierks Lumber & Coal Company for all taxes and extended against it for said years."

The attempted additional assessment was based on the testimony of Rutledge given in another court in another case, wherein he testified that for the years in question appellee had an average stock of lumber on hand of six million feet worth about $45 per thousand feet, mak-

ing a total average of $270,000 in valuation. Assuming that this testimony is competent and relevant in this case, without so deciding, still we are of the opinion that the attempted assessment of the additional taxes, in the manner herein set out, was without authority and void, as the court properly held.

Appellant relies upon the provisions of § 13666 of Pope's Digest. This section is too lengthy to be set out, but under it, the right to assess property "omitted for any cause from the assessment roll," in either of two instances therein set out is dependent on discovery of that fact and the entry of the assessment on the tax books "before the collector closes his books for the collection of taxes for the year in which such property was due to have been assessed." The taxes sought to be collected in this action are for the years 1940, 1941 and 1942. The attempted assessment was made in November, 1944, long after the collector had closed his books for each of said years. Therefore, § 13666 confers no authority for the procedure here attempted.

If appellee has, in fact, undervalued its personal property, the state and its subdivisions might have a remedy. See § 13987 of Pope's Digest in connection with § 13899, and the decision of this court in *State ex rel. Attorney General* v. *Chicago Mill & Lumber Corporation,* 187 Ark. 65, 58 S. W. 2d 951.

It follows that the decree is correct, and it is accordingly affirmed.

REYNOLDS *v.* HAULCROFT.

4-7728 189 S. W. 2d 930

Opinion delivered November 5, 1945.

Cunningham & Cunningham, for appellant.

S. L. Richardson, for appellee.

HOLT, J. In the early part of 1931, Village Creek Drainage District, one of the appellees, brought suit to foreclose its lien for delinquent benefit assessments against lots 8 and 9, block 16 of the original town of Hoxie and other lands, and secured a decree April 28, 1931. Pursuant to said decree, sale was made May 11, 1934, report of said sale made to the court June 1, 1934, and on this same date, deed to the purchaser, which was Village Creek Drainage District, was approved by the court. March 11, 1934, the drainage district conveyed lot 9, block 16 of the original town of Hoxie, to appellee, Florence Haulcroft.

April 15, 1942, appellant filed intervention in the drainage district's foreclosure suit in which he alleged, in substance, that his father, James Reynolds, Sr., died

August 21, 1927, and was survived by his widow and appellant, a minor 4 years of age, an only child and sole heir; that at the time of his death, his father owned the lots involved here, was living on this property and that appellant and his mother have continued to occupy the property as their home at all times since Mr. Reynolds' death; that appellant reached his majority on December 8, 1943; that the decree foreclosing the lien for delinquent Village Creek Drainage District benefit assessments was rendered April 28, 1931; that in addition to the tax of 60 cents against each of the two lots a twenty-five percent. penalty and six percent. interest, together with $5 for attorney's fee, $3 for clerk's cost, and $5 for commissioners' fee, were added and adjudged against each lot involved here, and all other tracts of land involved in the sale; that the foreclosure suit involved approximately 3,000 separate tracts of land and was an uncontested suit.

"That the sum of $5 as attorney's fees against each of said tracts would amount in the aggregate to approximately $15,000 attorney's fees . . . the sum of $3 against each of said tracts as clerk's costs would amount to approximately $9,000" and that "the $5 assessed against each tract as costs of the commissioners for making the sale would amount to approximately $15,000."

That "said amounts as costs was such a gross abuse of the discretion of the court as to amount to a fraud; that the court had no power to assess the lots above set out with the sum of approximately $2.80 clerk's cost in excess of the amount of such costs legally chargeable against the said lots"; that "said decree was rendered either through fraud or mistake" or if not so rendered, the allowance of the above amounts as costs was such a gross abuse of the court's discretion as to amount to fraud upon the rights of appellant.

He further alleged that the lands were arbitrarily struck off to Village Creek Drainage District, with approximately 3,000 other tracts, without giving anyone else an opportunity to bid. He further alleged that he

had been in actual, open, notorious, and adverse possession of the property here in controversy for more than seven years and prayed "that his title to lots 8 and 9, block 16 of the original town of Hoxie, be approved and confirmed . . . ; that such foreclosure decree in so far as it affects the lots involved here be set aside . . . ; that the said decree be cancelled and set aside and that this plaintiff be allowed to pay the amount really due and that his lots be discharged from any further liability," etc.

Appellee, Florence Haulcroft, demurred to appellant's intervention on the ground that it did not state facts sufficient to entitle appellant to the relief prayed, or facts sufficient to constitute a cause of action. Appellee, drainage district, adopted Mrs. Haulcroft's demurrer. This demurrer was sustained by the trial court and this appeal followed.

In testing the sufficiency of appellant's intervention, or complaint, on demurrer, the rule is well established that all allegations in the complaint that are well pleaded must be taken as true. *Eddy* v. *Schuman,* 206 Ark. 849, 177 S. W. 2d 918.

Village Creek Drainage District in Lawrence county was created under Act 40 of the "Extraordinary Session of the Legislature of 1920. Section 22 of that act provides that "said board of commissioners shall enforce the collection by chancery proceedings, in the manner and with the effect set forth in §§ 23 and 24 of Act No. 279 of the Acts of the General Assembly of the year 1909, entitled: 'An Act to Provide for the Creation of Drainage Districts in this State'; but any landowner whose property has been sold in said proceedings shall have the right to redeem the same within two years from the time they are stricken off by the commissioners making the sale," and § 23 of Act 279 of 1909 (now § 4482 of Pope's Digest) provides that "said commissioner shall by proper deeds convey to the purchaser the lands, . . . and the title to said lands . . . shall thereupon become vested in such purchaser as against all others

whomsoever, saving to infants and to insane persons having no guardian or curators, the right they now have by law to appear and except to said proceedings within three years after their disabilities are removed."

Whatever appellant's rights were must be derived from the two acts, *supra.* Appellant's right to redeem was no greater than that allowed an adult. Since the sale was made May 11, 1934, the right to redeem under the statute had expired long before appellant's intervention here was filed. He had, therefore, lost all right to redeem. In *Deaner* v. *Gwaltney,* 194 Ark. 332, 108 S. W. 2d 600, this court, referring to § 23 of Act 279, now § 4482 of Pope's Digest, said: "After providing when the decree of foreclosure may be rendered (said section) contains a 'saving to infants and to insane persons having no guardian or curators, the right they now have by law to appear and except to said proceedings within three years after their disabilities are removed.' It is obvious that this is not a redemption statute, . . ." and in an earlier part of the opinion, "This right of redemption was given to all owners and was not limited to minors, nor were minors given any right of redemption peculiar to themselves. Minors and all others had the same period of redemption."

The question, therefore, is narrowed to a proper construction of § 4482, *supra,* in proceedings such as are presented here, which saves to infants "the right they now have by law to appear and except to said proceedings within three years after their disabilities are removed."

It is our view, and we so hold, that this section saves to an infant the right within a period of three years after he reaches his majority to file exceptions to the proceedings and it can make no difference that there might have been confirmation of the sale before the infant reached his majority. In other words, the right accorded the infant, under the statute, to file exceptions to the proceedings within the three-year period subsequent to his majority, gives to him the same right that an adult would

have to file exceptions to the proceedings and the fact that there had been a confirmation during the time of minority when such minor was unable to defend for himself, does not take away his right to file exceptions to the proceedings. It is, therefore, clear, we think, that appellant is making a direct and not a collateral attack on the decree of foreclosure because the right is given by statute. See *Nash* v. *Delinquent Lands,* 111 Ark. 158, 163 S. W. 1147.

Here, among other things, it is alleged that the decree was rendered through fraud or mistake, or if not so rendered, that the allowance of the excessive costs, *supra,* was such a gross abuse of the court's discretion as to amount to a fraud upon the rights of appellant. Since, as indicated, appellant's allegations of grossly excessive costs are admitted on the demurrer to be true, we think a cause of action was stated and that the trial court erred in sustaining the demurrer and dismissing appellant's complaint. Accordingly, the judgment is reversed and the cause remanded with directions to overrule the demurrer.

CLAY *v.* GAULDING.

4-7721 189 S. W. 2d 928

Opinion delivered November 5, 1945.

Wilson & Wilson, for appellant.

SMITH, J. The parties to this litigation entered into an undated contract, leasing a five-acre tract of land described as follows:

"Beginning on the west side of Lake Side Public Road 636 feet west of the southwest corner of the southeast quarter of southwest quarter of section 9, township 13 south, range 16 west; thence running west 709 feet; thence north 330 feet; thence east 518 feet to the west side of said Lake Side Public Road, etc., to point of beginning. Excluding the fenced yards and gardens surrounding the two houses that we own."

It was provided that: "This lease is to be valid for 12 months from date with the privilege of renewal for succeeding twelve-month period at $10 per month rental." The lessees agreed "to install running water in the kitchen and an electric light in each of the two rooms of the house owned and occupied by J. B. Clay and his family; and to furnish water and electric lights free of all cost to this house throughout the duration of this lease; and to leave all construction that is on a permanent foundation."

Under the authority of this contract, the lessees made extensive improvements, costing between two and three thousand dollars, necessary and useful in the operation of a tourist camp, and they installed, without expense to the lessors, the utilities for which the contract provided.

The lessors brought this suit in which they prayed judgment for $350, for the breach of the contract, and they prayed also for its cancellation.

The breach of the contract alleged consisted in the entry upon and improper use of the portion of the 5-acre tract which had been excluded from the lease, by tearing down portions of the fence inclosing the garden, and by placing gravel on a portion of the garden, rendering it unfit for gardening purposes.

The relief prayed was denied and from that decree is this appeal, and appellants say in their brief: "We

respectfully submit that appellees have breached the contract, and appellants are entitled to have same canceled, and the decision of the trial court is erroneous and should be reversed and the contract in question canceled."

Appellants failed to prove, and do not here claim damages, but seek only the cancellation of the lease. This relief was, in our opinion, properly denied.

In an opinion prepared by the chancellor reviewing the testimony it is recited that the testimony is conflicting as to the portion of the garden covered by the lease, and as to whether the portion of the fence torn down had been removed by consent, and the finding was made, "that the gravel was taken up, as much as could be, and removed to another place, at the instance of the defendant (lessor)."

But, however that may be, no ground for cancellation of the lease was shown. The improper use of the land not covered by the lease would not prevent the use of the portion that was covered by the lease, and this appears to be the relief appellants here seek, inasmuch as they are asking only the cancellation of the lease. Appellants say "in the instant case damages were waived, by reason of not being able to ascertain the damages at the time of the trial," and it is said that another suit is pending to recover damages.

Relief by way of cancellation of the lease was properly denied, and that decree is affirmed, but without prejudice to appellant's right to enjoin the use of the land not covered by the lease, if any, or to recover damages on that account.

FEDERAL COMPRESS & WAREHOUSE COMPANY *v.* HALL.

4-7732 189 S. W. 2d 922

Opinion delivered November 5, 1945.

Herbert Gannaway, C. M. Buck and *J. G. Sudbury,* for appellant.

Reid & Evrard, for appellee.

MILLWEE, J. Appellee, C. H. Hall, brought this action alleging that prior to June, 1940, he was employed by appellant as superintendent of its plant at Blytheville, Arkansas, and while so employed he received accidental injuries which forced him to retire from such employment; that under a verbal contract entered into by the parties at the time of appellee's retirement, appellant agreed for a valuable consideration to pay appellee $200 per month for the remainder of his life. It was further alleged that payments were regularly made to appellee under the contract from July 1, 1940, until January 1, 1944, when appellant refused to make further pay-

ments. Judgment was prayed for payments which had accrued at the time of the filing of the suit and which might accrue up to the date of trial, at the rate of $200 per month with interest.

In response to appellant's motion to make the complaint more definite, appellee filed an amendment alleging that he sustained injuries to his back in October, 1937, by slipping on some mud which certain employees of the plant had negligently permitted to accumulate on a platform to a railroad car, over which it was necessary for appellee to walk, causing appellee to fall a distance of five feet to the rails of the track. In the amendment to the complaint it was also alleged: "that in consideration of the action of defendant in contracting and agreeing with him that it would pay him the sum of $200 per month for the remainder of his life, plaintiff was induced to and did forego any effort to assert any claim for compensation for the damages sustained by him as a result of the injury herein mentioned, and his action in so foregoing the assertion of any such claim was the valuable consideration referred to in the original complaint in this cause."

In its answer, appellant denied that appellee received accidental injuries and denied that it had agreed to pay appellee $200 a month for the remainder of his life. Appellant admitted that it had paid appellee $200 a month until January 1, 1944, and stated that it was under no obligation to pay appellee after said date and was not indebted to appellee in any sum. Trial to a jury resulted in a verdict and judgment for appellee in the sum of $2,486.40, representing 12 monthly payments with interest.

The first contention of appellant is that the trial court erred in refusing to direct a verdict in its favor at the conclusion of the testimony of appellee and at the conclusion of all the testimony. The question of the legal sufficiency of the evidence to support the verdict is thus presented. If the testimony, when given its highest probative value in favor of appellee, fails to disclose any

substantial evidence to support the verdict, appellant's contention must prevail.

Appellee came to Blytheville in 1923 as superintendent of appellant's plant and served in this capacity until his retirement in June, 1940. The record discloses that he was an efficient and faithful superintendent, and that the business of appellant prospered under his management. Appellee's son, Sheldon Hall, lived with his father and was also employed at the compress during the time his father was superintendent. He succeeded his father as superintendent of the plant upon the latter's retirement.

According to the testimony of Sheldon Hall, appellee fell from a platform between some box cars and broke two or three ribs and injured his back during the latter part of the time he was employed as superintendent. Appellee continued to work until his retirement on June 1, 1940. A short time before appellee quit work Sheldon Hall was present at a conference with appellee, R. L. Taylor, chairman of the board of appellant company, and Binford Hester, president of the company, in Memphis, Tennessee. When asked to state the substance of the conversation between appellee and R. L. Taylor at that conference, witness replied: "Well, there was agreed that Daddy would be paid $200 a month for his leaving there. When he left he asked them—he didn't ask for the payment, they voluntarily gave it to him, and he said, asked them, 'How will this be?,' and he said, 'Until you are able to come back to work or from there on out.' That was the meaning of the conversation."

After the witness had succeeded his father as superintendent he received a letter from R. L. Taylor, dated June 19, 1940, which contained the following instructions: "Beginning with July 1st, you will send Mr. C. H. Hall check first of every month for $200. Charge to salary account in the usual way unless he prefers to have it charged out otherwise." The payments were still being made when Sheldon Hall left the employment of appel-

lant in September, 1943, to take a job with another company.

Appellee testified that he was injured by a fall between two railroad cars at appellant's plant in 1937, but continued to work. In response to questions as to whether or not any demand was made for compensation as a result of his injuries, appellee gave the following testimony: "Q. Did you make any formal demand on them at that time for any compensation or anything of the sort? A. No, sir. Q. Did you report the fact that you had been injured? A. Well, I didn't make a formal report. I made a note of it, and later or after this difference came up I went to the compress to get that and found that at that time a majority of the records during my period with them had been destroyed. Q. You said you made a note of it. On what? A. The daily report. Q. The daily report? A. Yes, sir. Q. Was that a report that you sent in anywhere? A. To the general office in Memphis."

In May, 1940, appellee received a letter from R. L. Taylor stating that he had been informed by Sheldon Hall that appellee was still having some trouble with his back. In this letter Taylor insisted that appellee draw a check for $500 and accept it as a bonus and go immediately to a famous clinic which Taylor had patronized, and which he had recommended to his friends and other employees of the company. About two days later appellee went with his son to Memphis where they had a conference with Taylor and Hester in the general office of appellant. When asked to relate the conversation, appellee gave the following answer: "Well, I had phoned before going over to be sure that I could see Mr. Taylor, told him I had something I wanted to discuss with him. When I got over there he was in his office and we had just a general conversation for a short while and I told Mr. Taylor that I was wanting to quit, that my condition had gotten to where it was hard on me and I didn't think that I could give the service that I had been giving to my duties and attention to them, and he said, 'Why

you mustn't do that, we don't want you to,' and I told him I didn't really want to either, but on account of my health and for the company there that I thought it best, and he says, 'Well, we don't want you to, but we have got two propositions to make you, Charlie. One is to take a year's salary, a year's living, get to feeling better and come back to work, or you can retire permanently. We will give you $200 a month.' And I said, 'How long will that continue,' and he says, 'From now out,' and I says, 'From now out—does that mean for the rest of my life?', and he says, 'It does,' and he says, 'You have made me more money than all the compresses in Memphis combined.' Says 'I don't want it said about me that that old————of a————got rich on the work or effort of someone working for me and then I just turned them out,' and he also said that 'I am going to make this of record at the next meeting of our executive committee so that when I get out there will be no doubt about you getting it,' and the reorganization or some other things that he explained to me about the company.''

Appellee further testified that he had lived in Loveland, Colorado, since his retirement and received the last check from appellant in December, 1943. He was 52 years old at the time he was injured in 1937 and knew that appellant carried liability insurance on its employees, but made no report of his injury to the insurance carrier. The checks he received were charged as salary and social security payments were deducted from each check. He received the first notice about Christmas, 1943, that the $200 monthly checks would be stopped. This notice was received in a letter from R. L. Taylor in which he stated that, when appellee left the employment of the company, Taylor felt that appellee's advice would be valuable to his son as the new manager, and he (Taylor) had recommended a salary for appellee, but since the son had left the company, appellee could be of no further service and Taylor had recommended discontinuance of the salary payments.

In reply to this letter appellee expressed his disappointment at Taylor's action and asked for reconsideration of the matter. In this letter appellee said: "You will recall that you told me that the payments of $200 per month to be made to me were because of my loyalty and services to the company and were to continue for the rest of my life. . . ." Other letters passed between Taylor and appellee, and in a letter written by appellee on February 5, 1944, he stated: "Yours of January 20th did not state definitely that the monthly payments to me were going to be stopped, and I am surprised that I have not received check for January, as I have told you both in letter and talking to you, that my back injury and health keep me from going back to work and that our future living conditions depend almost entirely on the half retirement pay that you told me would continue for the rest of my life. . . ."

Other testimony was given by appellee pertinent to the alleged agreement as follows: "Q. Mr. Hall, prior to the time you had this conversation at Memphis at which the agreement was made about this $200, did Mr. R. L. Taylor know you had received an injury at the plant? A. Yes, sir. Q. What, if any connection, did that fact, the fact of your having received an injury, have with the making of this agreement? A. That was the foundation for the whole thing. . . . Q. Was there any discussion of the connection of this between you and Mr. Taylor? A. Well, that was my reason for resigning, that the injury had made my physical condition where I couldn't fool the boss." Appellee also testified that he would have brought suit for the injury if some agreement had not been reached for compensation.

The moving consideration for the action of appellant in contracting to pay appellee $200 per month for the remainder of his life is alleged to be that appellee was induced to and did forego any effort to assert any claim for compensation for the damages sustained by him as a result of his injuries. An agreement not to exercise a legal right is a valid consideration to support a contract.

There are numerous decisions of this court holding that forbearance to institute legal proceedings for a time on an asserted claim, or to refrain therefrom altogether, is sufficient consideration to support a new obligation. It is also well settled that an agreement for the compromise of a disputed claim, even one which is in fact without merit, constitutes a sufficient consideration for a new promise. *Matthews* v. *Morris,* 31 Ark. 222; *Willingham* v. *Jordan,* 75 Ark. 266, 87 S. W. 424; *Fender* v. *Helterbrandt,* 101 Ark. 335, 142 S. W. 184; *Lay* v. *Brown,* 106 Ark. 1, 151 S. W. 1001; *Brinkley Car Works & Mfg. Co.* v. *Cook,* 110 Ark. 325, 161 S. W. 1065; *Jonesboro Hardware Co.* v. *Western Tie & Timber Co.,* 134 Ark. 543, 204 S. W. 418. The surrender of, or forbearance to prosecute, a claim for damages for personal injuries is a sufficient consideration. *Gerard B. Lambert Co.* v. *Fleming,* 169 Ark. 532, 275 S. W. 912; 17 C. J. S., p. 460; Annotation 57 A. L. R. 279. It is also well settled that mere forbearance from exercising a legal right, without any request to forbear, or circumstances from which an agreement to forbear may be implied, is not a consideration which will support a promise. 12 Am. Jur. 578-79; Annotation 74 A. L. R. 293.

The controlling question in this case is: Did appellee, at appellant's request, refrain from the exercise of a legal right to assert or prosecute a claim for damages for personal injuries pursuant to and in consideration of appellant's promise to pay him $200 per month the remainder of his life? The testimony on behalf of appellee has been reviewed in considerable detail. It is the opinion of the majority that when such testimony is viewed in the light most favorable to appellee, there is no substantial evidence to support the verdict of the jury on this question. It may be pointed out that there was testimony of an injury to appellee in 1937, although there was no proof of appellant's liability therefor. But in none of the testimony is it disclosed that appellee placed any blame on appellant for his injury or that he ever actually made or asserted any claim against appellant for such injuries.

While he testified that R. L. Taylor knew he had received an injury, and that the injury was the foundation of the agreement, when pressed with the question as to what connection his injury had with the discussion with Taylor in making the agreement, appellee simply stated that the injury was the reason for his resignation, and not that he asserted any claim against appellant. After the payments had been stopped, the letters of appellee show that he regarded the payments as being made for his loyalty and services to appellant in line with the company's policy of half-pay on retirement. It is true, he mentions his injury in the letters in explanation of his inability to go back to work, but no contention is made in the letters that the $200 per month payments were made in settlement of a claim for damages.

Sheldon Hall, in recounting the conversation which is alleged to have formed the basis of the agreement, makes no mention of an injury or claim for damages. On the contrary, this witness testified that his father asked for no payment and the clear import of his testimony is that the promise to pay appellee $200 per month was a voluntary gift.

The burden was upon appellee to establish a valid contract for the payment of $200 per month for the term of his life. The only valid consideration for such contract which was urged and relied upon by appellee was his agreement to forbear prosecution of a claim for personal injuries against appellant. Since the conclusion is reached that there was a lack of substantial evidence to establish a valid consideration in support of the alleged contract, it follows that the learned trial judge erred in refusing to direct a verdict in favor of appellant. It, therefore, becomes unnecessary to discuss other interesting questions presented in the briefs.

The judgment must, therefore, be reversed, and, as the cause appears to have been fully developed, it will be dismissed.

FLY & MCFALL *v.* WATTS.

4-7167 190 S. W. 2d 533

Opinion delivered November 12, 1945.

Rehearing denied December 10, 1945.

Owens, Ehrman & McHaney, for appellant.

Ulys S. Lovell, Buzbee, Harrison & Wright and *U. A. Gentry,* for appellee.

McFaddin, J. The facts in this case are quite bizarre!

In May, 1939, Scott Watts, a retail grocer of Springdale, Arkansas, purchased 100 shares of stock in Anaconda Copper Company (hereinafter called Anaconda) from the Little Rock firm of W. J. Herring & Co., Inc., (hereinafter called Herring & Co.). W. J. Herring was the manager or "head" of the company, and is referred to herein as Herring. All dealings of Watts with Herring & Co. were with W. J. Herring, except when otherwise specifically mentioned herein. Herring & Co. had its office in Little Rock, and had been in the business of stocks and bonds for several years, and had made purchases and sales through appellants, Fly & McFall (a partnership composed of D. W. Fly and O. A. McFall), which had an office in Little Rock, one in Memphis and one in New York. B. Goodbar was the manager of the Little Rock office of Fly & McFall.

Although he purchased this Anaconda stock from Herring & Co. in May, 1939, and paid $2,370 therefor, Watts never received or even saw the stock certificate. He trusted Herring & Co. to hold it for him. On September 5, 1939, Watts called Herring & Co., and instructed the sale of the 100 shares of Anaconda stock. When he did not receive his money from Herring & Co., Watts came to Little Rock on September 27th and received a check from Herring & Co. drawn on a Little Rock bank for $3,789.38 as the value of the Anaconda stock. Watts also received at the same time another check from Herring & Co. for $174.48 as Watts' profit on the sale of some Electric Bond & Share stock, which is not here in controversy. Herring requested Watts to hold the larger check until October 1st. Watts deposited these checks in a bank at Springdale; the smaller check was paid and the larger one was protested for nonpayment. On October 4th (as soon as he learned of the protest) Watts returned to Little Rock, and demanded explanation and payment from Herring & Co. Watts received a long interview, but

no money. Finally, Herring & Co. agreed to repurchase and deliver to Watts 100 shares of Anaconda stock to settle the "hot check." Herring went to the Little Rock office of Fly & McFall and placed an order for 100 shares of Anaconda stock, and received the following instrument:

"Branch Office at Little Rock

"Arkansas, October 4th, 1939. 19.....

"Received from W. J. Herring and Co. Thirty-three hundred seventy-eight and 75/100 dollars ($3,378.75) represented by check No. B-4406, drawn on the Commercial National Bank of Little Rock, purchase price 100 shares Anaconda Copper common stock; certificate ordered out of New York, to be delivered to Scott Watts, Springdale, Arkansas, on instructions from W. J. Herring and Co.

"Fly & McFall by B. Goodbar."

Herring gave this instrument to Watts, along with a signed copy of the order of delivery, reading:

"October 4, 1939

"Fly & McFall
"400 Louisiana Street
"Little Rock, Arkansas

"Attn: Mr. Bernard Goodbar

"Gentlemen:

"This is your authority to deliver 100 shares of Anaconda Copper common stock which we purchased from you today @ 35-5/8, to Mr. Scott Watts of Springdale, Arkansas.

"Thanking you for your attention in regard to this matter, I am,

"Very truly yours,

"W. J. Herring & Co.

"By (s) W. J. Herring."

Herring had at that time the original of this order of delivery which Watts claims was subsequently delivered to the appellants by Herring. The delivery and accept-

ance of this order will be discussed in section I hereinafter.

The Anaconda stock was to be received by Fly & McFall in Little Rock from New York in some six or seven days from October 4th. After a lapse of only three or four days (and on either October 7th or 8th), Watts returned to Little Rock. He and his father went to the office of Fly & McFall to see if the Anaconda stock certificate had reached Little Rock, and learned that it had not. Both Watts and his father testified that they were assured by Goodbar that the certificate would be delivered to Watts as soon as received. Watts then went to see Herring & Co., explaining that he needed some money immediately, and Herring gave Watts two checks. One was a telegraphic money transmittal for $413 (as the difference between the value of the Anaconda stock on October 4th and September 27th); and the other was a cashier's check for $1,450. These made a total of $1,863 received by Watts on October 7th. Whether either of these checks was an advance against the Anaconda stock, or was part payment on the $3,789.38 bad check of September 27th, and whether the receipt of this $1,863 constituted a waiver of Watts' claim to receive the stock certificate, are matters that will be discussed in section II hereinafter.

On October 16th Watts returned to Herring & Co., again seeking the stock certificate or some additional money. On that day W. J. Herring was reported to be in the hospital, but his son took Watts to Herring's lawyer, and Watts says it was represented to him that it would be best for him to take the note of Herring & Co. for $1,872.62, due in six months, so that Herring & Co. could "realize on some other deals" and pay the note. Watts took the note; and it is now insisted by appellants that Watts thereby waived all claim against Fly & McFall for the delivery of the Anaconda stock. Watts denies this, and this will be discussed in section II hereinafter.

On October 11th, Fly & McFall, by their Little Rock manager, Goodbar, delivered the stock certificate for the 100 shares of Anaconda stock to Herring for Herring &

Co., in direct violation of the letter of instructions that Herring had written to deliver the stock certificate to Watts. Herring obtained this stock certificate by giving Fly & McFall a "hot check" (which was never paid), and then Herring sold the stock certificate to another stock broker for $3,289.68, using $972.22 to pay one creditor, and depositing the balance of $2,317.46 to the general bank account of Herring & Co. It was not until October 19th that Watts learned that Fly & McFall had delivered the stock certificate to Herring; and Watts immediately asserted his right to the certificate. W. J. Herring & Co., Inc., was adjudicated a bankrupt on December 27, 1939, and Floyd Barry was chosen as the trustee in bankruptcy of the estate of W. J. Herring & Co., Inc. Herring served an imprisonment sentence.

On October 1, 1940, Scott Watts filed suit in the Pulaski chancery court against Fly & McFall for $3,000 as damages alleged to have been sustained by Watts because of appellant's failure to deliver to Watts the Anaconda stock certificate in keeping with the agreement, (as evidenced by the letter of instructions of Herring to Fly & McFall and the alleged oral agreement of Goodbar to deliver the stock). The complaint recited that the full claim was reduced from $3,378.75 to $3,000. Floyd Barry, trustee in bankruptcy of the estate of W. J. Herring & Co., Inc., (hereinafter referred to as "Barry, Trustee") intervened and claimed a lien to the amount of $1,863 on any judgment that Watts might obtain against Fly & McFall. This intervention was on the theory that Herring & Co. was insolvent when Watts obtained the $1,863 on October 7th, and that Watts thereby obtained a voidable preference. The questions about the voidable preference will be discussed in section III herein. Watts denied the allegations of the intervention. Fly & McFall filed answers denying the complaint, and the intervention, and also cross-complaining against Scott Watts for $3,378.75. The theory of the cross-complaint was that Herring, in receiving the stock certificate, was the agent of Watts, and Watts was liable for the amount due on the stock certificate. Watts filed denial to the cross-complaint. A trial in the chancery court resulted in the decree against

Fly & McFall in favor of Watts for $3,000, and a lien imposed thereon in favor of Barry, Trustee, for $1,863. From the $3,000 judgment, Fly & McFall have appealed, and from the decree impressing a lien in favor of Barry, Trustee, the appellee, Scott Watts, has appealed. We list and dispose of the questions involved in the appeal.

I. *Did Fly & McFall agree to deliver the Anaconda stock certificate to Scott Watts?* This is the basic question of fact on which Watts' entire case depends. The chancery court, in deciding the case against Fly & McFall, necessarily answered this question in the affirmative; and we agree that the preponderance of the evidence supports this finding. On October 4th, when Herring ordered from Fly & McFall the 100 shares of Anaconda stock, Herring received a receipt from Fly & McFall as heretofore copied. This receipt stated, *inter alia,* that the certificate was "to be delivered to Scott Watts, Springdale, Arkansas, on instructions from W. J. Herring & Co." Herring then prepared and exhibited to Watts a letter in duplicate as heretofore copied, directing Fly & McFall to deliver the stock certificate to Watts. A signed copy of this letter was given to Watts by Herring. Watts testified that he saw the original of this letter in the office of Fly & McFall on October 7th when Goodbar showed him the letter, and told him unequivocally that the stock certificate would be delivered to Watts as soon as it was received from New York. Watts' father was present at the conversation, and fully substantiated the testimony of his son. In addition, Shelby Ford, a banker of Springdale, Arkansas, testified that he talked with Goodbar over the telephone (occasioned by Watts' seeking a loan from Ford's bank, which loan was never consummated), and in that conversation Goodbar told Ford that the stock certificate would be delivered to Watts as soon as it was received from New York. Watts so insisted in his two conversations with Fly, one of the partners of Fly & McFall.

In opposition, there is the testimony of Goodbar, who said that he made no such statements about the delivery of the stock certificate, but admitted most of the other details of every conversation stated by the witnesses.

We are convinced that Fly & McFall, acting through their local manager, Goodbar, definitely, positively, and unequivocally agreed to deliver the Anaconda stock certificate to Watts, and to look to Herring's check for payment. The fact that Fly & McFall filed a claim and secured payment from a fidelity company for the amount of Herring's bad check to Fly & McFall (on the basis that the stock was obtained from them by Herring giving a bad check in fraud) further shows that Fly & McFall looked to Herring's check for payment. So we affirm the finding of the chancery court on this fact question, that Fly & McFall were definitely bound to deliver the stock certificate to Watts.

II. *Did Watts, in accepting money from Herring on October 7th, or in accepting the note of $1,872.62 on October 16th, waive or lose his claim against Fly & McFall for the stock certificate?* The chancery court, by its decree, necessarily answered this question in the negative; and we cannot say that the finding is against the preponderance of the evidence. Watts testified that the reason he sought the money from Herring & Co. on October 7th was because he needed money and the stock certificate had not come; and that he did not agree to relinquish his claim against Fly & McFall for the delivery of the stock certificate. Watts made answers to questions as follows:

"Q. What understanding, if any, was had between you and Mr. Herring with reference to the return of the $1,450, if the stock was delivered to you? A. If the stock had been delivered to me, I was to return the $1,450 to Mr. Herring. Q. On the occasion of this visit, which you place somewhere around the 7th or 8th, what conversation did you have with Mr. Goodbar with reference to the expected arrival of the stock. A. Well, Mr. Goodbar—I remember at the time we were in there, Mr. Goodbar—he even went as much as to find out that the stock had already left New York, at that time. Q. What, if anything, was said to you with reference to delivery of the stock to you upon its arrival in Little Rock? A. He said that he would. Q. Deliver it to you? A. Yes, sir."

And, again, Watts, in referring to the $1,450, said:

"A. It was understood with Herring if I got the stock I was to return the money to him."

The fact that Watts, on this same day that he obtained the $1,863, was making inquiries of, and receiving assurances from, the manager of Fly & McFall about the delivery of the stock certificate, is a strong circumstance that Watts was not intending to waive the right to receive the stock certificate when he accepted the $1,863.

On October 16th, when Watts was taken by the son of W. J. Herring to the office of the attorney for Herring & Co., where Watts accepted the note of Herring & Co. for $1,872.62 due in six months, it is clear that Watts did not, at that time, know that Fly & McFall had previously delivered the Anaconda stock certificate to Herring, in violation of Fly & McFall's agreement to deliver the stock certificate to Watts. Watts made answers to questions as follows:

"Q. On the occasion of this visit on October 16th, did Mr. W. J. Herring disclose to you that he had, five days prior, received the stock from Fly & McFall? A. No, sir. Q. Did any person reveal that to you at this time? A. No, sir.

. . . .

"Q. By the acceptance of that note, was it your intention to relinquish whatever rights you may have had against Fly & McFall? A. I never did, at any time.

"Mr. Ehrman: If the court please, we object to what his intention was. Court: I think that would be competent."

And, again, on cross-examination, Watts made answers:

"Q. Well, why did you take a note from W. J. Herring & Co. on October 16th if you still thought you were going to get this stock? Now, you already had $1,450, didn't you, and this note represented the entire balance that would have been due from Herring & Company?

A. Why did I take the note? Q. Didn't Herring tell you, on that date, that you were not going to get the stock? A. No; no, sir. Q. You were down here on the 16th, still after Herring for more money, weren't you? A. That's right. Q. And you hadn't got the stock? A. No, sir. Q. And you hadn't become suspicious that you were not going to get the stock? A. No; as far as I knew, the stock was still— Q. As far as you knew, the stock was still coming, and that was twelve days later, and you didn't go by Fly & McFall's and inquire about it? A. No, sir. Q. Nobody told you you were not going to get the stock? A. No, sir."

We think the equities in this case were and are that Herring & Co. (as debtor) owed Watts $3,789.38, certainly, on September 27, 1937, the date of the check. The relationship was debtor and creditor; and that all of Watts' actions thereafter were those of a creditor trying to collect his debt and get security, and be made whole; and that the Fly & McFall agreement was such security; and that Herring, in placing the order for the Anaconda stock certificate with Fly & McFall, was the debtor of Watts and certainly not the agent of Watts.

III. *Did Watts, in accepting the $1,863 from Herring on October 7th, receive a preference that is voidable under the National Bankruptcy Act?* Barry, Trustee, intervened and alleged:

"At all times mentioned in the complaint herein and prior thereto, Scott Watts was an unsecured creditor of W. J. Herring & Company. On October 7, 1939, and within four months of the filing of the petition in bankruptcy, the said W. J. Herring & Company paid to Scott Watts on said indebtedness the sum of $1,863, which payment, if not voided, would enable the said Scott Watts to obtain a greater percentage of his debt than other creditors in the same class. At the time of said payment, the said Scott Watts knew, or had reasonable cause to believe, that the debtor was insolvent. Said payment constitutes a voidable preference."

The chancery court found that Watts received a voidable preference, and rendered judgment against

Watts in favor of Barry, Trustee, for $1,863. We think the chancery court was in error in this finding, because the trustee failed to prove the essential elements of a voidable preference, as these words are understood and used in the National Bankruptcy Act, and the cases construing it.

Section 70 of the Bankruptcy Act is the section dealing with voidable preference, and may be found in 11 U.S.C.A., § 96. The germane language here to be considered is:

"(a) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, . . . the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

. . . .

"(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."

Remington on *Bankruptcy,* 5th Edition, and Collier on *Bankruptcy,* 14th Edition, are standard treatises on the National Bankruptcy Act. Volume 3, page 731, *et seq.,* of Collier deals with the essential elements of a voidable preference. The elements are numbered and arranged slightly different in Collier from those in Remington, but the net result is the same whether viewed from either treatise. In Remington, § 1657, *et seq.,* the five elements of a voidable preference are listed as follows:

1. A transfer on, or payment of, an antecedent debt.
2. By an insolvent debtor.
3. Within four months before bankruptcy.
4. Resulting in advantage to the creditor.

5. Who then had reasonable cause to believe that the debtor was insolvent.

Says Remington: "When the term 'voidable preference' is used in this chapter, it means a transaction which has all five elements or characteristics. If any element is missing, a transaction cannot result in a voidable preference."

Collier, Volume 3, page 1040, says: "Just as the trustee in his suit to recover property preferentially transferred must include allegations, in his statement of claim, of all the elements of the alleged voidable preference, so also must the trustee introduce evidence at the trial to sustain all such averments that have not been admitted. The law places upon the trustee (or receiver) the unmistakable burden of proving by a fair preponderance of all the evidence every essential, controverted element resulting in the composite voidable preference."

Herring & Co. was adjudicated a bankrupt on December 27, 1939, and it was stipulated that on October 7, 1939, the corporation was insolvent, and we have previously stated that Scott Watts was a creditor of Herring & Co. at all times from September 27th: so the first three elements of a voidable preference are shown or admitted in the case at bar; but neither the fourth nor the fifth element of a voidable preference has been established.

Regarding the fourth element—resulting in advantage to the creditor—the trustee had the burden of proving that when Watts received the $1,863 on the $3,378.75, he thereby received a preference—*i.e.*, a greater percentage of his debt than other creditors of the same class. (See Remington, 5th Edition, § 1700, *et seq.*). But there is absolutely no evidence in the record here to show what other creditors of Herring & Co., of the same class as Watts, received or would receive from the bankrupt estate. There is no showing that Watts filed a claim in the bankrupt estate of Herring & Co. In short, there is no evidence in the record in this case to prove the existence of the fourth element of a voidable preference.

Regarding the fifth element—reasonable cause to believe the debtor insolvent—the evidence convinces us that Watts did not have any such reasonable cause on October 7th when he received the $1,863. Watts knew that Herring & Co. had issued him a check for $3,789.38, and that it had been protested, but that fact—standing alone and by itself as it does here—is not sufficient to conclusively show reasonable cause. As stated by Remington, § 1710:

"Mere suspicion is not enough, even if it has led the creditor to refuse further credit. . . . Mere doubt of solvency is not enough. A creditor may feel anxious about his claim, and have a strong desire to secure it or have it paid, and yet not have such belief as the act requires. . . ."

Collier, Vol. 3, p. 988, after pointing out that under the Bankruptcy Act, insolvency means the excess of liabilities over assets, says:

". . . mere inability to meet current obligations is not insolvency in the bankruptcy sense, which is the excess of liabilities over assets at a fair valuation."

Goodbar, the agent of Fly & McFall, testified about the condition of Herring & Co. at the time that Watts received the $1,863. Goodbar made answers to questions as follows:

"Q. You knew that Herring—I mean W. J. Herring & Co., Inc.—you knew it was in financial straits at that time, didn't you? A. No, sir; I believed just the contrary. Q. Hadn't Herring had some irregular dealings with Fly & McFall prior to this time? A. No, sir; all of Herring's dealings had always been strictly on the up-and-up. That's one thing that made me have so much confidence in him. He did give us two bad checks, about which I wrote the firm and suggested to the firm that they discontinue shipping stocks to him in this manner. They vetoed that and suggested I tell Herring if there was a repetition, they would stop shipping him stock.

. . . .

"Q. Didn't the fact that two checks of a dealer of the size of Herring & Co. were turned down by his bank serve as notice to you of his business instability? A. No, not exactly that. Ordinarily, it would make me suspicious but, in this case, it didn't. I was in Herring's office frequently, and he had a big business. I have seen him sit there and buy $100,000 worth of bonds at a clip. He had all the appearance of progressiveness, aggressiveness, and prosperity, and I had no reason to believe otherwise. He had never done anything shady, so far as I was aware of. I wasn't a bit alarmed when they told me the check had been turned down. I thought he would make it good. I thought he was very resourceful and smart."

If Goodbar, the manager of Fly & McFall, engaged in the stock broker business for many years, did not have reasonable cause to believe that Herring & Co. was insolvent, then certainly Watts, a country grocer from Springdale, Arkansas, should be charged with no greater perspicacity. Further, if Watts had believed Herring & Co. to be insolvent, it is inconceivable that on October 16th he would have taken a plain note due in six months rather than to have continued immediately to press for his money.

To cite all or even a substantial number of cases of "reasonable cause" would be a work of supererogation. We mention only *Harrison* v. *Merchants' National Bank,* 124 Fed. 2d 871, as a comparatively recent case from the Eighth Circuit Court of Appeals, and indicating the general holdings. Judge Nordbye, who delivered that opinion, said:

"As one views any business failure in the retrospect, many incidents and circumstances bearing upon a bankrupt's financial condition loom much larger and more formidable than they did before the crash occurred. All well-considered cases have enunciated the doctrine that mere apprehension on the part of the creditor is not equivalent to good cause to believe that insolvency exists. *Grant* v. *First National Bank,* 97 U. S. 80, 24 L. Ed. 971.

. . . .

"The language used by the Supreme Court in *Stucky* v. *Masonic Savings Bank,* 1883, 108 U. S. 74, 2 S. Ct. 219, 27 L. Ed. 640, is particularly apposite. The court was considering the dealings of a creditor with a debtor in failing circumstances, and stated (page 75 of 108 U. S., page 220 of 2 S. Ct., 27 L. Ed. 640): '. . . He may feel anxious about his claim and have a strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law.' "

From all the evidence, we conclude that the trustee in bankruptcy has failed to prove all the essentials of a voidable preference, and therefore the judgment in favor of Barry, Trustee, should be reversed and dismissed.

IV. *What amount should Watts recover on this appeal?* Having reached the conclusion—as we have—that Watts should recover from Fly & McFall the damages that he suffered because of the misdelivery of the stock certificate, and that Barry, Trustee, should not recover from Watts on account of a voidable preference, we come, in conclusion, to what amount Watts should recover for his damages; and this involves a brief recapitulation of the facts and figures.

1. Herring & Co. owed Watts on September 27th the sale price of the Anaconda stock; this was evidenced by the check and was $3,789.38.

2. On October 4th Herring agreed to purchase 100 shares of Anaconda stock and deliver it to Watts. He made the purchase; and on that date the Anaconda stock had a value of $3,378.75.

3. Deducting the October 4th value from the September 27th value as shown (1) and (2) above, it will be observed that Watts stood to lose $410.63 by this decline. To cover this "differential," Herring gave Watts on October 7th a telegraphic money transmittal for $413, which was separate and distinct from the $1,450 cashier's check of that date. When Herring gave Watts the $413 on October 7th, that left Watts entitled only to the Ana-

conda stock certificate which Herring had ordered on October 4th, and which Fly & McFall misdelivered on October 11th at a value of $3,378.75.

4. But Herring on October 7th paid Watts $1,450, which Watts said was to be returned to Herring when Watts received the stock certificate. Since Watts never received the stock certificate, he keeps the $1,450, but must deduct this from the value of the stock certificate and the damages that he suffered by reason of the misdelivery of the certificate by Fly & McFall on October 11th.

5. Deducting the $1,450 from the $3,378.75 leaves the balance of Watts' damages at $1,928.75. That is the only remaining damage that he has suffered by reason of the misdelivery of the stock certificate by Fly & McFall, and is the greatest amount that he should recover in this suit.

6. When Watts filed this present suit, he stated that his damage for the misdelivery of the certificate was $3,378.75, but he voluntarily reduced his claim to $3,000. Thus, he agreed to reduce his damages by $378.75; and this amount should be deducted from the $1,928.75, which leaves the damage at $1,550.

7. So, the net result is that Watts is entitled to judgment for $1,550 with interest at 6 per cent. from October 11, 1939, the date of the misdelivery of the stock certificate.

Watts cannot complain at this small amount, because it makes him whole (except for the $378.75 that he voluntarily waived when he filed this suit). Barry, Trustee, cannot complain; because when he intervened in this case he did not ask that Watts be declared a trustee for the $1,450, but intervened solely on the theory that Watts had received a voidable preference. Furthermore, the proof shows that when Fly & McFall misdelivered the stock certificate to Herring & Co. on October 11th, Herring immediately sold the stock certificate for $3,289.68 and paid $972.22 to another creditor and deposited the balance of $2,317.46 to the bank account of Herring &

Co. So Herring & Co. received the benefit of the stock certificate that Fly & McFall misdelivered.

The decree of the chancery court is reversed and remanded, with directions to enter a judgment against Fly & McFall for $1,550 and interest at 6 per cent. from October 11, 1939, until paid, together with all costs, and to enter a decree denying all relief to Barry, Trustee.

McHaney and Holt, JJ., dissent.

Goodlett *v.* Goodlett.

4-7740 190 S. W. 2d 14

Opinion delivered November 12, 1945.

June P. Wooten, for appellant.

Ed E. Ashbaugh, for appellee.

ROBINS, J. By decree of the lower court appellee was granted a divorce from appellant, and was awarded $1,125 in cash, one-half of certain personal property, all the furnishings in one room of their home and an undivided one-third interest for her life in the real estate of appellant, consisting of 40 acres in Pike county and a residence in Little Rock. This decree was affirmed by us. *Goodlett* v. *Goodlett,* 206 Ark. 1048, 178 S. W. 2d 666.

After our decision was rendered, appellant filed in the lower court a petition, asking that the value of appellee's interest in the Little Rock real estate, and in the personal property, be ascertained by appraisers and that upon payment of the value of appellee's interest in the real estate to appellee by appellant the entire title be vested in appellant, and that the personal property be sold and the proceeds divided equally between appellant and appellee. Appellant also asked that he be permitted to deduct from the amount so to be paid to appellee $312 for rent of the residence, which had been occupied by appellee, and certain other sums said to have been expended by appellant for taxes, local improvement district assessments and insurance on the property.

Appellee filed response to this petition and on hearing thereof the lower court granted appellant's petition for ascertainment of the value of the personal property and ordered a sale of the real estate for division of the proceeds, in event the parties were unable to agree relative thereto, but refused to allow appellant's claim for rent for the period elapsing from date of the original decree to the time this court passed upon the case. Appellant excepted to the portion of the order by which he was denied this rent, and prayed an appeal which was granted, but which was not prosecuted by appellant.

Thereafter appellant, conceiving that there was doubt as to the legality of this order, moved that it be set aside. The lower court granted appellant's motion in part, and made an order setting aside the order "in so far as the same relates to a sale of the real property." This left in force that part of the order denying appellant recovery of rent on the dwelling house for the period

elapsing from the rendering of the original decree by the chancery court up until affirmance thereof by this court.

Appellant then filed as a new suit a petition for partition, asking for a sale of the Little Rock property and division of the proceeds thereof between the parties in accordance with their respective interests. This petition was granted by the lower court, which ordered sale of the property, reserving determination of the respective shares of the parties in the proceeds.

At the commissioner's sale the property brought the net sum of $3,454.60. It was agreed by the parties that the present value of appellee's interest in the proceeds amounted to $610.46.

After the sale, appellant filed a motion in which he asked the court to deduct from appellee's share in the proceeds, to be paid to him by the commissioner, the amount claimed by him for rent on the property and certain other sums for taxes, insurance and repairs on the property. Appellee answered this motion with a general denial and a plea of *res judicata*. At the same time she filed a bill of review in which she asserted that in the original divorce proceedings appellant had fraudulently concealed his ownership of a $5,000 deposit in a bank, and of a certain automobile; and she asked that she be awarded a proper share of this undisclosed property.

On trial below the court found that appellee owed appellant $63.44 for rent on the dwelling house accruing after final disposition of the divorce case by this court, denied him any rent up to that time, allowed him recovery of certain items of taxes, insurance and utility bills, and denied in full his claim for repairs; and the court refused appellee any relief under her bill of review.

Both sides have appealed, appellant urging that the lower court erred in not allowing him one-third of the rental value of the dwelling house from the granting of the divorce to the affirmance by us, and also one-third of the amount expended by him for repairs on the residence; and appellee assigns as error the refusal of the court to allow her relief on her bill of review, and she

further contends here that the court, having awarded her a life interest in the home place, was without power to order a partition thereof, since it was her homestead.

Appellant's claim for rent had been passed on and disallowed by the lower court in the order of April 29, 1944, from which appellant was granted, but failed to prosecute an appeal. The former decree was a complete bar to assertion of this claim by appellant. Conceding that in any view of the matter appellee was liable for a part of the expense of repairs made on the dwelling house without her authorization, appellant failed to prove when these repairs were made. If they were made before the divorce decree, appellee would, of course, not be liable for any part of the costs thereof. Appellant showed when he paid for these repairs, but failed to prove when they were made. The lower court for this reason, if no other, properly denied recovery therefor.

As to appellee's rights under the bill of review, it may be said that she failed to allege sufficient grounds to entitle her to have the previous judgment re-opened. For requisite grounds of a bill of review, see *Evans* v. *Parrott,* 26 Ark. 600; *White* v. *Holman,* 32 Ark. 753; *Parks* v. *Gray,* 176 Ark. 629, 3 S. W. 2d 690.

But, assuming that her bill did state grounds for vacating the decree, she did not prove any of the grounds she alleged. It was shown that appellant did not have the concealed bank account which she alleged, and that there had been no concealment of the ownership by him of the automobile. Appellant's possession of such a car was not only known to her during the first litigation, but it was discussed in her testimony and in her brief in the first appeal. It follows that the lower court properly denied appellee relief under her bill of review.

A complete answer to appellee's contention that the lower court improperly awarded partition of the residence property is that appellee did not assert any homestead right when appellant petitioned for partition, nor did she appeal from the decree ordering partition. The lower court granted her, not the entire property for her

life, but only an undivided one-third interest for her life therein, and the remaining share was vested in appellant, thus creating such a tenancy in common between her and appellee as would authorize partition. 40 Amer. Jur., p. 90, § 107.

No error appearing, the decree of the lower court is affirmed.

DENTON *v.* DENTON.

4-7736 190 S. W. 2d 291

Opinion delivered November 12, 1945.

E. G. Ward, for appellant.

Arthur Sneed, for appellee.

McHaney, J. Appellant brought this action of unlawful detainer against appellees, E. T. Denton and wife, Annie Denton, alleging that she is the owner of a certain one hundred acre tract of land in the eastern district of Clay county and is entitled to the possession thereof; that she rented said land to said appellees for the year 1943 for a portion of the crops grown on said lands, in said year, which said appellees had refused to pay; that after due notice to quit and deliver up the possession thereof said appellees had refused to comply, but unlawfully detain same; and that appellees are indebted to her in the sum of $200 as rent for said year. Judgment was prayed for possession, rents and damages. Appellant gave a delivery bond in the sum of $500 and appellees gave a cross-bond in the same sum to retain possession.

Appellees answered with a general denial and filed a long cross-complaint against appellant, questioning the title of appellant to said lands and her right to the possession thereof. In the view we have of this case, the allegations of the cross-complaint are unimportant and are not herein stated. The object of said cross-complaint was to bring in question appellant's title and right to the possession of said lands.

The undisputed facts disclose that, for the year 1943 on February 25, appellant and said appellees, E. T. and Annie Denton, entered into a written rental contract for said land for said year, by which appellees agreed to pay appellant as rent "the usual crop rents, one-fourth of all cotton delivered and sold at gin, and the customary rents on any and all other crops that said second parties (appellees) may grow on said lands in said year 1943"; that the rents were paid for 1943, but appellant, being desirous of obtaining possession of said lands caused a notice to be served on her said tenants to vacate, which they refused to do; that she then gave the statutory notice to

quit and deliver up possession prior to suit in unlawful detainer, gave the bond required, and appellees gave a cross-bond as above stated.

Trial resulted in an instructed verdict for appellees based on their cross-complaint, and judgment was entered for them.

We think the court erred in entertaining the cross-complaint of appellees. Unlawful detainer is defined by § 6035 of Pope's Digest. Such an action will not lie except where the relation of landlord and tenant exists. *Dortch* v. *Robinson,* 31 Ark. 296, and other cases cited under said § of the Digest. Section 6054 of the Digest provides: "In trials under the provisions of this Act, the title to the premises in question shall not be adjudicated upon or given in evidence, except to show the right to the possession, and the extent thereof." See *Anderson* v. *Mills,* 40 Ark. 192, and other cases cited under said section.

In *Mo. Pac. R. R. Co.* v. *Bozeman,* 178 Ark. 902, 12 S. W. 2d 895, we quoted with approval the following from *Dunlap* v. *Moose,* 98 Ark. 235, 135 S. W. 824: "The action of unlawful detainer is only to decide the right to the immediate possession of lands and tenements, and not to determine the right or title of the parties to or in them. A tenant cannot dispute the title of his landlord while he remains in possession under him, nor acquire possession from the landlord by lease and then dispute his title, but must first surrender possession and bring his action." Moreover, as to the cross-action of appellees, under § 6058 of Pope's Digest, it is provided: "No cross-action or actions for the recovery of the possession of premises in litigation by the defendant, or any person claiming under him, against the plaintiff or his lessee shall be brought under this act during the pendency of the first action. Provided, however, that nothing herein shall preclude such party from instituting and prosecuting an action of ejectment for the premises during the pendency of an action under this act." See *DeClerk* v. *Spikes,* 206 Ark. 1004, 178 S. W. 2d 70.

Appellant proved sufficient title on which to base her action of unlawful detainer. She held a deed from E. T.

and Annie Denton and two of the Landers heirs dated September, 1937, and a deed from the Central Clay Drainage District, based on a foreclosure and commissioner's sale to the district in 1932 for the delinquent assessments for 1928 and 1929, and dated October, 1937, both deeds being made to J. E. and Ola Denton, husband and wife, an estate by the entirety. J. E. Denton having died prior to the institution of this action, she succeeded to all his rights and title therein as surviving tenant. Her right of possession was, therefore, sufficiently established on which to base an action for unlawful detainer.

It was conclusively established that the relation of landlord and tenant existed between appellant and appellees, E. T. and Annie Denton, and, under the statutes and decisions of this court above cited, said tenants cannot question the title of their landlord without first surrendering possession and ceasing to be tenants.

The judgment is accordingly reversed and the cause remanded for a new trial to determine the amount of damages, if any, accruing to appellant since 1943, under the cross-bond of appellees by which they have continued in possession, without prejudice to the right of appellees to question appellant's title to said land in an appropriate action for that purpose, as they sought here to do under the allegations of their cross-complaint.

BLAKE *v.* SMITH.

4-7738 190 S. W. 2d 455

Opinion delivered November 12, 1945.

Rehearing denied December 10, 1945.

J. Fred Jones, for appellant.

O. W. Pete Wiggins, for appellee.

HOLT, J. This litigation involves the care and custody of a little eight-year-old girl, who was adopted by appellant and appellee a few hours after her birth. The parties here were married in 1923, divorced in 1936, remarried a short time later, and a divorce was granted appellee May 31, 1944, but the custody of the child was awarded to appellant. That part of this divorce decree of 1944 in so far as it relates to the child involved here, recites: "The custody of the infant child, whose custody is involved in this action, to-wit: Mary Dolores Blake, be and the same is hereby awarded as follows: To the defendant, with the plaintiff being permitted to visit said child at any reasonable times, until the further order of this court or of some other court or judge vested with competent jurisdiction to change the custody of said child. . . . The court doth retain control of this cause for such further orders and proceedings as may be necessary to ascertain definitely and enforce the rights of the parties hereto in the property herein referred to."

June 7, 1944, appellee went to Houston, Texas, and married Hale A. Smith on June 8, 1944, and has since resided in that city. Hale Smith had secured a divorce from his wife in the Pulaski chancery court on February 24, 1944, after establishing a residence here for that purpose, and his only child, a daughter 14 years of age, was awarded to the mother, Minnie Smith.

February 26, 1945, appellee filed petition in the court here, asking for a change in the custody of the child and that it be awarded to her on the grounds "that said child is not getting proper care and attention, . . . that the defendant (appellant) has done all in his power to poison the mind of said child against the plaintiff, . . . and that said child is not receiving the love, attention and affection, as well as the motherly supervision, she is needing and rightly entitled to receive," and prayed for "an order granting to her the custody and responsibility of said child in the future."

April 10, 1945, upon a hearing, the decree of May 31, 1944, *supra,* was modified by the Pulaski chancery court and the custody of the child was given to appellee for approximately nine months of the year—or the school months, and to the appellant, the remaining three months —or vacation months.

From this decree modifying the divorce decree of May 31, 1944, comes this appeal.

The cause is before us for trial *de novo.*

In determining the custody of a minor child, the welfare of the child is the supreme and controlling consideration. In the comparatively recent case of *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817, we said: "It is the well-settled doctrine in this state that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity. Act 257 of 1921 (now §§ 6203-6207, Pope's Digest). . . . A decree fixing the custody of a child is, however, final on the conditions

then existing, and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child." See, also, *Phelps* v. *Phelps, ante,* p. 44, 189 S. W. 2d 617. The party seeking a modification of a divorce decree awarding custody of a minor child assumes the burden of showing such a change in conditions as to justify such modification. *Kirby* v. *Kirby, supra,* and *Seigfried* v. *Seigfried* (Mo. App.), 187 S. W. 2d 768.

We proceed to examine the evidence to determine whether there has been such change in conditions as would warrant the decree of the lower court dividing the custody of this little girl, as above indicated.

After a careful review of the entire record, we have reached the conclusion that the preponderance of the testimony does not support the findings of the trial court and the decree thereon.

The record discloses, as above noted, that prior to the granting of the decree of divorce to appellee, May 31, 1944, and the awarding of the child to the father, appellant, Hale A. Smith came from Houston, Texas, to Little Rock, established his residence and obtained a divorce from his wife in February, 1944. While residing in Little Rock, he boarded most of the time in the home of appellant and appellee. During a part of his stay here, appellee's mother boarded Smith. Appellee, Mary Blake Smith, admitted that she had been in love with Hale Smith since she was 15 years of age, or for approximately 25 years. Immediately after Smith procured his divorce here, he went back to Houston, assumed his work as a longshoreman on the docks there, and has since resided in that city.

Appellee kept in touch with Smith by letters and telephone after his decree of divorce here and prior to her divorce from appellant. One of appellee's letters to Hale Smith contains matter too indecent and obscene to be set out here. Immediately following appellee's divorce from appellant here, she went to Houston, Texas, and married Hale A. Smith. There they have since lived in a

four-room house in the "working men's" section of Houston. This house contains a bedroom, a living room with a studio couch that unfolds to accommodate two people, and appellee's mother lives with her a great part of the time. The last time she spent four months with appellee and was there when this case was tried. This mother of appellee devotes at least a part of her time to gambling. In her own words, "A. When I started going to the races, then I started to Belvedere and I am a racing fiend. Q. Do you usually win at the races? A. Well, I have come home without." Appellee's health has improved some since she married Smith, but is still under the care of a specialist.

Appellant, following the divorce decree, by permission of the Pulaski chancery court, took this little adopted child to Mobile, Alabama, and placed her in the home of his brother and his wife, Hazel Blake, who have two little girls near this child's own age, whose company and association she enjoys. She goes to school there and is making fair progress. Appellant earns good wages and is devoted to the child. There is no evidence that he has ever mistreated her. The child and the two little girls of Hazel Blake have a bedroom to themselves, and she has the care and guidance of Mrs. Hazel Blake, whose character is unquestioned.

There is some little evidence in support of appellee's allegation that appellant tried to alienate this child's affections from appellee. However, this alone would not be sufficient grounds to warrant a change in the child's custody. In *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47, we said: "A change of custody was not necessary in order to prevent the mother from alienating the affections of the child from the father. This might have been done by admonishing the mother."

Appellee also says that the child's custody should be changed and given to her for the reason that she "is not receiving the love, attention and affection, as well as the motherly supervision, she is needing and rightly entitled to receive." Appellee's professed love for the child is strongly contradicted by her actions, which speak so much louder than her words. We have before us here a woman

who brazenly admitted that she had been in love with Hale Smith over a long period of years, and during all the time that she was married to appellant. That she possessed a degraded intellect was indicated by the vile language in one of her letters to Smith, referred to above. After ridding herself of appellant by divorce, she transferred her affections to Smith, deliberately abandoned this little adopted girl, hurried to Texas and married Smith, and there in a small house with but one bedroom, she lives with her new husband. A part, if not the greater part, of appellee's mother's time is spent in this home with appellee. It is into these surroundings, influences and environment that appellee proposed to take the child.

Appellant, on the other hand, has not remarried. The evidence reflects his devotion to this little girl. He earns good wages and is amply able to and is adequately supporting her. He has been caring for the child since the divorce in May, 1944, and shortly after the decree, with the court's permission, took her to Mobile, Alabama, and placed her in the home of his brother and sister-in-law, where she has been given that care, attention and motherly love which appellee voluntarily refused to give.

It is our view that the preponderance of the testimony but emphasizes the soundness and wisdom of the trial court's original decree in which the custody of this child was awarded to appellant. We find nothing in the evidence indicating such changed conditions since that decree which would justify a modification thereof. In *Rose* v. *Rose,* 90 Ark. 16, 117 S. W. 752, this court says: "We are also of the opinion that the decree was erroneous with reference to the custody of the child. The custody was divided between the two parents—three weeks alternately to the father and one week to the mother. In view of the fact that the mother voluntarily parted with the child when it was very young, and the father has had it since then, we do not feel justified in disturbing the decree awarding the custody to him. And, of course, the mother should, notwithstanding the fact that she was willing to give the child up, be permitted to see it at reasonable intervals and have an opportunity to enjoy its society. But we deem it inadvisable, for the good of the

child, for it to be shifted about at frequent intervals from the custody of one parent to another."

For the error indicated, the decree is reversed and the cause remanded with directions to dismiss appellee's petition for want of equity and for further proceedings consistent with this opinion.

TWIN CITY COACH COMPANY *v.* STEWART, ADMINISTRATOR.

4-7687 190 S. W. 2d 629

Opinion delivered November 12, 1945.

Rehearing denied December 10, 1945.

Partain, Agee & Partain and *Hardin, Barton & Shaw,* for appellant.

Jeptha A. Evans, for appellee.

GRIFFIN SMITH, Chief Justice. Dewey Stewart, as administrator, sued to compensate damage occasioned when his daughter, Valeta, was killed in an automobile-bus collision April 22, 1944. The tragedy occurred on Midland Boulevard—connecting Fort Smith and Van Buren.

Midland is a two-lane thoroughfare divided by a strip twenty-four inches wide. Each roadway is twenty-eight feet and five inches in width.

Appellant's bus, driven by Bill Booth, had proceeded southwardly from Van Buren to Fort Smith, making stops at intersections where passengers indicated an intention to get on or off. At a point within the Fort Smith city limits, Booth stopped the bus near the curb where one passenger got off and twelve or fifteen soldiers were ready to enter. Booth estimated that after stopping, two minutes elapsed before the impact of a car from the rear was felt. Allegation of negligence is that the bus was parked too far from the curb—"four or five feet," one witness testified. It is also insisted that the bus suddenly stopped without giving appropriate warnings, etc. A Fort Smith ordinance requires that busses must park with the right wheels not more than twelve inches from curb or gutter.

Of the six errors alleged in the motion for a new trial, we find it necessary to consider but two: (a) that the Court was without jurisdiction because appellee's intestate was a resident of Sebastian County, where the fatal injury occurred, and (b) the defendant's request for a directed verdict should have been given.

First.—October 16, 1944, we denied the defendant's petition for a writ of prohibition directed to the Logan Circuit Court, giving as a reason that a question of fact was involved in respect of which this Court would not presume there would be an incorrect determination. The point was preserved and has been re-presented.

We agree with counsel for appellee that the venue was properly laid in Logan County. Circumstances attending the conduct of one who leaves home in search of employment usually afford substantial guidance when (after an injury has occurred and the question of venue is raised) such person's intentions and purposes become the subject of judicial consideration. See *Norton* v. *Purkins, Judge,* 203 Ark. 586, 157 S. W. 2d 765; *Southern Compress Company* v. *Elston,* 204 Ark. 180, 161 S. W. 2d 202.

Second.—Elam Hoffman, soldier who had received his medical discharge, was driver of the death car. He met Valeta (eighteen years of age) at eight o'clock in the evening and together they got Elam's brother and two sisters. Thereafter they went to a cafe and were joined by others, including Paul Edgin, who also had an automobile. From the cafe (Wisley's Place on Midland Boulevard) they left with the intention of visiting a dance hall on Garrison Avenue. Edgin and others started just ahead of Hoffman, but slowed down to allow Hoffman and his companions to pass. As they drew alongside[1] someone called from Edgin's car, "We will see you down town." Hoffman then drove on; and, as he says, while proceeding at 30 or 35 miles an hour, crashed into the bus. The bus, he says, was "angling to the curb," with the back farther out than the front—how far, he could not say. Hoffman did not see the bus driver or any stop lights, although he was looking. The right part of his car struck the left rear of the bus—"all I saw was the lights on top. *I started to pull around when I saw that the bus was stopped.*"

Edgin's testimony was that he was driving 35 miles an hour "when I caught up with [Hoffman]." Q. "He overtook you?" A. "Yes, sir." Q. "He passed you?" A. "Yes, sir." Q. "Some words were passed between you?" A. "Yes, sir." . . . Q. "He went on faster than you did?" A. "Yes, sir." Q. "The front of your car was even with his?" A. "It was a little farther back than

[1] The statement was made by Elam Hoffman on direct examination.

that." Q. "You saw the bus then?" A. "Yes, sir." Q. "You saw the car run into it?" A. "Yes, sir."

Edgin and his companions drove a short distance beyond the parked bus to a fire station. Some of them then returned to the scene of accident. Edgin, who had made a written statement shortly after April 22, was asked if he hadn't said: "About the time I got even with the front of the bus I heard a crash and saw that Elam's car had run into the rear of the bus." After first answering that he "didn't believe" he made that statement, the witness said: "I made a statement, but I don't know whether it was that or not." A transcript of testimony given by Edgin in Municipal Court where Hoffman was tried was read for the purpose of refreshing Edgin's memory. He admitted that impressions were clearer then than later. There was this further testimony: "I saw the bus and heard the crash. [The first information I had of the accident was when I heard the crash.] I had to look sideways to see it." Q. "What did you mean when you said, 'I got [as] close to the middle as I could—I guess I was halfway to the front when it hit the back end.' " A. "That was about right."

Vernice Rogers, a witness for the plaintiff who was in the back seat of Hoffman's car, did not see the bus until the instant of collision, and knew nothing regarding the immediate transaction. Concerning circumstances attending their leaving Wisley's cafe, the following testimony discloses the general attitude of those who participated: Q. "That is a dance place—a restaurant and beer place?" A. "Yes, sir." Q. ". . . Then Paul Edgin, with Lewis and his wife and Florence and a soldier, left in his car, and then you and Elam and Valeta and Wade left in Hoffman's car?" A. "Yes, sir."[2] Q. "Do you know how many minutes [the Edgin car] left ahead of you?" A. "It was just a few minutes." Q. "Your car overtook him on the way?" A. "Yes, sir." Q. "You were talking back and forth as they drove along?" A. "Yes,

[2] There is conflict in some of the testimony as to whether Hoffman or Edgin left the cafe first. This appears to be accounted for by reason of the fact that they passed each other several times.

when we first started out." Q. "After you overtook him?" A. "Yes, sir."

Vernice did not know whether Edgin was "alongside" the Hoffman car when the impact occurred. Q. "You saw the bus an instant before the accident?" A. "Yes: there was the bus,—and 'just like that,' they hit! That is the best I recall."

Paul Graham testified that he was a passenger on the bus, intending to go to Fort Smith. When the stop was made he observed a skating rink on the opposite side of Midland Boulevard and concluded to get off the conveyance. The time was about 10:30. When the idea of going to the rink occurred to Graham, four or five passengers (soldiers) had gotten on the bus from the front end.—"I pulled the cord and got off [through] the back door and went to the back of the bus to cross the street [on my way to] the skating rink. I got just about the middle of the bus and saw two cars coming behind the bus—a Chevrolet and a Ford. They were about a quarter of a block [away] when I first saw them, so I jumped back on the curb. [One of the cars] was coming just in line with the bus—right down the highway. They were both picking up speed and making about sixty miles an hour when [Hoffman's car] hit [the bus]. . . . They were [driving] side by side, and both stayed at an 'even keel.' [The Hoffman car] did not seem to be going around, so I jumped back on the curb and stood there and saw it hit the bus. It was a terrible jolt, and the back of the car went up and came down, and all were 'knocked out'—unconscious. The other car went by the bus. They were [about] even but as the other car went on it was a little in the lead when they got to the bus. . . . The bus was parked right against the curb; it couldn't have been more than a foot, as I stepped off to the curb. After the accident the [Hoffman] car was two or three feet, 'or something like that' [from the curb]."

It is argued on behalf of appellee that because Hoffman testified he was unable to go around the bus, a fair inference is that because it was parked at an angle there was insufficient room for Hoffman to clear such an ob-

struction. But Hoffman did not testify that the bus alone blocked his way. When asked, "Why didn't you go around?" he replied, "I couldn't; *they* had me blocked on the left." Effect of Edgin's testimony is that the car he was driving and the one driven by Hoffman were almost parallel. They were traveling at a rate of speed certainly not less than thirty miles an hour—the lowest estimate made by any of the plaintiff's witnesses. Edgin says thirty-five miles. Others say sixty. But in any event Edgin's car was, for all practical purposes, on Hoffman's left when, as he testified, the bus lights loomed up in front; and, "*they* had me blocked." Hoffman does not know whether the bus was moving or parked, because he hadn't seen it until the instant of impact. Others in the cars were equally uncertain.

There is no substantial evidence that the bus suddenly stopped. It has not been shown by any of the witnesses that a failure to give signals, or a sudden stop, prevented Hoffman from clearing the obstruction. His testimony is susceptible of the inference that the bus was at rest before Hoffman reached a point where ordinarily an emergency would arise, for his explanation is, "I started to pull around it when I saw that the bus was stopped."

Was the bus parked at an angle? Probably so. For the purpose of this decision we must assume that the rear end was four or five feet from the curb. This may not be true; but there is substantial testimony to that effect and the jury's verdict precludes our reëxamination of that single fact. But it does not follow, as a matter of course, that erroneous parking was the proximate cause of injury. Position of the bus was merely evidence of negligence—a circumstance for the jury's consideration, something upon which a verdict may be predicated if, in the light of all the surroundings it can be said that the defendant was negligent, and that such negligence occasioned the damage complained of. Conceding the first element—that there was *evidence* of negligence—would

reasonable minds agree that this negligence caused Hoffman to drive headlong into the rear of a parked bus?[3]

Edgin's testimony, and that of other witnesses for the plaintiff, is subject to the single conclusion that the Ford and Chevrolet were running parallel, with Edgin blocking the lane into which Hoffman would have had to swerve with instantaneous impulse to avoid the bus. According to Hoffman's detailed testimony he was virtually "on" the bus before he saw it; therefore, in order to prevent the collision he must have turned at a sharp angle. This could not be done because Edgin was in the other lane. But, it is insisted, the bus was parked three feet farther from the curb than the law authorized; and this may have been controlling. Photographs disclose that the entire front of the Hoffman car was wrecked; and physical evidence is that the greater width of the automobile struck the bus. This is emphasized by Hoffman's statement that the bus just loomed large in front of him, and the impact came. It is true he testified that he could not go around it because "they" blocked the boulevard. Even so, "they" included Edgin; and by any construction of the evidence at least five feet of the bus was rightfully in the lane from which Hoffman would have turned if it had not been blocked.

Since there is a want of substantial evidence to sustain the plaintiff's theory that the defendant's negligence in parking the bus materially contributed to the event, it must be held that the proximate cause was Hoffman's carelessness in racing along the highway in complete disregard of possible obstruction.

The judgment is reversed. The cause, having been fully developed, should be dismissed. It is so ordered.

Mr. Justice McFaddin dissents.

McFaddin, J., dissenting. The majority holds: (1) that venue was in Logan county, and (2) that a directed verdict should have been given for the defendant.

[3] It is not seriously argued that Hoffman and those with him were not on a joint mission; hence imputed negligence is not an issue.

I. *Venue.* I agree with the majority on the question of venue: although, in sustaining the venue in Logan county, I think we are weakening, if not impliedly overruling, the case of *Norton* v. *Purkins,* 203 Ark. 586, 157 S. W. 2d 765.

The majority opinion did not give the facts regarding the venue question in the case at bar. Here are the facts: Miss Valeta Stewart became 18 years of age on March 7, 1944, and was killed in Fort Smith, Arkansas, on April 22, 1944. Her parents lived in Booneville, in Logan county; and she lived in the home with them until April 19, 1943, when she began working as a waitress at a cafe in Fort Smith, in Sebastian county. Miss Stewart and other girls had an apartment in Fort Smith, and paid the rent monthly. She kept her clothes in Fort Smith. She worked six days a week in the cafe, and went to Booneville on her rest day "nearly every week," and took her soiled clothes to Booneville where she and her mother laundered them. During three weeks in early 1944 the cafe was closed for repairs; and Miss Stewart spent this time with her parents in Booneville. There is no record of any voting or payment of taxes.

The question was whether, under the venue statute (Act 314 of 1939), Miss Stewart "resided at the time of injury" in Logan county. A comparison of the above facts with those detailed in *Norton* v. *Purkins* leads me to the conclusion that no sound distinction can be drawn between the two cases. But I think that *Norton* v. *Purkins* took too narrow a view of residence, and the present holding goes more to the correct conclusion, which is that residence may be *domicile* as well as the *place of temporary sojourn.* So I agree with the majority on the venue question.

II. *Instructed Verdict.* My dissent in this case is on this issue of the instructed verdict. Appellee's instruction No. 1 was abstract—insofar as the bus *being about to stop* was concerned—and the judgment should be reversed; but the cause should be remanded instead of dismissed. I think there was evidence that would carry the

case to the jury on correct instructions on the question of whether the illegal position of the bus was the negligence that proximately caused the injury. The majority opinion recites "position of the bus was merely evidence of negligence—a circumstance for the jury's consideration, something upon which a verdict may be predicated if in the light of all the surroundings it can be said that the defendant was negligent, and that such negligence occasioned the damage complained of." Who is to consider whether the position of the bus was the proximate cause of the collision? The majority, in the above quotation, has said that the position of the bus was a circumtance for the *jury's* consideration; and yet the majority holds that there was not sufficient evidence to take the case to the jury!

There was introduced in evidence an ordinance of the city of Fort Smith requiring vehicles to be parked close to the curb. The ordinance provided that a vehicle (such as the appellant's bus) should be "parallel with the edge of the roadway, headed in the direction of traffic, and with the curb-side wheels of the vehicle within twelve inches of the edge of the roadway." It is undisputed that the bus in question was in a position in violation of that ordinance. One witness testified that the rear end of the bus was "around four to five feet from the curb and the front was about two feet from the curb." Further, it was testified by the witness, Edgin, that he was over to the center of the street as far as he could go. He said:

> "I got as close to the middle as I could."

Hoffman testified that there was not sufficient space between Edgin's car and the protruding end of the bus for Hoffman's car to pass the bus. The majority opinion refers to the photographs in the record. I have examined these carefully; and they do not disclose where the bus was struck. They do show—to my satisfaction—that the right front part of the Hoffman car received the greatest force of the impact; and that circumstance lends support to Hoffman's testimony.

I have recited some of the facts, in order to show that the question of who was at fault could only be determined by the drawing of inferences, and the reaching of a conclusion from these facts and others, detailing all of which would considerably lengthen this opinion. The question is: was the collision proximately caused by the illegal parking of the bus, or by the reckless driving of Hoffman? If, by the illegal parking of the bus, then there is liability; if, by the reckless driving of Hoffman, then there is no liability. To answer the question is to determine a factual issue; and the jury should decide it. The crux of the whole matter is this: Who should draw inferences and reach conclusions? I unhesitatingly answer: "the jury"; and I quote from my dissenting opinion in the case of *Union Central Life Insurance Co.* v. *Sims,* 208 Ark. 1069, 189 S. W. 2d 193:

"Who should draw these inferences and reach these conclusions? The jury. Our cases all hold to that effect. In *Grand Lodge of A. O. U. W.* v. *Banister,* 80 Ark. 190, 96 S. W. 742, 744, Mr. Justice McCulloch said: 'if the facts are such that men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute, then they are properly submitted to the jury for determination. Judges should not, under that state of the case, substitute their judgment for that of the jury.' In *St. Louis Ry. Co.* v. *Coleman,* 97 Ark. 438, 135 S. W. 338, 339, Ch. J. McCulloch said: 'When the testimony, though unconflicting, is such that different minds may reasonably draw different conclusions therefrom, then it is the duty of the trial court to submit the issues to the jury for determination, and on appeal the verdict of the jury should not be disturbed.' In *St. Louis, I. M. & S. Ry. Co.* v. *Fuqua,* 114 Ark. 112, 169 S. W. 786, 788, Mr. Justice Hart said: 'The rule is that where fair-minded men might honestly differ as to the conclusion to be drawn from the facts, whether controverted or uncontroverted, the question at issue should go to the jury.' See, also, *Mississippi River Fuel Corporation* v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255, and many other cases collected in 16 West's Ark. Dig., Trial, § 142, and see also

64 C. J. 346. . . . I think the majority opinion invades the province of the jury, so I respectfully dissent from the dismissal of the case. There were errors in the instructions which would necessitate a reversal, but the cause should be remanded for a new trial."

WALSH *v.* BUCKNER.

4-7735 190 S. W. 2d 447

Opinion delivered November 12, 1945.

Rehearing denied December 10, 1945.

A. D. Chavis, for appellant.

Henry W. Smith, for appellee.

SMITH, J. Appellant filed a petition to confirm his title to the east half, northwest quarter, section 18, township 3 south, range 10 west. The statutory notice of the filing of the petition was published, proof of which was made an exhibit to the petition. The proceeding ceased to be *ex parte* and became adversary, when a summons was served on Lena Vaughn Buckner, who filed an answer and cross-complaint. These pleadings, with the answer to the cross-complaint, contain allegations which we think are extraneous, and confuse the issues upon which the case must be decided.

No testimony was taken, and the cause was submitted upon an agreed statement of facts, which dealt with the northeast quarter, northwest quarter and the southeast quarter, northwest quarter, which together comprise the east half, northwest quarter, as separate tracts of land.

The petition alleged, and the allegation is not denied, that Cornelius Vaughn obtained a patent from the United States, dated July 23, 1888, to the east half, northwest quarter, and the book and page thereof in which the patent is recorded in Jefferson county, where the land is situated, was given. In the stipulation of the parties, it is recited that a patent from the United States issued to Cornelius Vaughn to the southeast quarter, northwest quarter, the book and page in which it is recorded, being that alleged by petitioner. However, the parties treat Cornelius Vaughn as the source of the title so far as this litigation is concerned. Cornelius Vaughn was survived by a daughter, Hettie Franklin, and a son, H. F., who is the father of the defendant, Lena Vaughn Buckner, who

obtained deeds from her father and aunt, dated July 25, 1936, which would vest title in her, if it was not lost by the proceedings presently referred to.

Both 40-acre tracts were included in a suit brought by Road Improvement District No. 4, of Jefferson county, to enforce payment of delinquent taxes due the road district. Foreclosure of the district's lien was decreed and F. M. Reeves was made commissioner to sell the lands, and after the sale thereof, the commissioner, on July 17, 1918, executed a deed to Jake Cohn and Irving Reinberger, conveying both 40-acre tracts.

Suit was brought by the Jefferson County Bridge District to foreclose its lien against the northeast quarter, northwest quarter, and in the decree foreclosing this lien, S. F. Vaulx was named commissioner to sell the land, and under its authority northeast quarter, northwest quarter was sold to Jake Cohn, and the commissioner executed a deed to Cohn on July 27, 1921.

A decree was rendered in the suit of Road Improvement District No. 4 to enforce its lien for subsequent unpaid betterment assessments due it on the southeast quarter, northwest quarter, pursuant to which a sale was made by S. F. Vaulx, named as commissioner in the foreclosure decree, to Richard Franklin, and on November 1, 1920, Vaulx executed a commissioner's deed to Franklin.

Under the provisions of § 1844, Pope's Digest, these commissioner's deeds are "evidence of the facts therein recited, and of the legality and regularity of the sale of the lands so conveyed until the contrary be made to appear," and no attempt was made to make that showing.

Hettie Franklin brought suit for divorce against Richard, her husband, and in the decree awarding her divorce, it was adjudged that she, and not her husband, was the owner of the southeast quarter, northwest quarter, this being the land conveyed to Richard, her husband, by S. F. Vaulx, above referred to. This decree was rendered September 20, 1923, and on October 1, 1923, thereafter, Hettie Franklin conveyed that tract to A .D. Chavis, by warranty deed, which was not filed for record until

November 17, 1930. This filing date is nearly six years prior to the date of the deed to Lena Buckner from H. F. Vaughn, her father, and Hettie Franklin (then Holt), her aunt.

On August 4, 1939, A. D. Chavis obtained a quitclaim deed from Jake Cohn and wife to the northeast quarter, northwest quarter, and by mesne conveyances from Chavis to petitioner, such title as Chavis had to both 40-acre tracts passed to petitioner, who brought this suit to quiet and confirm his title.

The stipulations of counsel recite the facts herein stated, and give a separate history of the payment of general taxes on each 40-acre tract. This statement shows that the taxes have been kept down and were usually paid by Lena Buckner, but rarely in the year in which they were payable, but by way of redemptions from delinquent tax sales, one such redemption covering the years 1937, 1938 and 1939. For the year 1935 the taxes on the southeast quarter, northwest quarter, were paid by Gordon L. Chavis, who had received a deed from, and later reconveyed to A. D. Chavis, and the taxes on the northeast quarter, northwest quarter for the year 1942 were paid by A. D. Chavis.

It is stipulated by the parties, and in the brief filed by Lena Buckner's counsel it is said that "all the land is wild and unimproved," and the decree from which is this appeal finds and recites that fact.

The decree "finds that the petition of the plaintiff should be dismissed for the want of equity, for the reason that the plaintiff has not established his title to the said land." The decree further finds that "the defendant has had open, peaceable, adverse, and uninterrupted possession of said lands for a period of more than seven years next before the filing of the petition that the defendant's plea of the statute of limitations should be granted and that the title in and to said lands should be quieted and confirmed in the defendant, Lena Buckner." This appeal is from that decree.

This finding as to possession contravenes the stipulation of the parties that the land is wild and unimproved, and can be sustained only upon the theory, if at all, that possession attached under § 8920, Pope's Digest, as the result of the payment of taxes for a period of seven years. But it cannot be sustained upon that ground for the reason that, although appellees may have paid more than seven years taxes, they were not paid in the year in which they were payable, and were paid more often than otherwise by redemptions from tax foreclosures, and it was held in the case of *Wyse* v. *Johnston,* 83 Ark. 520, 104 S. W. 204, that the payment of taxes by way of a redemption from a tax sale was not a payment within the meaning of § 8920, Pope's Digest. It was said in this opinion, in the Wyse case, *supra,* that "paying taxes and redeeming from tax sales are two separate and distinct things. One cannot be construed as the other when each has a separate, distinct meaning, well defined in law and well known to the public." See, also, *Price* v. *Greer,* 89 Ark. 300, 116 S. W. 676. It follows, therefore, that appellee's title cannot be quieted upon the theory that she had had possession for as long as seven years.

It appears from what has been said that appellant does have the apparent and *prima facie* title to the northeast quarter, northwest quarter, having acquired by *mesne* conveyances the title conveyed by Vaulx, commissioner, to Jake Cohn, under the sale foreclosing the lien of the Jefferson County Bridge District. Having lost by this sale and conveyance any claim of title she might otherwise have had, appellee cannot question appellant's apparent title. It was held in the case of *Horner* v. *Jarrett,* 99 Ark. 154, 137 S. W. 820, to quote a headnote that, "Where the plaintiff in an action to quiet title shows *prima facie* title in himself, his title cannot be questioned by a defendant who has neither title nor possession." Appellant is, therefore, entitled to have his title quieted to the northeast quarter, northwest quarter, as against appellee.

But it does not follow that appellant's title should also be quieted to southeast quarter, northwest quarter.

As has been said, this title was acquired by Irving Reinberger and Jake Cohn, through a commissioner's deed to them, based upon the foreclosure of Road Improvement District No. 4's lien for unpaid betterment assessments. How Cohn acquired Reinberger's interest, if he did acquire it, does not appear, except that Cohn did obtain the deed of commissioner executed pursuant to a decree foreclosing the road improvement district lien for taxes of a subsequent year.

Appellant has apparently proceeded upon the theory that this deed of the commissioner to him individually operated to vest title in him alone, and extinguished the title of Reinberger, but not so. The first commissioner's deed to Cohn and Reinberger made them tenants in common, and Cohn did not acquire the title of Reinberger, his co-tenant, by a purchase at the subsequent sale. The case of *Spikes* v. *Beloate,* 206 Ark. 344, 175 S. W. 2d 579, holds and cites a number of earlier cases holding that a tenant in common cannot add to or strengthen his title by purchasing title to the entire property at a tax sale, nor by purchasing it from a stranger who has purchased at such sale, and that such purchase amounts to no more than a redemption, which inures to the benefit of the other tenants as much as himself, and confers no right upon such tenant so purchasing except to demand contribution from his co-tenant. *Holloway* v. *Berenzen,* 208 Ark. 849, 188 S. W. 2d 298, a very recent case, is to the same effect.

It appears, therefore, that while appellant has acquired the title of Cohn to the southeast quarter, northwest quarter, he has not acquired the interest or title of Cohn's co-tenant, and this decree as to that tract will be affirmed.

The decree as to the northeast quarter, northwest quarter will be reversed and the cause remanded with directions to quiet appellant's title as against appellee. Appropriate orders will be made reimbursing appellee for taxes paid by her on this tract since the date of the commissioner's deed to Cohn. *Turner* v. *Grove Land & Timber Co.,* 208 Ark. 921, 188 S. W. 2d 121. The costs of

this appeal and of the entire case will be divided equally between appellant and appellee.

OLIVER *v.* CULPEPPER.

4-7746 190 S. W. 2d 457

Opinion delivered November 19, 1945.

Rehearing denied December 10, 1945.

Barney & Quinn, for appellant.

Bert B. Larey and *Arnold & Arnold,* for appellee.

SMITH, J. Mrs. Mary E. T. Culpepper, a resident of Cass county, Texas, died testate in 1907. She owned at the time of her death 100 acres of land in Cass county, Texas, and a small amount of personal property. Her will reads as follows:

"I, Mrs. Mary E. T. Culpepper of Cass county, Texas, being of sound mind and being desirous to settle my worldly affairs while I have strength to do so, do make this my last will and testament hereby revoking all others heretofore by me made.

"Item 1: I desire and direct that my body be buried in a Christian-like manner suitable to my circumstances and conditions in life.

"Item 2: I desire and direct that all my just debts be paid by my executor to be hereinafter named.

"Item 3: I give, bequeath and demise to my afflicted daughter, Nancy T. A. Culpepper, all of my property, both real and personal of all character and kinds regardless of where situated, to have and use for, and during her natural life, and at her death whatever remains, if any, of said property, I give, bequeath and demise to my son, W. E. Culpepper, and my daughter, Mary Beulah Culpepper, share and share alike.

"Item 4: I hereby appoint my son, W. E. Culpepper, guardian and trustee of the person and estate of the said Nancy T. A. Culpepper.

"Item 5: My executor hereinafter appointed shall have full control and management of all said property herein granting to him full power to sell and make title to any and all of said property and to invest same or any part thereof in other property as to him may seem to the best interest of the legatee herein.

"Item 6: I hereby constitute and appoint my son, W. E. Culpepper, sole executor of this my last will and testament without bond for the due and legal performance of the same and will and direct that the Court have nothing further to do with my said estate, other than the probate of this my last will and testament, and the return of an inventory and appraisement of same.

"In testimony whereof I hereunto set my hand this 6th day of June A. D. 1906."

Art. 3436, Vernon's Ann. Texas Statutes reads as follows: "Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than probating and recording of his will, and the return of an inventory, appraisement and lists of claims of his estate." (Acts 1876, p. 124; G. L. Vol. 8, p. 960.)

Under such a will the person named as executor is known in that state as Independent Executor, and it was held in the case of *Gaines* v. *First State Bank,* 28 S. W. 2d

wife, since that time, have had the care and expense of Nancy T. A. Culpepper, and it is not denied that this burdensome duty was discharged as completely as the circumstances of W. E. Culpepper and his wife permitted.

Beulah Oliver, nee Culpepper, one of the remaindermen under the will of her mother, lived on the land until her marriage, when she moved away, and has not since had any of the care and responsibility for her afflicted sister, and appears to have made no contribution to her support, except that on one occasion she gave her some candy and fruit, and another occasion gave her a pair of garters, and for some years before the institution of this suit had not visited her.

By mesne conveyances, of which there are a large number, Mrs. Stella Pattillo acquired the Bivins title to the southwest quarter, southwest quarter of section 17 and the south half, northwest quarter, southwest quarter of section 17, and D. W. Pattillo acquired the Bivins title to the north half, northwest quarter, southwest quarter of section 17.

The remaining 120 acres were conveyed by W. E. Culpepper, in his own right, and as trustee, to his wife, Mrs. Ethel Culpepper. This deed recites the provisions of the will of the grantor's mother, and purports to convey pursuant to the power to sell there conferred. This deed is dated December 17, 1918, and recites that it "is made to compensate his wife, Ethel Culpepper, for taking care of my said invalid sister who owns a life estate in the above described property." The testimony shows that this deed was executed in contemplation of W. E. Culpepper being called as a soldier in World War I, then raging, but he was not called to service. The undisputed testimony shows that for many years Mrs. Culpepper faithfully performed the service of caring for Nancy T. A. Culpepper, the contemplation and assumption of which service formed the consideration of the deed to her.

On October 17, 1942, W. E. Culpepper and wife executed an oil and gas lease covering the southeast quarter, northeast quarter of section 17 to J. K. Wadley, which was assigned by Wadley (Feb. 15, 1943) to Barnsdall Oil

Co., and the Standard Oil Co., which last named company assigned its interest to Sohio Pet. Co.

On November 17, 1942, W. E. Culpepper and wife executed an oil and gas lease covering the northwest quarter, southeast quarter of section 17 to J. K. Wadley, who assigned the lease to Barnsdall Oil Co. and Standard Oil Co., and the Standard Oil Co. assigned its interest to Sohio Pet. Co.

On February 13, 1945, Mrs. Ethel Culpepper, as guardian of Nancy T. A. Culpepper, executed an oil and gas lease to J. K. Wadley covering the southwest quarter, northwest quarter of section 16; west half, southwest quarter of section 17; northwest quarter, southeast quarter of section 17; southeast quarter, northeast quarter of section 17. This lease covers the entire 200 acres and includes, of course, the two forty-acre tracts on which W. E. Culpepper and wife had executed the leases above mentioned to J. K. Wadley. Further reference will be made to this lease, as it has an important bearing on the question of the title to this land.

On December 1, 1944, Mrs. Ethel Culpepper and her four daughters, each in her own right, executed a royalty deed to J. K. Wadley, covering the northwest quarter, southeast quarter of section 17.

W. E. Culpepper died intestate March 31, 1944, and was survived by his widow and their four daughters who, with their mother, executed the royalty deed just referred to, to J. K. Wadley.

Oil prospects gave these lands a value they would never otherwise have had, and on February 14, 1945, Mrs. Ethel Culpepper, the widow of W. E. Culpepper, filed a bill in her name individually, and as guardian of Nancy T. A. Culpepper, an incompetent, to quiet the title to the lands hereinabove described against Beulah Oliver. Stella and D. W. Pattillo were named as plaintiffs, but they filed separate pleadings in which they prayed that their title be quieted.

This bill alleges, and the testimony clearly shows, that an error was made in the description of the lands

297, that an executor with power to administer without control of the probate court is a trustee for those entitled to take under the will. W. E. Culpepper was therefore a trustee under this statute as thus construed. W. E. Culpepper derived his power from the Texas will and it appears to be the law of that state that an independent executor may do without an order of court anything which the court could order him to do. *Beckham* v. *Beckham,* 202 S. W. 517. In addition paragraph four of the will expressly appoints him "guardian and trustee of the person and estate of the said Nancy T. A. Culpepper," and the next paragraph of the will provides that the executor, who is also trustee, "shall have full control and management of all said property herein granting to him full power to sell and make title to any and all of said property and to invest same or any part thereof in other property as to him may seem to the best interest of the legatee herein."

These are as great powers as could well be granted and clearly contemplate that the son, W. E. Culpepper, might consume the entire estate in the support of his sister, as the devise to the remainderman is of "whatever remains, if any, of said property."

This will was dated June 6, 1906, and was admitted to probate in Texas in October, 1907. The daughter, Nancy T. A. Culpepper, is now 63 years old, is blind, mentally incompetent, an invalid, and wholly unable to take care of herself.

In December, 1908, W. E. Culpepper, under the power conferred in his mother's will, sold her 100-acre tract of land in Texas, for the sum of $1,000, and thereafter removed, with all the members of his mother's family, to Miller county, Arkansas, where he bargained to buy and bought a 200-acre tract of land, for the consideration of $2,000, from W. E. Pattillo. He had only the $1,000 in cash received from the sale of his mother's land, and he gave notes, secured by vendor's lien, for the balance of $1,000. These notes were sold by Pattillo to R. S. Allday & Son.

The deed from Pattillo to W. E. Culpepper described the land as follows: Southeast quarter, northeast quarter of section 16; west half, southwest quarter of section 17; northwest quarter, southeast quarter of section 17; southeast quarter, northeast quarter of section 17, all in township 18 south, range 28 west.

On the same day on which he received this deed from Pattillo, W. E. Culpepper, as guardian and trustee for his sister, Nancy T. A. Culpepper, conveyed to himself, his brother, J. M., and A. B. Cornett, the husband of another sister, for the recited consideration of $1,000, the east half, southwest quarter, northwest quarter of section 16 and west half, southwest quarter of section 17, township 18 south, range 28 west. This description covers 100 acres, or one-half of the 200-acre tract.

The evident purpose of this deed was that the three grantees named should pay the balance of the purchase money, and they executed separate notes totaling $1,000, to the order of W. E. Culpepper, guardian and trustee. It was contemplated that these notes would be paid with money earned by farming the land, but the crops were poor and no payments were made on the notes, and at a later date J. M. Culpepper and A. B. Cornett, joined by their wives, reconveyed this 100 acres to W. E. Culpepper individually. This deed was dated October 14, 1909.

This left W. E. Culpepper as guardian and trustee owing the $1,000 unpaid purchase money, to pay which he executed a deed December 14, 1910, to A. Frank Bivins for the west half, southwest quarter of section 17, township 18 south, range 28 west, for the sum of $250, which he paid to Allday & Son, the holders of the vendor's lien notes, and he paid the balance of the $1,000 in 1917 and 1918. It is said that this balance was paid with the proceeds derived from the cultivation of the land, and so it may have been, in part at least, but it is obvious and clearly shown that these proceeds would have paid only a very small part of the expense and the value of the services rendered by W. E. Culpepper and his wife to Nancy T. A. Culpepper. It is shown, and undisputed, that W. E. Culpepper, until the time of his death, together with his

conveyed by W. E. Culpepper to his wife, and reformation to correct this error was prayed. It was prayed also that it be decreed that Beulah Oliver no longer owned an interest in the land; that a receiver be appointed pursuant to the provisions of § 10554, Pope's Digest, to execute oil and gas leases, and for all other and further relief to which plaintiffs may be entitled.

Numerous pleadings were filed, including an answer by Beulah Oliver, in which she alleged she was owner in fee of an undivided one-half interest in the lands herein described, subject to the life estate of Nancy T. A. Culpepper. She also filed a cross-complaint in which she prayed the cancellation of the various deeds and leases hereinbefore referred to, and she prayed also that her title be quieted against all such conveyances.

After the Pattillos had made themselves parties defendant, they alleged title in themselves through the conveyances in their chain of title herein set out. They also claimed title to the 80 acres in which they are interested through actual adverse possession over a period of much longer than seven years.

An amendment to the original bill was filed against Beulah Oliver, in which all the persons interested as herein shown, joined as plaintiffs and prayed that their respective titles and interests be quieted against any claim of Beulah Oliver.

In general terms the decree granted all the relief prayed, including the reformation of the description of the lands mentioned in the deed from W. E. Culpepper to his wife, and from that decree Mrs. Oliver has appealed.

So much of the decree as quieted the Pattillo title is affirmed. The deed from W. E. Culpepper and wife to Bivins, through whom the Pattillo title is derived, was executed December 14, 1910. This is a warranty deed with covenants of warranty, and purports to convey any and all title owned by W. E. Culpepper. The consideration for this deed was $250 cash, and its purpose was to obtain money to be applied to the partial payment of the balance

due on the purchase price of the 200-acre tract by W. E. Culpepper. It was shown that this $250 was applied to the payment of the past-due note, held by Allday & Son, and was required to save the property from the foreclosure of the vendor's lien. It was the duty primarily of W. E. Culpepper to support his incompetent sister, and for that purpose he was given full power to sell all, or any part of the trust property. *Heiseman* v. *Lowenstein,* 113 Ark. 404, 169 S. W. 224, Ann. Cas. 1916C, 601. See, also, *Thurman* v. *Symonds,* 126 Ark. 216, 190 S. W. 106. It is true W. E. Culpepper did not convey to Bivins in his representative capacity, but he did attempt to convey the entire title and he warranted the title conveyed.

The case of *Lanigan* v. *Sweaney,* 53 Ark. 185 ,13 S. W. 740, discussed the effect of a conveyance by a trustee which makes no reference to the power to sell conferred by the instrument which created the trust. After stating that the rule as first announced in England was that if such a conveyance would have no effect at all without reference to the power, it would be referred to the power, but if it would have some effect, though not all expressed on its face, it should be referred to the grantor's interest. But the opinion proceeds to say: "But the rule is much more liberal under subsequent adjudications, and it is now generally if not universally held, that if such a conveyance would have some effect if referred to an interest, but would not have full effect without reference to a power, it should have effect by virtue of the power. This seems reasonable and right, for the grantor is understood in equity to engage with his grantee to make his conveyance as effectual as he has power to make it, and it should be assumed that he acted by virtue of whatsoever right enabled him to discharge his full undertaking, and his act will be so referred." See, also, *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373, and the numerous cases cited in the annotator's note to the case of *Reeside* v. *Annex Bldg. Assn.,* 165 Md. 200, 167 Atl. 72, 91 A. L. R. 426.

Moreover, the title to the Bivins land has been settled by the long, continued adverse possession of the Pattillos, who succeeded to this title. It is apparently

conceded, and we think it true, that the acquisition of the Miller county land, the 200-acre tract, with the proceeds in part at least, of the sale of the Texas property, imposed the same trust relation upon the Miller county property. But even so, the adverse, continuous and open holding of the 80-acre tract for 25 years, or more ,by the Pattillos, and the testimony shows that the entire 80-acre tract was enclosed by a fence, would have, and did bar the trustee's title, and if so it barred the title of the *cestui que* trust.

Such is the holding in the case of *Chase* v. *Cartwright,* 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207, where it was said: "Seven years adverse possession was sufficient to bar the right of the trustees, they being under no disability; but whenever the right of action in the trustees is barred by limitation, the right of *cestui que trust* represented is also barred. (Citing cases and authorities.)" See, also, *McGaughey* v. *Brown,* 46 Ark. 25; *Bland* v. *Fleeman,* 58 Ark. 84, 23 S. W. 4, and *Little* v. *McGuire,* 113 Ark. 497, 168 S. W. 1084.

It will be remembered that Mrs. Oliver did not institute this suit, and she says that she is now required to assert her title, failing which it would be canceled, but that she was not previously required to do so, as her interest was that of a remainderman, and her sister is still alive, and she therefore had no title which she could have asserted. This is her answer to the contention of the appellees that she has lost her interest.

Appellees urge that as Mrs. Culpepper's will gave her son, as executor, full power to convey, his deed to his wife conveyed the title. We do not think so. The recent case of *Dowell* v. *Land,* 208 Ark. 908, 188 S. W. 2d 134, cites numerous cases to the effect that a trustee cannot sell property to himself, or to his wife, and we therefore hold that Mrs. Culpepper did not acquire title by the deed from her husband, and as will presently appear, we do not think it was understood that it had done so.

As has been said, W. E. Culpepper executed two leases and we think the will of his mother gave him this power. His widow, in conjunction with her daughters,

the heirs of W. E. Culpepper, executed another lease which is invalid, except only as to the interest of Mrs. Culpepper acquired under the deed to her from her husband. But the proceeds of this and all other leases (except the Bivins land) must be treated as made for the benefit of Nancy T. A. Culpepper.

It is argued that W. E. Culpepper acquired title to a one-half interest in the 200-acre tract, as a resulting trust, arising out of the fact that he paid one-half of the purchase money. But not so. The record in its entirety shows that he bought the 200 acres for the use and benefit of his sister, Nancy T. A. Culpepper, pursuant to the discretion and powers contained in his mother's will. It is insisted also that Mrs. W. E. Culpepper has acquired title to the land conveyed to her by her husband, by adverse possession, but this contention cannot be sustained.

There is a probate order made and entered February 13, 1945, which refutes both of these contentions. On that day the court, on the petition of Mrs. Culpepper, filed as guardian of the person and estate of Nancy T. A. Culpepper, approved the lease she had given J. K. Wadley. This order recites that on February 13, 1945, Mrs. Culpepper had been duly appointed by that court as guardian of Nancy T. A. Culpepper, who "still owns and claims all the right, title and interest in the lands above described, which she acquired under and by virtue of deed from D. W. Pattillo and wife to W. E. Culpepper, as guardian and trustee of Nancy T. A. Culpepper." This order admitted the will of Mary E. T. Culpepper to probate in this state, it having been regularly probated by proper court order in Texas on November 4, 1907.

The court had the power to make this order, and its effect is to confirm the Wadley lease, but it has the effect also of refuting any contention that W. E. Culpepper had title to a one-half interest in the 200-acre tract, as a resulting trust, and it would refute also any contention that Mrs. W. E. Culpepper acquired title of any kind by adverse possession.

Mrs. Culpepper will, at an appropriate time, account for, and charge herself with the proceeds of these leases,

against which she will be entitled to take credit for the expenses of Nancy T. A. Culpepper's support and for the value of her services in that connection.

So much of the decree as quiets the title to the Bivins 80 acres will be affirmed, but the decree quieting title to the remainder against Beulah Oliver will be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.

It is finally insisted that although it be held that Beulah Oliver has an interest in the land, which she has not lost through the proceedings hereinbefore recited, partition of the oil and gas leasehold estates should be ordered. It is within the discretion of the court to grant that relief. Section 10549, Pope's Digest; *Overton* v. *Porterfield,* 206 Ark. 784, 177 S. W. 2d 735, and the fact that there is a life tenant is not of itself sufficient reason for denying that relief. *Rockamore* v. *Pembroke,* 208 Ark. 995, 188 S. W. 2d 616; but whether this is done or not, all proceeds of any leases (except the Bivins land) must be paid to Mrs. W. E. Culpepper, as the guardian of Nancy T. A. Culpepper, for the support of her ward, and be accounted for as guardian until the estate of the remaindermen shall vest upon the death of Nancy T. A. Culpepper. This will include all proceeds derived from the land not owned by the Pattillos.

McHaney *v.* McHaney.

4-7743 190 S. W. 2d 450

Opinion delivered November 19, 1945.

Rhine & Rhine, for appellant.

Kirsch & Cathey and *D. G. Beauchamp,* for appellee.

MILLWEE, J. Lafayette McHaney died intestate November 8, 1908, in Greene county, survived by eleven children and his widow, Jennie McHaney, who was the step-mother of said children. At the time of his death Lafayette McHaney was the owner of considerable property and in settlement of the widow's interest in the estate, the eleven heirs by warranty deed conveyed lot 8, block 8 of Pruett's First Addition to the City of Paragould, Arkansas, to their step-mother. Two business buildings are located on this lot which is the property involved in this suit. Afterwards the widow moved from Paragould to Patoka, Illinois, where she married Mr. Carter and left the above described property in charge

of Bob McHaney, one of the heirs. Bob McHaney acted as the agent of Jennie Carter in renting and looking after the property until his death in 1932. Afterwards appellant, Sam P. McHaney, another step-son of Mrs. Carter, became her agent in renting the property. Appellant was acting as such agent in September, 1939, when he received a letter from Jennie Carter enclosing a letter from R. A. Reynolds of Paragould wanting to purchase the property. Appellant's conduct thereafter affords the basis of this suit.

Appellees filed their complaint on March 3, 1943, against appellant alleging in substance that it was the desire and intention of Jennie Carter that the property involved in this suit return to the McHaney heirs upon her death; that in September, 1939, it was ascertained that R. A. Reynolds was seeking to purchase the property and appellees and appellant had a conference in which it was agreed that appellant would go to Patoka, Illinois, as the agent of all the heirs, including appellees, to have Jennie Carter place the title to the lands in such condition or position that the McHaney heirs would receive same in fee simple upon their step-mother's death; that appellant instead of carrying out the contract between him and the heirs, prevailed upon Jennie Carter to deed the land to appellant individually in disregard of his duty as agent of appellees; that appellant's conduct was a fraud and device to defeat appellees in their rights in the property; and that appellant held the property as trustee of appellees to the extent of their three-elevenths interest therein. A demurrer to the complaint was overruled. Appellant filed his answer specifically denying the allegations of the complaint, but not pleading limitations, laches or the statute of frauds.

The cause was submitted to the trial court on April 3, 1945, and a decree was entered in favor of appellees. The court found that appellant became the agent of the McHaney heirs for the purpose of procuring a will or a deed from Jennie Carter in order that title to the land should pass to the heirs upon her death; that while professing to so act, appellant, in violation of his duties as

such agent, procured a conveyance of the land from Jennie Carter to himself; and that he held an undivided one-eleventh interest in said lands as trustee for each of the appellees. The court further found that appellant had paid out a total of $3,975 in acquiring legal title to the lands, but had enjoyed the possession and use of the property, which had a net rental value of $40 per month, from November 1, 1939, to April 1, 1945; and that appellant had paid $1,862.43 in excess of the credits allowable for the net monthly rentals. As a condition to the vesting of title in each of appellees of their respective interests, it was determined that each of them should pay appellant one-eleventh of $1,862.43, or $169.31. Upon appellant's refusal of a tender of such sums, it was decreed that an undivided three-elevenths of the title to the property be divested out of appellant and vested in appellees, and that appellant receive from the registry of the court the $169.31 found to be due from each of the appellees.

The testimony on behalf of appellees shows that Jennie Carter had repeatedly, through the years, expressed an intention to make arrangements for the property involved in this suit to go to the McHaney heirs at her death. Appellee, J. T. (Jack) McHaney, 78 years of age, testified that in September, 1939, appellant showed him a letter which Jennie Carter had received from Reynolds wanting to buy the property; that appellant told him the best thing the McHaney heirs could do would be to get up to Patoka quick and have Mrs. Carter make a will or deed to the McHaney heirs; that appellant agreed to represent all the heirs and go to Patoka and take care of the matter. Appellant told witness that he had a letter he wanted him to sign showing that it was all right for appellant to come up and get the matter fixed for the heirs; that appellant was in a hurry to get off that night and witness signed the letter without reading it. Witness asked appellant if he had a will for Jennie Carter to sign and appellant pulled some papers out of his brief case and showed them to witness and hurried out. Appellant said there would probably be about $25 expense attached to the trip which it was agreed the heirs should pay. When appellant returned from Illinois and informed witness that he had

procured a deed for the property to himself, witness reminded him that this was not what he had agreed to do. Appellant said he had to look after his own interest, as well as that of the heirs, and would pay the other heirs $2,700 twelve months after Jennie Carter's death.

On cross-examination J. T. McHaney testified that appellant did not tell him Mrs. Carter wanted to sell the property, but such possibility was discussed and appellant was to see that the heirs would receive the proceeds of a sale, if made. They did not discuss the value of the property, but appellant did say he would give $3,600 for it, but witness told him it was worth much more. Witness went to see Mrs. Carter a week after appellant was up there to see what appellant had done. Mrs. Carter did not need money and had not changed her mind about leaving the property to the heirs. Appellant did not tell him that he had a note payable to each of the heirs for $225. Mrs. Carter paid appellant $50 for looking after the property the last time she was in Paragould. The testimony of J. T. McHaney, as to the first conversation between witness and appellant, was corroborated by that of his son and daughter and Farris Stevenson.

Mrs. Effie Fleming testified that she knew all of the parties and was related to none of them; that she saw appellant after his first trip to Patoka and he told her he had been up to see Mrs. Carter in the interest of the heirs. Appellant told her that Mrs. Carter was feeble, had had a stroke, and her mind was not active and she was not capable of taking care of her business; that he had suggested buying the property and settling with the heirs and that J. T. McHaney was the only one causing any trouble.

I. T. Russell, a nephew of the parties, testified that he saw appellant after he had made two trips to Patoka and appellant told him that he wanted to get the property back in the McHaney name and did not want anyone else to get hold of it. Appellant also told witness he made a deal for $2,700 on the first trip, but made a better deal the second trip. Appellant told witness that he wasn't going to pay appellees anything.

Appellee Claude McHaney testified that Mrs. Carter had often expressed her desire that the property return to all the McHaney heirs; that Mrs. Carter visited in the homes of all the appellees on her trips to Paragould, and he knew of no reason she could have for not wanting to treat J. T. and W. W. McHaney the same as the other heirs.

Appellee W. W. (Bill) McHaney, who was 83 years old, testified that he and Jennie Carter were always on friendly terms; that she visited in his home every time she was in Paragould and always said she intended that the property go back to the McHaney heirs at her death. Witness had not objected to the marriage of his father and Jennie Carter, but appellant had, and quarrelled about it for quite awhile. Appellant and J. T. McHaney were visiting in witness' home one night soon after appellant returned from Illinois with the deed. Appellant told J. T. McHaney on that occasion that he was interfering with appellant's business and appellant said, "I am going to see that you don't get a thing." On the same night appellant said to witness and his wife, "You all keep quiet. I will see that you get yours." Mrs. W. W. McHaney and J. T. McHaney gave substantially the same testimony about the conversation.

Appellant testified that Jennie Carter wrote him in September, 1939, that she needed some money and had received letters from Reynolds wanting to buy the property. He did not have the letter, but she wanted him to come to Patoka. He saw his brother, J. T. McHaney, in Stevenson's office and told him about the letter from Mrs. Carter. There were three or four other people present, but he talked with his brother privately. Nothing was said about having Mrs. Carter make a will or any other specific arrangement. His brother, Jack, later came to appellant's office where they again discussed the possibility of her selling the property and appellant told his brother that the only way for Mrs. Carter to have money was for appellant to buy the property as he later did, and his brother agreed; that nothing was said about taking title in the name of the heirs; that they had a third conversation in which Jack told appellant he thought the

property was worth $3,500 or $4,000 and would make a statement to that effect. Appellant wrote the following statement in duplicate which his brother signed: "Dear Miss Jennie Carter, Sam said that Red Reynolds had wrote you wanting to buy your property, and he, Sam, was going up to see you. Said that you wrote him that you did not know its worth. I think about $3,500 or $4,000 cash would be its worth. Should you make a deal with Sam I think it will be OK with all here. J. T. McHaney." He told Jack that he would offer Mrs. Carter $40 per month for life and $3,000 at her death, and this proposition was approved; that Jack understood fully that he was going to buy the property for himself and nothing was said about the heirs paying the expenses of the trip.

Appellant went to Patoka on Sunday and found that Jennie Carter was in need of money for living expenses and was dependent on the Paragould property. He gave her the letter Jack had signed and made the offer which Jack had approved and advised her to think it over until the next morning. Monday morning they discussed the matter again in the presence of his son and Norman Carter, a stepson of Mrs. Carter by her last husband. She accepted his offer to pay $50 per month as long as she lived and $2,700, less his share, to be paid twelve months after her death. She wanted to sell it to appellant cheaper than to anyone else because he had looked after the property for eight years without any charge and she felt she owed him the difference between $3,500 and $2,700 for his service. She executed a warranty deed to appellant which recites a consideration of $2,700 "cash in hand," and a further consideration of $50 per month to Jennie Carter for life. Appellant paid her $200 and executed notes to each of the other ten heirs for $225 payable twelve months after her death. These amounts together with $225 allowed for appellant's share and $25 for expense of the trip made up the $2,700 consideration expressed in the deed. The ten notes to the heirs were turned over to appellant, but it was agreed that Mrs. Carter might recall the notes if she needed money.

Appellant further testified that on returning to Paragould he told J. T. McHaney what he had done and the latter wanted $400 for his part which appellant refused to pay. Soon after J. T. McHaney returned from Patoka, appellant received a letter from Mrs. Carter advising that Jack had been up there and requested appellant to come back. Appellant did not have this letter, but Jack had told her she had no assurance of receiving the $50 per month. Appellant went back the following Sunday with his son and invalid brother, Ed McHaney. Mrs. Carter was angry at Jack and asked appellant for the notes which he gave to her. She wanted more money and requested that he make one note for $2,000, give her $225 cash, and keep $25 for expenses of the trip, which he did; that she wanted to cut Jack and Bill out, but he persuaded her not to and she assigned the $2,000 note to the ten heirs. A written agreement was signed by them dated October 9, 1939, which provided that the note be left in Mrs. Carter's lockbox and mailed to the Security Bank & Trust Company at Paragould by her stepson, Norman Carter, for collection after her death.

Appellant further testified that about a year later Jennie Carter asked him to come back to Patoka. On this occasion Mrs. Carter wanted $400 to set aside for her burial expenses and $200 to be credited to appellant on the note for Mrs. Simpson, one of the heirs, who owed appellant that amount and had requested that such credit be given. A new agreement was written and note executed for $1,400 and appellant gave Mrs. Carter a check for $200 and $200 cash. In assigning the new note to the heirs the names of Mrs. Simpson, Jack and Bill were left off. Witness objected to her leaving Jack's and Bill's names off. Mrs. Carter said Jack had caused her too much worry and it was appellant's understanding that Bill had opposed the marriage of their father to Jennie Carter and she never liked Bill for that reason. Mrs. Carter was 79 years old and in good health when they made the contract in 1939.

The testimony of appellant was corroborated on most points by that of his son, Sam L. McHaney, his brother, Ed McHaney and Norman Carter. According to the testi-

mony of Ed McHaney, the reason given by Mrs. Carter for leaving the names of Jack and Bill off the assignment of the note was that they had never been nice to her while she lived in Paragould before 1912. Other witnesses for appellant placed the value of property in 1939 at $3,500 to $5,000.

Jennie Carter died on September 8, 1942. The $1,400 note was sent to the Security Bank & Trust Company for collection and six of the heirs accepted their $200 share of the note. Appellee Claude McHaney declined to accept his share and joined in this suit with J. T. and W. W. McHaney.

It is argued by appellant that if he was the agent of appellees his duty as such agent was to secure a gift for the heirs in the form of a deed or will, and a violation of this duty would give appellees no cause of action against him because: (1) appellees have not been damaged by the action of appellant, and (2) if appellees had a cause of action, it is barred by laches.

As we understand appellant's first contention, he could have been under no obligation to negotiate a gift because such transaction may only result from a donor's own volition and the very nature of a gift would bar any duty on the part of appellant in the negotiation thereof. An agent, it is argued, could not, therefore, be charged with fraud for any action on his part that might have defeated the gift. We do not understand that appellees' cause of action was based upon an alleged violation of duty on appellant's part to persuade Jennie Carter to execute a gift to the McHaney heirs. The contract of agency which formed the basis of the complaint was that appellant agreed to enter upon a mission for the purpose of determining whether Jennie Carter was willing to do a thing she had already expressed an intention of doing, and which the heirs, under the circumstances, had a right to expect she would do when the contract of agency was made. The complaint of appellees is that appellant acted primarily in his own interests by purchasing the property for himself without making any attempt to perform the obligation of his contract of agency

with the other heirs, and to the prejudice of their interests.

The rule governing the relationship of appellant and appellees is stated in the case of *Walthour* v. *Pratt,* 173 Ark. 617, 292 S. W. 1017, as follows: "Everyone, whether designated agent, trustee, servant, or what not, who is under contract or other legal obligation to represent or act for another in any particular business or line of business, or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it. This is a rule of common-sense and honesty, as well as of law. The agent is not entitled to avail himself of any advantage that his position may give him to profit beyond the agreed compensation for his services. He may not speculate for his gain in the subject-matter of the employment. He may not use any information that he may have acquired by reason of his employment, either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest. 21 R. C. L. 825."

The applicable principle is also set out in the case of *Dudney* v. *Wilson,* 180 Ark. 416, 21 S. W. 2d 615, where the court approved the following statement from *Trice* v. *Comstock,* 121 Fed. 620: "Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage which he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principal to accomplish the purpose for which the agency was established." See, also, *Houston Rice Co.* v. *Reeves,* 179 Ark. 700, 17 S. W. 2d 884; and *Lybarger* v. *Lieblong,* 186 Ark. 913, 56 S. W. 2d 760, where this court said: "The fact that the agency is gratuitous does not affect the rule requiring good faith and loyalty on the part of the agent if he has entered upon or assumed the performance of his duties."

Appellant's contention that the cause of action is barred by laches contains much merit and might be well

taken if such plea had been made in the trial court. Appellant did not plead laches in his answer and we do not understand that the case was presented to the trial court on that theory. Laches, like the defense of limitations or the Statute of Frauds, to be available as a defense must be pleaded in the trial court. In the case of *Barrett* v. *Durbin,* 106 Ark. 332, 153 S. W. 265, the court said: "Appellee, Durbin, did not set up laches in the court below as a defense to the suit for specific performance. The evidence was not developed with reference to such defense, and the case was not presented on that theory to the trial court; therefore, he should not be allowed to take advantage of such defense here for the first time." Appellees are, therefore, not barred by laches from maintaining the suit.

It is also insisted by appellant that if he was an agent it was an agency coupled with an interest and he had the right to change or vary his instructions to protect his own interests in the subject-matter of the agency. In discussing the rule which requires an agent to act with the utmost good faith and loyalty for the advancement of the interests of his principal, the textwriter in 3 C. J. S., pages 6-7, says: "It is immaterial, in the application of this rule, that the agency is one coupled with an interest, or that the compensation given the agent is small or nominal, or that it is a gratuitous agency." At page 33 of the same work it is said: "Where the agent's power is coupled with an interest in the subject-matter, unreasonable instructions of the principal, detrimental to the agent's interest, may be disregarded, provided the agent acts in good faith." The right of the agent to disregard instructions where the agency is one coupled with an interest is, therefore, dependent upon the good faith of the agent's action. It was the contention of appellees that appellant failed to exercise good faith in his actions in furtherance of the interests of the heirs. The finding of the trial court was that appellant, while professing to act in the interest of the heirs, procured a conveyance of the property to himself in disregard of his relationship to appellees. Such determination of the issue by the chancellor precludes the supposition that appellant acted

in good faith, and we cannot say this finding is against the preponderance of the evidence.

The testimony in the record is voluminous and we have reviewed it in considerable detail. The issues primarily involve questions of fact which are sharply disputed. In view of the trial court's favored position in testing the credibility of the various witnesses, we are unable to say that his findings on the whole case are against the preponderance of the evidence. The decree is accordingly affirmed.

McHaney, J., disqualified and not participating.

Albright *v.* Karston.

4-7749 190 S. W. 2d 433

Opinion delivered November 19, 1945.

Guy E. Williams, Attorney General; *Cleveland Holland* and *Elmo Taylor,* Assistant Attorneys General, for appellant.

Jay M. Rowland, for appellee.

ROBINS, J. Appellees filed complaint against appellant, Gray Albright, superintendent of State Police, alleging that he was unlawfully retaining certain sums of money, aggregating $6,400, which appellant had taken from their establishments in Hot Springs; that said moneys were taken for use as evidence against appellees and there was no authority under the law for confiscation of said moneys; and they prayed that the money be ordered paid into court, so that same might be properly disposed of upon the termination of any charges against appellees as a result of the raids in which the money was taken.

By amendment there was added to the complaint an allegation that the said Albright had resigned as superintendent of State Police, but was still holding the said moneys, and in the amendment judgment for $6,400 against Albright in his official capacity and individually was asked.

Demurrer to this complaint, filed by the Attorney General on behalf of the superintendent of police, being overruled, there was a further amendment in which the amount of money taken from each of the appellees respectively was set out and judgment in favor of such appellees for these respective amounts was prayed.

Thereafter, Albright filed an answer, denying all allegations of the complaint and amendments thereto and also a "cross-complaint" in which he averred that the money held by him was taken by members of the State Police, while raiding the gambling houses of appellees, the money being used at the time in the operation thereof; and that "such moneys are subject to be and should be forfeited by plaintiffs to the State of Arkansas." There

was a prayer for "an order . . . declaring such moneys a forfeit and ordering the clerk to pay same into the state treasury."

At the time of filing his answer, Albright paid to the sheriff $5,718.34, the amount admitted by him to be in his hands, which he alleged "was taken from the plaintiffs herein in connection with various raids upon their places of business," and the court made an order finding that he had "deposited said sum of money with the court to be disposed of according to law," and discharging "Albright, both in his former official capacity as Superintendent of State Police, and in his individual capacity . . . from all liability therefor."

The case was tried upon the following agreed statement of facts:

"1. That the money in question in this action was taken into custody by the defendant, Gray Albright, acting as Suprintendent of the State Police and by other members of the State Police force under the direction of the said Gray Albright in various sums from the different places being operated in the City of Hot Springs, Arkansas, by the plaintiffs, and upon various occasions.

"2. That at such places being operated by the plaintiffs, and at each of them, turf exchanges or pool rooms, commonly called bookies, were maintained and operated, where money was received, bet, won and lost on horse races, and where tickets for pools on horse races to be held and run in this state and elsewhere were bought, sold and cashed.

"3. That at the various times when the members of the Arkansas State Police made such raids they seized the money and property involved in this case while the said places were being operated by plaintiffs as set out in paragraph two hereof.

"4. The various parties plaintiff from whom the money was taken by the defendant and his agents were charged with the offenses of operating gambling houses and with gaming, and were arrested and required to make

bond and appeared in Municipal Court and their cases were submitted to the Garland County Grand Jury.

"5. That the Grand Jury returned no true bills against any of the plaintiffs herein.

"6. That there are no charges pending against any of the plaintiffs.

"7. The defendant, Gray Albright, has paid the sum of $5,718.34 into the registry of this Court and same is all of the money seized by defendants upon said raids from plaintiffs."

The following judgment was rendered by the lower court:

"On this 7th day of May, 1945, this matter is presented to the Court upon the complaint and amendments thereto, answer and cross-complaint of the defendant and an agreed Statement of Facts, which is this day filed herein; from all of which the Court finds:

"That the State of Arkansas is not entitled to any of the money or property involved herein as a forfeit or otherwise, and that the cross-complaint of the defendant should be dismissed.

"It is therefore considered, ordered and adjudged by the Court that the cross-complaint of the defendant be, and the same is hereby dismissed, to which action of the Court, the defendant at the time excepted and prayed an appeal to the Supreme Court of Arkansas, which appeal is, by the Court granted, and the defendant allowed sixty days time in which to tender and file his Bill of Exceptions herein."

The money involved herein was seized by the State Police under authority of search warrants which were issued in pursuance of § 3327 of Pope's Digest: "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."

For reversal of the judgment of the lower court the Attorney General urges that the money was a part of the paraphernalia used in the operation of the gambling houses by appellees and that appellees had by their wrongful and unlawful use of these sums of money converted same into gambling devices. In support of this contention he cites our decisions in the case of *State* v. *Sanders,* 86 Ark. 353, 111 S. W. 454; and *Albright* v. *Muncrief,* 206 Ark. 319, 176 S. W. 2d 426.

The question to be decided in the *Sanders* case was whether a pool table, upon which the ordinary game of pool might be played without any wagering on the part of the players, but which was shown in that case to be used in games on which bets were made, was a gambling device, within the meaning of the provisions of § 3327, *supra.* The court held that such table was shown to be a gambling device, saying: "A gambling device is an instrumentality for the playing of a game upon which money may be lost or won; and the instrumentality is not necessarily intended solely for gambling purposes."

In the *Muncrief* case the court held that teletype machines, over which bookmakers received racing information used by them in unlawfully accepting wagers on the results at race tracks throughout the country, might be seized and destroyed as gambling devices. In both of these Arkansas cases the court was dealing with *instrumentalities* through and by means of which the gambling operations were actually being carried on—not with the money or property that was bet by the players.

The precise question posed by this appeal has not previously been passed on by this court, and, so far as we have been able to discover, the legality of the seizure of money, used in gambling, by officers raiding the places where the gambling was carried on has been considered by the courts of other states in only five reported cases:

Rader v. *Simmons,* 264 App. Div. 415, 35 N. Y. S. 2d 573; *People* v. *Mettlemen,* 155 Misc. 761, 281 N. Y. S. 474; *Miller* v. *State,* 46 Okla. 674, 149 P. 364; *Davis* v. *State,* 165 S. W. 2d 757; and *Dorrell* v. *Clark,* 90 Mont. 585, 4 P. 2d 712, 79 A. L. R. 1000.

In the *Rader* case, the court, construing a statute which authorized the seizure of any "device or apparatus for gambling," said: "Obviously money does not come within this definition, nor is it included under the classification of other 'apparatus or article, suitable for gambling purposes,' within the meaning of the statutes."

To the same effect was the holding in the *Mettlemen* case, wherein the court said: "A 'device or apparatus for gambling' is a device or apparatus designed for carrying on the actual gambling . . . The money and the two diamond rings contain no scheme for gambling, nor are they a device or apparatus for determining who shall win or lose in gambling."

In the *Miller* case the supreme court of Oklahoma, construing a law providing for seizure and destruction of "articles or apparatus, suitable to be used for gambling purposes" held that money seized by the sheriff, along with a poker table, dice table and other gambling paraphernalia, was not within the purview of this statute. The court in that case said: "We do not think that 'money' comes under the classification of 'articles or apparatus, suitable to be used for gambling purposes.' Men do not, save in a sense, gamble 'with,' but 'for' money."

The *Davis* case involved a statute of Texas in which confiscation of money found by officers in a "gaming house" was authorized. The court in that case held that the money, which was seized by officers in a raid on a poker game carried on in a hotel room, could not be confiscated because the room was not a gambling house. This case, of course, is not analogous to the case at bar, but is of some relevancy as showing that at least one state has a statute expressly authorizing forfeiture to the state of money found in gambling places.

Nor is the question decided in the case of *Dorrell* v. *Clark,* 90 Mont. 585, 4 P. 2d 712, 79 A. L. R. 1000, the same as that involved here. In that case the owner of gambling (slot) machines brought suit for money which the sheriff took from these machines after he seized them in the plaintiff's place of business. The court denied recovery of the money to the owner of the slot machines, emphasizing that the sheriff did not know that the money was in the slot machines until he had taken charge of the latter, and that it was necessary for him to take the money while he was taking the machines. Furthermore, as the court pointed out the coins dropped in the machine caused the operation thereof, thereby becoming a part of the gambling device. The court in that case did not indicate what final disposition should be made of the money, being content to base its position on the broad rule that "whatever may or may not be done with the money in the custody of the court, the power of our courts, either at law or in equity, cannot be invoked in aid of one showing a violation of the law, to complete the illegal transaction and secure to the violator the fruits of his outlawry."

But, in the case at bar, we are not dealing with any asserted right of the gamblers for return of the money. We are only considering the appeal of the state from a dismissal of its cross-complaint, asking for a forfeiture of the money to the state. We are not asked to decide whether the gamblers shall have this money, because the lower court has not ordered its return to them, and the question of final disposition is not before us. We may only determine herein whether the state is entitled to have this money as a forfeit. The sole authority under which property found in gambling houses may be seized is the statute (§ 3327) quoted above. Under this statute there is no power given to the officers to take any property other than "gaming tables or devices." This statute also requires that the seized property must be burned; but the state is not seeking to burn this money—it is seeking only to confiscate it.

The money involved herein cannot be held to be a gambling device or a part of paraphernalia used for gaming; and, since we have in Arkansas no statute authorizing the seizure and confiscation by the state of money used in gambling operations, the courts are powerless to award such a remedy.

The judgment of the lower court is affirmed.

GRIFFIN SMITH, Chief Justice, dissents.

GRIFFIN SMITH, Chief Justice, dissenting. The fact that my six associates agree with all that is said in the majority opinion would ordinarily cause me to doubt the soundness of my views, and to impute to the concepts I entertain an urge to moralize, as distinguished from a duty to correctly declare the law.

But where one's beliefs respecting a transaction that must be dealt with officially reach the dignity of an earnest conviction; and when, as here, the subject is of first impression in Arkansas and there is no domestic precedent to which the term *stare decisis* may attach—in these circumstances there is no discretion behind which I may retire and assert with assurance that my concealment is a reality rather than a fiction.

We are not dealing with the rights of gentlemen who earn their bread by the sweat of their brows. But, even so, those who appear as appellees are entitled to the law's impartial application—fully, effectively, and as completely as though they were engaged in a business impressed with the public welfare. Certainly they are not to be denied equal protection merely because the occupation in which they are engaged is founded upon another's misfortune; a vocation to which the suspicion attaches that mathematical margins and percentages contribute to the travail of customers who in moments of weakness assume there is a chance to win, and who sometimes use their own funds.[1]

Sufficiency of the search warrants, by virtue of which the raids were made, is not in doubt. It is equally

[1] *Simpson* v. *Brooks*, 208 Ark. 1093, 189 S. W. 2d 364.

certain that illegal gambling was being carried on in the "Blue Ribbon Club," operated by George Pakis, Gordon Henderson, and Louis Larsón (where over a period from January to October, 1944, $2,071.10 was taken in six raids); in the "White Front Club," operated by Tony Karston,—and in such other places as Main Cigar Store, Circle Grill, Pass-Time Club, Reno Club, Milwaukee Bar, Citizens Club, and resorts bearing less dignified and alluring titles. Operating in these establishments (other than those already mentioned) were M. D. Clark, Raymond Tweedle, L. J. R. Wilson, Willie Page, Erb Wheatley, Walter Weldon, Louis Longinotti, Otis McCraw, Tim Crain, and Jack McJunkin.

That the State's interdictions against certain forms of gambling were being openly, flagrantly, brazenly, collusively, coöperatively, and defiantly violated is the only conclusion justified by the record. Effect of the willful conduct engaged in by those who were mentioned, (and, inferentially, by persons having larger interests, but whose identity is not revealed) was, *and still is,* to say that the General Assembly may make laws, but that officials elected and appointed at Hot Springs expect to defy them as the profits or convenience of a particular situation may suggest.

While this challenge to authority, and to the commonwealth's power, was riding the crest of popularity and profit, the Governor sent units of the State Police to Garland County, with the result that nearly six thousand dollars in gambler money was taken from the tables of these social mutineers; and it now forms the subject matter of this appeal.

To repeat, these gambler-claimants are not to be denied equal protection because their gains must necessarily result in another's loss. There are circumstances in which the act of receiving money from A, and on condition giving it to B, meets legislative approval. As to rights acquired through *legalized* gambling there is protection. But we are not now concerned with authorized machinations. The question is, Does money used in gam-

bling houses for the sole purpose of implementing the prohibited transaction come under the statutory ban?

The decision in *Albright* v. *Muncrief,* 206 Ark. 319, 176 S. W. 2d 426, was that a teletype (through which racing data were received and relayed) was not a gambling device *per se;* but if used for the purpose of transmitting information without which betting would have been restricted, the teletype then became a gambler's aid; and when matter passing through the machine was delivered to the so-called "bookies," the instrumentalities were subject to confiscation and destruction.

This statement appears in the Muncrief opinion: "While [appellee, a printer in whose office teletypes were operated], was not physically present with the machines in question, in each of the gambling houses, we think he was constructively present with these machines, aiding and abetting the operation of these gambling houses through the use of the machines, and was equally guilty."

Later the decision says: "Our lawmakers have gone far in their attempt to suppress the gambling evil; and in so doing have given our enforcement officers authority to destroy the tools by the use of which gambling is carried on."

This declaration of the law, no doubt, had reference also to section 3335 of Pope's Digest, providing that "The judges of the several courts in this State shall, in their construction of the statutes prohibiting gaming, construe the same liberally, with a view of preventing persons from evading the penalty of the law, by changings of name, or the invention of new games or devices, that now are or may hereafter be brought into practice in any and all kinds of gaming, and all general terms of description shall be so construed as to have effect *and include all games and devices as are not specifically named,* and in all cases, when construction is necessary, it shall be in favor of the prohibition and against the offender."

But, in effect it is said by the majority, *money* is not a device, even though the game in question, or the wager it sustains, would otherwise be useless.

One of Webster's definitions of money is ". . . anything customarily used as a medium of exchange and measure of value, as sheep, wampum, copper rings, quills of salt or of gold dust, shovel blades, etc."

We are more concerned with legislative intent than with abstruse definitions. But, says the majority opinion—and this appears to be the basis upon which the defiant appellees are being reimbursed—"The money involved herein cannot be held to be a gambling device or a part of paraphernalia used for gambling, . . . *and the Courts are powerless to award* [*the remedy requested*]."

Assuming that the lawmakers, in their choice of terms, used the word "device" in the exact sense my associates have construed it,—still, the statutes do not end there; and I cannot agree that "the Courts are *powerless.*" Again we have recourse to recognized authority. Formerly "paraphernalia" was the property (other than dower, marriage settlement, etc.) which at common law remained, more or less, under the control of a married woman, and which did not pass into the administration of the husband's estate upon his decease before her.—"Personal belongings, such as equipments, finery," and the like.

Ballentine's Law Dictionary speaks of personal ornaments, jewelry, and individual adornments peculiar to the woman's station in life. Paraphernalia embraced diamonds and other precious stones, as well as ornaments standing in the place of value or wealth.

It may rationally be presumed that this Court's majority has in mind that money, as such, is inanimate, cold, and bleak; and that it is barren of that capacity to corrupt which must exist under the General Assembly's conception of "device," or "paraphernalia." But the same legislative authority that tried (through the use of language stronger than is ordinarily used) to *divest* the

operator of a gambling house in respect of instrumentalities essential to his profession, and to deprive such gambler of the means by which he enforces financial stricture—that same authority directed Judges and Courts to declare the law *liberally*, ". . . *and all general terms of description shall be so construed as to have effect, and* [*such general terms shall include*] *all* . . . *devices as are not specifically named.*"

A work regarded as of preëminent value since a first edition was published in 1852 is Roget's Thesaurus of English Words and Phrases. It presents "paraphernalia" under two divisions—machinery, and belongings. The majority opinion accepts one classification and rejects the other. Under "property," Roget lists ". . . assets, belongings, means, resources, circumstances, wealth, money."

March's Thesaurus Dictionary—"A Treasure House of Words and Knowledge"—divides paraphernalia three ways: ornaments, instruments, and property. Included in property is money—"the medium of exchange."

I think we were correct in holding that machines leased by a printer and operated in distant cities became gambling paraphernalia when words reproduced by electrical impulses were transcribed on paper and the information, as the opinion says, was "relayed to various places in Hot Springs . . . where public betting was carried on."

The teletypes were devices or paraphernalia used by the gamblers, even though words, figures, and sentences were the product. Still, bookmakers relied upon the knowledge so obtained and thereby took their dollar tolls. In the case at bar money was the means by which the opposing interests of gambler and victim were represented. The table upon which this money was placed, if that were the method employed; the "chips" or tokens standing for money; the lamp illuminating the game; chairs upon which customers were seated; the carpet adorning the floor, and electric fans—these and other paraphernalia, including the scrap of paper delivered by

Muncrief when his teletype functioned—were subject to confiscation and destruction: but money, the admitted objective of manipulation—the reward for all that gave rise to the law's miscarriage—money must remain inviolate and be returned to the malefactors as the tools of their trade.

Why?

Because "the Courts are powerless."

BANK OF ATKINS *v.* WIRTH.

4-7752 190 S. W. 2d 445

Opinion delivered November 19, 1945.

Hays & Wait, for appellant.

J. H. A. Baker, for appellee.

McFADDIN, J. This is an appeal by a creditor, resisting a debtor's claim for personal property exemptions.

In 1940, appellant obtained judgment against appellee in the justice of the peace court for $216.54 and interest and costs. After *nulla bona* return, the transcript of judgment was filed in the office of the circuit clerk, and all subsequent proceedings have been on writs issued out of the circuit court (§ 8440 *et seq.,* Pope's Digest). In 1940, appellant obtained an execution, but appellee filed his schedule of personal property exemptions, which was allowed. No further effort for collection was made until 1944; and from that effort comes this appeal.

Appellee owned an undivided 1/6th interest, as tenant in common, in certain lands, and resided on the lands as his homestead. A partition suit filed by some of the other co-tenants resulted in a sale of the land. Appellee's net part of the proceeds from this land was $328.72. On June 13, 1944, appellant had a writ of garnishment served on the chancery commissioner who held the said $328.72 belonging to appellee. To secure the release of the funds caught by the garnishment, appellee filed in the circuit court his schedule of personal property exemptions as provided by § 7188 *et seq.*, Pope's Digest. He claimed the $328.72 was exempt as the proceeds of his homestead to be reinvested in another homestead; and he also claimed that all of his other personal property, together with this $328.72 made a total of less than $500 allowed him as his personal property exemption under the Constitution of Arkansas (Art. IX, § 2).

Appellant controverted the schedule, and a hearing was held before the circuit court without a jury on September 11, 1944; and at that hearing appellant introduced appellee's previous schedule (of 1940) in which appellee had listed and claimed as exempt certain household property itemized and valued as follows:

"3 bedsteads @ $2.50 each	$ 7.50
2 bed springs @ $1.00 each	2.00
1 rocking chair	2.00
4 chairs @ $1.00 each	4.00
2 mattresses @ $3.50 each	7.00
2 feather beds @ $15.00 each	30.00
8 pillow cases @ 0.25 each	2.00
4 pillows @ $1.00 each	4.00
15 quilts @ 1.25 each	18.75
4 sheets @ $1.00 each	4.00
1 homemade dining table	1.00
1 cooking stove	10.00
1 lot of dishes	5.00
1 lot of cooking utensils	4.00
1 set of knives and forks	2.00
TOTAL	$103.25"

There was other property in the 1940 schedule, but the above is all of the property that could come under the classification of "household goods."

When confronted by this 1940 schedule, appellee testified that this household property had been previously sold. At the conclusion of the September, 1944, hearing, the circuit court, on motion of the appellant, appointed three appraisers ". . . .to view and appraise all the personal property belonging to the defendant, J. A. Wirth, make a complete list thereof, and extend against each item thereof the value that they, or a majority of them, shall find its value to be, and shall report their findings and the items and value of all the personal property of the said J. A. Wirth to this court."

On January 13, 1945, the appraisers reported, and the following is the list of the property and value:

"Name of Article	Appraised Value
1 Jersey cow	$50.00
1 double shovel	0.50
1 iron beam plow	1.50
2 hogs—butchered for home use	
1 1930 Model A Ford—Sold	
1 trailer as heretofore mentioned	15.00
We compute the total	$67.00"

No exceptions were filed to this report, and no further evidence was offered by either side; and on January 15, 1945, the circuit court, on the evidence of September 11, 1944, and this report of the appraisers, entered judgment reading, in part, as follows:

"The defendant filed his schedule of exemption, to which the plaintiff objected, and thereupon three householders were appointed, sworn and viewed the scheduled property. They reported to the court that the said property did not exceed the exemptions allowed by law, whereupon the court found that the property claimed as exempt by the defendant did not exceed $500. . . .

"It is therefore the judgment of the court that *supersedeas* issue in favor of the defendant, and the garnishment be dismissed."

From an unavailing motion for new trial, based on nine assignments, the bank brings this appeal. Many interesting questions are discussed by counsel in the briefs, two of which are:

1. Does a co-tenant have the right of homestead in property held in co-tenancy?

2. Do the proceeds of a homestead, sold in partition proceedings brought by another co-tenant remain as exempt, when the homestead debtor says he intends to reinvest the said proceeds in another homestead as soon as the funds come into his hands?

But we find it unnecessary to explore or discuss these questions, because there is substantial evidence in the record to sustain the judgment of the circuit court on the fact question, irrespective of these law questions. The judgment is sustainable on the facts for either one of the alternatives below:

1. The appellee testified that he had disposed of the household property (as previously listed and itemized); and his wife also testified to like effect. On this evidence the circuit court could have based his judgment, that the debtor did not own such household property.

2. The circuit court might also have reached the conclusion that, even counting the household property, and the proceeds of the land sale, still the debtor's property was within the $500 exemption allowed by the Constitution; for this calculation could have been made:

a.	Value of money in hands of Chancery Commr.	$328.72
b.	Household goods, as heretofore itemized	103.25
c.	Property shown by appraiser's report to circuit court	67.00
	Total	$498.97

In short, the circuit court heard the case and rendered judgment, and there is substantial evidence to sustain the court; and we said in *Ward* v. *Nu Way Laundry Cleaners,* 205 Ark. 713, 170 S. W. 2d 381:

"There was substantial evidence to sustain the circuit court's judgment; and this being an appeal from a law court, the finding of the court on a controverted question of fact is conclusive if supported by substantial evidence. 25 C. J. 163; 35 C. J. S. 192, 'Exemptions,' § 164."

Affirmed.

PARETTE *v.* IVEY, EXECUTOR.

4-7748 190 S. W. 2d 441

Opinion delivered November 19, 1945.

Ben D. Rowland and *Edward H. Coulter,* for appellant.

J. A. Weas, for appellee.

HOLT, J. Mary Edna Grimes died testate December 8, 1944. Appellant, E. T. Parette, an only brother, sought to prevent the probation of the will on the grounds of lack of testamentary capacity and undue influence at the time the will was made.

Under the terms of the will, Mrs. Grimes gave a part of her real property to Carolyn Benson, a niece, and the remainder, both personal and real, to "my dear friend, Joe J. Ivey," and appointed him executor without bond.

The trial court, after hearing the testimony, found against appellant's contentions, and admitted the will to probate. This appeal followed.

The questions to be determined are: Did Mrs. Grimes lack mental capacity when she executed the will, and was she unduly influenced? The two questions are so interwoven that we consider them together. *Brown* v. *Emerson,* 205 Ark. 735, 170 S. W. 2d 1019.

The burden of proof was on the contestant, appellant. *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264.

The cause comes here for trial *de novo* and unless we can say that the decree is against the preponderance of the evidence, we must affirm it. *Brown* v. *Emerson, supra.*

After reviewing all of the testimony, we are unable to say that it does not support the findings and decree of the trial court.

Much of the material testimony is in conflict. Mrs. Grimes suffered a paralytic stroke on the morning of October 16, 1943, and on the afternoon of that day she executed a will—not in controversy here. Thereafter, on November 11, 1943, she executed another will, the one here in question. She was confined in a local hospital from the 17th to 27th of October, 1943, and thereafter in her home until her death.

Dr. A. R. Sparks testified that he attended Mrs. Grimes from October 17th to November 15, 1943; that while she was in the hospital, he saw her once or twice a day, and three or four times between the date she left the hospital and November 15th. He testified: "Well, she seemed to be in control of her faculties; that is, she was aware of her environment. Q. (Mr. Weas) Was she always cooperative? A. Yes, sir. Q. And responded immediately to any of your questions? A. Yes, sir; she was surprisingly alert. Q. In your opinion, from the time you started to treat her until the last call you made, taking into consideration her responses to your questions and cooperation, would you say she was capable of knowing and transacting business? A. Well, I really believe she was. Most of the times, I would say that a patient in that condition wasn't, but she seemed to be mentally clear the whole time. Q. She seemed to be mentally clear? A. I would say I would feel sure that she would know what she was doing. Q. And know how to transact business? A. I believe so."

Dr. Howell Atkinson saw the deceased only once, and that was on October 16th, when she suffered the stroke. He testified: "A. Just as I said ,I think she was physically unfit, and mentally, too, to transact any business

the day I saw her. Now, before that, I don't know, and, after that, I don't know."

Dr. Annie Bremyer, a chiropractor, saw Mrs. Grimes professionally November 11, 15, 19, 22, 25, 29; December 3, 6, 10, 13, 17, 31, 1943, and on eleven other occasions after December 31st and it was her opinion that Mrs. Grimes was mentally competent at the time she made the will in question here. She was present on November 11th when the will was being discussed by the deceased and her attorney, Mr. Weas; that on that occasion the deceased discussed and named her relatives, and in witness' opinion realized the claims and deserts of her relatives and those close to her, and knew perfectly what she was doing. Mr. J. A. Weas, the attorney who drew both wills, corroborated Dr. Bremyer's testimony.

Mrs. Pearl Coors testified: "A. When Joe first came out there, he used to play with my boys, and he couldn't have been better to Mrs. Grimes if he had been her own son. When he first went to work for the WAP (WPA), he came in and gave Mrs. Grimes his check. She said, 'Well, I have got to do so-and-so for my boy. That's all he wants from me, is money to buy him his lunch or for me to fix his lunch.' He gave her his check all the time. When he came back from the army, he hadn't been long out when she had this stroke, and when she came back from the hospital nobody in the neighborhood took care of her except Joe, and nobody had much time except, as I said, I did. I went over there one to six times a day. I did her washing and Joe helped me. When she came home from the hospital—her family insisted on her going to the hospital—when she came back, there were no neighbors to sit with her, and it was my job to look up somebody to stay with her, day and night. When she first came back from the hospital, she had bed-sores on her back as big as that. When she died, there were no bed-sores on her anywhere. Mr. Coors' mother was sick and I took care of her. She was nice and clean, and had everything she wanted to eat. Q. What was the condition of her mind? A. Well, I tried to get her not to give Carolyn anything. She told me, No, she knew definitely what she

wanted to do. There wasn't a thing the matter with her mind. The day before she passed away, I was over there and her mind was just the same as it was when she moved there, ten years ago."

Mrs. Annie Priest testified that appellee, Joe Ivey, lived in the home of deceased seven or eight years and that during the last few years of her life she depended largely upon him for support; that when he went into the army he sent her a check every month; that he was good to the deceased and "was a better boy to her than lots of sons to their own mother."

We quote from the testimony of Mrs. Minnie Shelton: "Well, I don't think a son could have taken care of her as well. I know that he stayed with her day and night during the whole time after she came back from the hospital, and he fed her every bite she ate, and cooked the biggest part of the meals—most all of them."

Mrs. Eunice Hardy testified: "Well, an own son couldn't have done as much as he did."

Testimony similar in effect was given by a great many neighbors of the deceased, some of whom visited her almost daily after her stroke until the time of her death. There is also testimony that many of these neighbors counseled and advised Mrs. Grimes to remember appellee, Joe Ivey, in her will.

As has been indicated, there is testimony on the part of appellant contradicting that offered by appellee. The majority of these witnesses were related to appellant. Mrs. Carolyn Benson was his daughter, Mrs. E. T. Parette, his wife, Mrs. Leona Green, another daughter, Cecil B. Green, a son-in-law, and Elmer Parette, a son. Appellant testified: "Q. I want to ask you just one question. Did you furnish to your sister, Mrs. Grimes, the money, or any part of the money, with which she purchased the property where she lived at the time of her death? A. I brought a certified check from Morrilton down here for $1,600. That's what I brought," and "A. Paid back? No, sir. No, sir; they never paid me anything, no."

We do not attempt to set out the testimony in detail, for as above noted, on the question of testamentary capacity, it is in hopeless conflict. As was said by this court in *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695: "It is elementary that, subject to statutory restrictions, every person of sound mind and disposing memory has the untrammeled right to dispose of his property by will as he pleases, however capricious and unjust such disposition may appear to be. Sound mind and disposing memory constitutes testamentary capacity which is said to be the ability of the testator to retain in memory without prompting the extent and condition of the property to be disposed of, to comprehend to whom he is giving it, and to realize the deserts and relations to him of those whom he excludes from the will. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405. This definition presupposes a mental capacity sufficient to execute a will free from undue influence. *Tobin* v. *Jenkins,* 29 Ark. 151. With respect to the ability to know the extent and condition of the property to be disposed of and to whom it is being given, and to appreciate the deserts and relations to the testator of others against whom he discriminates or excludes from participation in his estate, it is unnecessary that he actually has this knowledge. It is sufficient if he has the mental capacity to understand the effect of his will as executed. 'Capacity to understand the effect of making one's will, and not actual understanding, is the test of mental capacity required of the testator.' *Huffaker* v. *Beers,* 95 Ark. 158, 128 S. W. 1040; *Emerich* v. *Arendt,* 179 Ark. 186, 14 S. W. 2d 547," and in one of our early cases on the subject, *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 690, this court held: (Headnote 2) "The infirmities of age and even a partial eclipse of the mind, will not prevent a person from making a valid testament if he can retain in his memory, without prompting, the extent and condition of his property, and understands to whom he is giving it and is capable of appreciating the relations to him and merits of others whom he excludes from any participation in his estate," and on the question of undue influence, (Headnote 1) "The undue influence which avoids a will is not the influence

which springs from natural affection, or is acquired by kind offices, but it is such as results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property. And it must be directly connected with the execution of the will and specially directed towards the object of procuring a will in favor of particular parties."

See, also, *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405, wherein this court said: "Testators are not required by law to mete out equal and exact justice to all expectant relations in the disposition of their estates by will, and the motives of partiality, affection or resentment, by which they naturally may be influenced, are not subject to examination and review by the courts. *Barricklow* v. *Stewart,* 163 Ind. 438, 72 N. E. 128; *Clapp* v. *Fullerton,* 34 N. Y. 190, 90 Am. Dec. 681. If one has the capacity indicated to make a will then he may make it as 'eccentric, injudicious and unjust as caprice, frivolity or revenge can dictate.' *Schneider* v. *Vosburgh,* 143 Mich. 476, 106 N. W. 1129; In re *Spencer's Estate,* 96 Cal. 448, 31 Pac. 453; *Rivard* v. *Rivard,* 109 Mich. 98, 66 N. W. 681."

There was other testimony that tended to show that an estrangement had grown up between appellant and his deceased sister, and indifference and neglect on appellant's part. Many facts and circumstances may be considered in determining whether the deceased at the time she made her will was conscious of the "deserts and claims" which her relatives had upon her. No hard and fast rule may be employed. In this connection, the testator may take into account, when considering his duties to relatives, past neglect, indifference, estrangement, and the like. Appellant's contention that because he loaned the deceased the money with which to buy a part of her property, he had a claim upon her bounty affords him little comfort in view of the uncertain and indefinite nature of his testimony. It will be noted that he made no attempt to explain just how or when the purported loan was made, or the circumstances or conditions surrounding it. He did not say that he ever demanded repayment. In this connection, the following colloquy that

took place during the examination of Dr. Bremyer is noteworthy. Q. (Mr. Coulter, continuing) I didn't say there was any obligation against the property; I say if it should be true that the brother (appellant) had given her the money to purchase that property and then she left him out—Court: And I think it would be open to objection if you asked a psychiatrist. Her brother might have given her the money 20 years before, or they might have had estrangements, or he might have told her he didn't want it back or –

Having reached the conclusion that the preponderance of the testimony supports the decree, it is affirmed.

PORTER *v.* PORTER.

4-7747 190 S. W. 2d 440

Opinion delivered November 19, 1945.

Downie & Downie and *Elmer Schoggen,* for appellant.

J. R. Booker and *Taylor Roberts,* for appellee.

McFaddin, J. This is a divorce case. In 1938, the parties were married in South Carolina, and lived there together until separation in December, 1942. Appellee, Lewis Porter, arrived in Arkansas on April 29, 1944, and filed suit for divorce against appellant, Florrie Porter, on July 3, 1944. The alleged grounds of divorce were indignities. A divorce decree was granted Lewis Porter by the Pulaski Chancery Court on August 3, 1944; but this decree was set aside by the Court on September 29, 1944, on a showing by appellant that she had been prevented by unavoidable casualty from making her defense and that she had a meritorious defense. The order of September 29th, setting aside the decree of August 3rd, reads in part:

". . . The Court, being well and sufficiently advised as to all matters of law and fact arising herein, doth order that the said decree granting a divorce to the plaintiff from the defendant on August 3rd, 1944, as now shown of record in Vol. 65, page 483, be and the same is hereby cancelled, set aside, vacated, and held for naught, and that the answer of the defendant attached to said motion be considered and treated as the answer of the defendant to the allegations in the complaint of the plaintiff, the issues thereby made to be submitted to the Court at a later date."

The effect of this order, as shown by its terms, was to leave the divorce case pending, as though no decree had ever been rendered. See 31 Am. Juris. 264 and 31 Am. Juris. 319. Thereafter, on January 10, 1945, the Court heard the evidence of both parties and supporting witnesses on the question of residence and also grounds for divorce; and on February 1, 1945, a decree of divorce was granted Lewis Porter. Florrie Porter has appealed.

We pretermit any discussion of the grounds of divorce, because we are convinced that the plaintiff (appellee here) has failed to prove the residence requirements

which are essential to jurisdiction. Section 4386, Pope's Digest (which is Act No. 71 of 1931) says in part:

"The plaintiff, to obtain a divorce, must prove . . . in addition to a legal cause for divorce:

"First: A residence in the State for three months next before the final judgment granting a divorce in the action . . ."

The plaintiff wholly failed to prove a residence for three months next before the hearing of January 10, 1945, or next before the decree of February 1, 1945, which is the "final judgment granting the divorce in the action," since the decree of August 3, 1944, was completely set aside and annulled, as previously shown.

The plaintiff testified that he remained in Arkansas continuously from April 29, 1944, to August 10, 1944; that he then left Arkansas and went to New York for a month, and then went direct to Charleston, South Carolina, and repossessed his old office, and resumed his practice of chiropody, and remained in Charleston, South Carolina, continuously from September, 1944, until a few days before January 10, 1945, when he came to Arkansas to testify in this divorce case. Appellee's witnesses, while supporting him in his testimony that he had been in Arkansas continuously from April 29, 1944, to August 10, 1944, also testified that appellee had not been in Arkansas from August 10, 1944, until January, 1945.

In *Parseghian* v. *Parseghian,* 206 Ark. 869, 178 S. W. 2d 49, we had under consideration the same statute as is here involved—that is, § 4386, Pope's Digest. There, we were considering the requirements of two months' residence prior to filing the complaint for divorce, while, here, we are considering the requirement of three months' residence "next before the final judgment granting a divorce in the action." But the reasoning in the *Parseghian* case applies with equal force to the case at bar, and we, there, said that the residence requirement was jurisdictional.

The appellee tried to show that he all the time (from August, 1944, to January, 1945) intended to come back

to Arkansas; but his actions speak louder than his words: during his sojourn in Arkansas, appellee had, all the time, left his automobile in Charleston, South Carolina; the telephone in the office at Charleston had all the time remained in his name; all his property had remained in South Carolina except that part of his clothing and those few vocational instruments which he brought to Arkansas with him. After he obtained the decree on August 3, 1944, appellee gave up the room where he had been boarding in Arkansas, and took away with him everything that he had brought to Arkansas—evidently on the assumption that his divorce residence requirements had been fulfilled (a factual question not before us). But when the Court, on September 29, 1944, set aside the decree of August 3, 1944, the appellee failed to return to Arkansas, and remain for three months "next before the final judgment granting a divorce in the action." He thereby defeated his own divorce suit in that he failed to confer, by actual residence, any jurisdiction on the Pulaski Chancery Court to award him a divorce, even under the case of *Squire* v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281, which, itself, has become a controversial holding.

It follows that the decree of the Chancery Court awarding the appellee a divorce is reversed, and appellee's action for divorce is dismissed at the cost of appellee.

GRIFFIN SMITH, Chief Justice, concurring. There is the statement in *Squire* v. *Squire,* referred to in the majority opinion, that "Even though [the plaintiff] moved to this State to bring a divorce suit and had the intention of leaving after the divorce was granted, this would not deprive the Court of jurisdiction, if she were actually and in good faith a *bona fide* resident for the period prescribed by the statute."

Although the Squire case has been followed by other decisions in which the statutory period was discussed, it is inconceivable that the General Assembly intended to invite dissatisfied non-residents to purchase round-trip tickets good for ninety days and come to Arkansas for the procurement of a divorce. The "good faith" spoken of in the opinion is so patently wanting in the very quality it mentions that *bona fide* has no meaning.

I think we should overrule what was there said and substitute a consistent declaration in respect of good faith.

JAMES *v.* MURRY.

4-7733 190 S. W. 2d 438

Opinion delivered November 19, 1945.

J. R. Long, for appellant.

Hebert & Dobbs, for appellee.

GRIFFIN SMITH, Chief Justice. The suit, although not designated as such, was originally an action in ejectment. The plaintiffs filed with their complaint the deed through which ownership was acquired by Fred Murry, sufficiency of which was conceded. When Murry died, his wife and three children succeeded to the title. Through their agent, W. T. Hawkins, a Hot Springs realtor, contract of sale for $350 was made with C. C. James in 1935. The down payment was $5, balance to be $10 monthly.[1]

The litigation was transferred to equity when James answered and cross-complained. He alleged that a conditional tender of all sums due had been made more than a year before the Murrys sought possession, but contended that an abstract to which he was entitled had not been supplied. On hearing there was testimony that an $86 judgment against Mrs. Murry was a lien on the land. Other defenses were interposed.

The Court found essential terms of the contract had been violated by James; that the plaintiffs were not at fault, and that possession was wrongfully withheld.

[1] The final payment was $5.

Appellees have moved that the appeal be dismissed because Rule Nine of this Court has been disregarded in this: "The oral testimony mentioned in the decree and taken in this case was not preserved. . . . All of this important and vital evidence, taken with the evidence set out in the transcript, was more than enough to justify the findings and judgment of the Chancery Court."

The Clerk's certificate is that the transcript ". . . [contains] a true and complete . . . record of the proceedings." Appellant has not filed a reply brief, nor has he otherwise challenged appellees' statements respecting incompleteness of the record.

The abstract copies the pleadings and Court orders, and concludes page six with this statement: "June 1944 Term. The following proceedings were had. . . ." Then there is printed the contract Hawkins made for appellees in 1935, and notation that it was filed by counsel. There is no other identification of the writing. Next there is a schedule of payments, effect of which, *prima facie*, is to show that during August, September, and October, 1935, Hawkins received $20 from James, and in December of the same year, and through January and February, 1936,[2] Mrs. Murry was paid $30.

We refer to this showing as *prima facie* because the names "W. T. Hawkins," and "Alice Murry," appear in print and inferentially were copied from an original document. Numerous items are entered under the heading, "Amounts Paid Out on the Contract." The grand total is $274.77. James' deposition was subsequently read, but at a time when its sequence to the original exhibit—if such it may be called—was broken. He did, however, testify to the extended charges, and as to the payments alleged to have been made.

Finally, there is presented what purports to be an abstract of the evidence, including the *deposition* of Alice Murry, the *testimony* of James Ussery, the *testimony* of C. C. James, and the *testimony* of Filmore Meadows. The decree recites that the cause was heard ". . . on the

[2] A payment presumptively receipted for by Mrs. Murry is dated "Jan. 4-35." This was probably January, 1936.

depositions of Alice Murry, in her own behalf and in behalf of her co-plaintiffs; *other depositions in behalf of the plaintiffs;* the *deposition* of the defendant . . . in his own behalf," . . . and concludes with the statement that evidence was taken *ore tenus* at the bar of the Court.

We have italicized the words "testimony" and "depositions" to identify terms used by the Chancellor—a distinction not observed by appellant's counsel in abstracting the evidence. From this difference in terminology it might be inferred that some of the oral testimony was not preserved, and that the Court's findings may have been predicated upon facts not appearing of record—hence the prayer of appellees that the appeal be dismissed.

Our conclusion is that while the true status is not reflected in a manner entirely harmonious with Rule Nine, inadvertence has probably resulted in presentation of a record more susceptible to attack than deficient in substance, and that other errors have added to appellant's difficulties. For example, the "testimony" of James Ussery, as designated in the abstract,[3] concludes on page fourteen with the statement that James "also built a barn and garage." On page fifteen the first sentence is: "The purchase price was $350 for the Murry tract of land involved in this suit, and I have paid $274.77, and that left a balance of $75.23 due, and I have deposited a check for that amount with the Clerk of the Garland Chancery Court about sixteen months ago, to be paid when I get a good title to the property."

Now, obviously, this is not the testimony of James Ussery; but by reference to the transcript (which we are not required to explore) it is found that C. C. James, in a deposition, said precisely what Ussery is represented as having told the Court as to the final matter quoted in the preceding paragraph. The garbled context seems to have resulted from an erroneous "make-up," or printer's "take," in paging the Linotyped matter. Additional testimony given by appellant James is credited to Ussery.

[3] This, in reality, was a deposition read in behalf of appellees.

Following that part of the abstract just referred to, and as cross-examination, Ussery is quoted as follows: "His witness testified that appellant had cut appellant, Mr. James, had told him that Mrs. Murry could not give a good title to the land in question because E. E. Davis was living on part of it."

What seems to have happened is that Davis occupied a small part of the property and James sought to dispossess him. In consequence James claims to have expended substantial sums he says were authorized by Mrs. Murry, and these were urged as offsets to the contractual obligation.

The appeal may be affirmed on its merits. The judgment lien James complains of did not attach until long after James had defaulted in his payments. Under the contract he was not entitled to an abstract until all payments had been made; but, be that as it may, (and we do not hold that this circumstance was controlling) the Chancellor found in effect that James' refusal to pay was not justified by condition of the title, and that the charges he had built up were arbitrary. The Court also found that use of the property fully compensated appellant for improvements he had made and for incidental claims he pressed.

Assuming that the entire record was presented on appeal and that failure to fully meet the requirements of Rule Nine was partially attributable to appellant's printer, the fact remains that the burden of demonstrating that the decree was contrary to a preponderance of the evidence has not been met; so the decree must be affirmed. It is so ordered.

WELLS *v.* GOLDEN.

4-7759 191 S. W. 2d 251

Opinion delivered November 26, 1945.

W. E. Beloate, Sr., for appellant.

Smith & Judkins and *Blackford & Irby,* for appellee.

ROBINS, J. This appeal is from decree of the lower court, entered after filing of mandate issued from this court in the case of *Shinault* v. *Wells,* 208 Ark. 198, 186 S. W. 2d 26.

The litigation was begun by the state filing a petition to confirm its tax title to certain lands in Lawrence county, among them the lots in the town of Minturn involved herein. In its petition the state alleged that it had acquired title to this property by forfeiture and sale for nonpayment of taxes of 1938.

Mrs. Fairbelle Mitchell, now deceased, intervened in the confirmation proceeding, alleging ownership of the property and invalidity of the tax title of the state. She also filed a cross-complaint against Homer Shinault and W. H. Golden, appellees in the case at bar, setting up that each of these parties had purchased certain of these lots from the state, and that they had also obtained conveyances (alleged by her to be void) for the same property from Village Creek Drainage District; and she offered to redeem and prayed a cancellation of muniments of title held by Shinault and Golden.

Pending trial of the case, the intervener, Mrs. Fairbelle Mitchell, died, and the cause was revived in the name of her daughter and sole heir, Juanita Wells, and her surviving husband, Ebb Mitchell.

On consideration of the former appeal, it was held by us that Mrs. Mitchell's right to redeem from the sale for drainage assessments had expired and that, since she had lost title by the drainage district's foreclosure proceeding, through which the district acquired title, her daughter and her husband had no right to the property. We also held that the conveyances from the district to Shinault and Golden were invalid, because the power of attorney under which the district's agent conveyed the lots to them did not authorize these conveyances. We reversed the decree of the lower court in favor of Mrs. Mitchell and directed that her intervention be dismissed "as having been filed by a person who had no title to or interest in the lots at the time the intervention was filed."

After the mandate of this court was filed in the lower court, the interveners, Juanita Wells and Ebb Mitchell, filed a motion asking that they be permitted to dismiss their intervention without prejudice. This motion was overruled.

Thereafter appellees, Shinault and Golden, filed a pleading denominated "Amendment to Cross-Complaint," in which they averred that after our decision herein the commissioners of Village Creek Drainage District adopted a resolution ratifying the sale and convey-

ance of the lots in dispute to them and authorizing new conveyances to evidence the same; and these conveyances, duly signed and acknowledged, were exhibited. Appellees prayed that their title to the respective lots claimed by each of them be quieted. To this appellants responded with a general denial and with the assertion that this new pleading filed by appellees was not germane to the original litigation and that the court had no jurisdiction to award relief thereunder. The drainage district was made a party and entered its appearance.

On final hearing the lower court rendered decree dismissing the intervention and cross-complaints of Fairbelle Mitchell, Juanita Wells and Ebb Mitchell and confirming title of appellees, Shinault and Golden, as against interveners and also the drainage district. Interveners, Juanita Wells and Ebb Mitchell, have appealed.

It is first urged by appellants that the lower court erred in not permitting them to take a non-suit after the mandate was filed. This mandate directed the lower court to dismiss the appellees' intervention because they had no title to the property in dispute. This was an adjudication of their rights, and, after their claim of ownership had been decided adversely to them by us, it was too late for them to take a non-suit. 5 C. J. S. 1532.

It is next urged by appellants that the lower court erred in permitting appellees to file amended pleadings setting up their new deeds to the property, obtained by them after our decision herein. The rule ordinarily is that, on reversal of a chancery case, the lower court must do no more than comply with the directions contained in this court's mandate. But it has been held that, where the status has been changed subsequently to the first decree, this may be brought to the attention of the lower court, and relief awarded as the altered situation may require, after the mandate of this court is filed in the court below. "The inferior court is bound to carry out the judgment of the superior court, rendered on appeal or writ of error, although the proceedings of the superior court may be irregular, or its decision made upon a misapprehension of facts. But in regard to matters arising

subsequent to the decision of the superior court, the inferior court is free to act in carrying out the decision according to its own judgment of the law." (Headnote) *Cunningham* v. *Ashley,* 13 Ark. 653.

In the case of *Greer* v. *Turner,* 36 Ark. 17, this court said: "The matters of this supplemental complaint could not have been considered on the first submission below, nor here, on the former appeal. They occurred *pendente lite.* Chancery delights in closing in one suit all litigation concerning the subject-matter down to the time of final submission. Otherwise, it would be interminable. If the chancellor had refused to consider this supplemental bill its matter would have afforded grounds for another suit, with additional delays and expenses. It is equitable on its face. The chancellor exercised a proper discretion in refusing to strike it out, and did not err in overruling the demurrer." See, also, *Chicago Mill & Lumber Company* v. *Osceola Land Co.,* 94 Ark. 183, 126 S. W. 380; *Donahue* v. *Arkadelphia Milling Company,* 179 Ark. 409, 16 S. W. 2d 569; *Chronister* v. *Robertson,* 208 Ark. 11, 185 S. W. 2d 104.

The lower court, in permitting appellees to amend and set up deeds, obtained by appellees from the district after our decision on the former appeal, and in confirming appellees' title, did not abuse its discretion; and, in any event, appellants are in no position to complain, because it has already been held by us that they have no title to the property in dispute.

It is finally urged by appellant that the new deeds executed by the drainage district to appellees were not duly authorized by the district. The drainage district offered no objection to these deeds or to confirmation of title in appellees as against it. The district has not appealed. Therefore, even if these deeds were not properly executed, all rights of the district, except as to future assessments, were barred by the decree.

The decree of the lower court is affirmed.

GOODYEAR TIRE & RUBBER COMPANY *v.* MEYER.

4-7758 191 S. W. 2d 826

Opinion delivered November 26, 1945.

Rehearing denied February 4, 1946.

A. R. Cooper, for appellant.

Maurice L. Reinberger, for appellee.

HOLT, J. Appellant, on July 23, 1942, filed its verified complaint in which it alleged, omitting formal parts, "the defendant is justly indebted to the plaintiff in the sum of $1,440.87, with interest thereon at six per centum per annum from March 1, 1933, until paid, upon a certain judgment entered in the Jefferson circuit court within and for Jefferson county, Arkansas, on June 8, 1934, in the said sum, the principal of said judgment, and the interest thereon to August 1, 1942, in the sum of $813.89, with the expended costs of the said suit, in the sum of $26.90, aggregate principal, interest and costs, the sum of $2,281.66.

"That on or about June 19, 1935, an execution of *fieri facias* directed to the county in which the judgment was rendered, to-wit: to the sheriff of Jefferson county, Arkansas, was returned by the proper officer, to-wit: the said sheriff of Jefferson county, Arkansas, in substance, no property found to satisfy the same. Plaintiff institutes this action, by equitable proceedings, for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the said judgment. Plaintiff further alleges that divers and certain persons are indebted to the defendant in execution, or holding money or property in which he has an interest, or holds the evidences or securities for the same; that the defendant has property subject to the payment of his debts, but that its kind, description, and manner of holding are concealed from and unknown to the complainant, and to reach which and subject it to the judgment of the plaintiff, discovery is necessary.

"Wherefore, the plaintiff prays the court to enforce the payment of its judgment, for a discovery of all property to which the defendant in execution is entitled, that the court enforce the surrender of the money or security therefor, or of any other property of the defendant in execution, that the court subject the same to the satisfaction of the judgment of the plaintiff, that the court appoint a receiver to take possession of the defendant's property, sell and dispose of the same, and apply the pro-

ceeds to the satisfaction of the judgment of the plaintiff, and for the costs of this action, and any and all further relief."

On the same date, appellant filed a *lis pendens*. February 9, 1945, appellee, Gabe Meyer, filed what he termed "Demurrer" as follows: "Comes Gabe Meyer, defendant herein, and would respectfully show to the court that he never had any notice of the above suit having been filed, never having been served with summons, and enters his appearance herein solely for the purpose of demurring to the above styled cause and states: That the complaint on its face shows that the judgment rendered in the Jefferson circuit court in the case of the Goodyear Tire & Rubber Company, a Delaware Corporation, versus Gabe Meyer is barred by the statute of limitations, and for that reason plaintiff would not have cause of action in the above styled suit. Wherefore, defendant prays that said demurrer be sustained."

February 23, 1945, appellant filed "motion to strike demurrer" and a "motion to make (demurrer) more specific," and thereafter on March 6, 1945, both motions were overruled. On the same date, March 6, appellant filed "motion to require defendant to file verified schedule of assets or property."

Other pleadings were filed by appellant, but become immaterial in view of the disposition we make of this case.

April 23, 1945, the cause was submitted to the court, (quoting from the decree) "upon the complaint in equity of the plaintiff, the *lis pendens* filed for record 23rd day of July, 1942, the demurrer of the defendant, plaintiff's motion to strike demurrer, plaintiff's motion to make more specific, and plaintiff's motion to require defendant to file verified schedule of assets, or property, and admission of plaintiff that summons had not been delivered to the sheriff of Jefferson county, Arkansas, since filing of suit; and after argument of counsel for the respective parties, it appearing to the court that defendant's demurrer should be treated as a motion to dismiss because he has never had any notice of the suit having been filed,

had never been served with summons, and plaintiff's motion to require defendant to file verified schedule of assets, or property, having been presented to and called to the attention of the court, the court declined to entertain plaintiff's said motion, and refuses to rule thereon; but doth sustain defendant's demurrer, treating the same as a motion to dismiss as aforesaid.

"It is, therefore, by the court considered, ordered and adjudged that defendant's demurrer be and the same is hereby treated as a motion to dismiss for the lack of any notice on the part of the defendant of the filing of suit, and lack of any service of summons, and the prayers thereof, and each of the same, be and the same are hereby in all particulars sustained and granted; and the plaintiff's complaint herein be and the same is hereby dismissed with prejudice, and the pliantiff take nothing thereby. It is the further order of the court that it declines to entertain plaintiff's motion to require defendant to file verified schedule of assets or property, and refuses to rule upon the same, for the reason that plaintiff's complaint should be dismissed."

This appeal followed.

It is undisputed that no summons in the present suit was ever placed in the hands of the sheriff for service on appellee or that he was ever served.

Appellant argues, however, that this suit was filed under the provisions of § 5378 of Pope's Digest, is a proceeding in the nature of a bill of discovery, in equity, for the purpose of enforcing a previous judgment rendered June 8, 1934, in the Jefferson circuit court in appellant's favor, and for that reason no issuance of summons for appellee, the judgment debtor, was necessary. We cannot agree with appellant's contention. Section 5378, *supra,* on which appellant based his complaint contains, among others, this provision: "The plaintiff in the execution may institute an action, by equitable proceedings, in the court from which the execution issued, or in the court of any county in which the defendant resides or is summoned, . . ."

We think it clear that this provision of the statute contemplates the institution of a new cause of action against a judgment debtor.

Section 1251 of Pope's Digest provides: "A civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon."

The rule is well established that the only manner in which a civil action may be commenced is by filing a complaint in a proper court, causing summons to be issued and placing the summons in the hands of the sheriff to be served. The mere issuance of the summons is not sufficient. The delivery of the summons to the proper officer for service is essential and no action is commenced until this is done.

In *Sims* v. *Miller,* 151 Ark. 377, 236 S. W. 828, this court said: "Our statute provides that the commencement of a civil action is the 'filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon.' Crawford & Moses' Digest, § 1049. (Now § 1251 of Pope's Digest.) The delivery of the writ to an officer is an essential part of the issuance of the writ, and until this is done an action is not properly commenced. *Hallum* v. *Dickinson,* 47 Ark. 120, 14 S. W. 477," and in the comparatively recent case of *Swartz* v. *Drinker,* 192 Ark. 198, 90 S. W. 2d 483, we held (Headnote 1): "An action is commenced against a resident when a complaint is filed and summons is issued and placed in the sheriff's hands for service, as provided by Crawford & Moses' Dig., § 1049."

As above noted, it was conceded that no summons in the present case was ever placed in the hands of the sheriff for service upon appellee and since there has never been any service on appellee, the trial court was without jurisdiction over appellee and properly dismissed appellant's complaint.

Nor do we think, as appellant insists, that appellee by filing "demurrer" entered his appearance generally and waived service of summons. The court correctly

treated this demurrer as a motion to dismiss. "A pleading is treated according to what its substance shows it to be, regardless of what it is called; under the code they are to be liberally construed, and every reasonable intendment is indulged on behalf of the pleader." *Geyer* v. *Western Union Telegraph Company,* 192 Ark. 578, 93 S. W. 2d 660 (Headnote 1).

At the very threshold of this suit, in the only pleading which appellee filed, he alleged that he "had never had any notice of the above suit having been filed, never having been served with summons," and entered his appearance "solely for the purpose of demurring," or for the purpose of moving to dismiss appellant's complaint. Having thus preserved his protest, he cannot be held to have waived his objection to the jurisdiction of his person, or to have entered his appearance.

In the case of *Spratley* v. *Louisiana & Arkansas Railway Company,* 77 Ark. 412, 95 S. W. 776, this court said: "There is no doubt but that where a party, who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance. But this rule of practice does not apply in cases where the party on the threshold objects to the jurisdiction of his person, and maintains his objection in every pleading he may thereafter file in the case. Where he thus preserves his protest, he can not be said to have waived his objection to the jurisdiction of his person." This holding was reaffirmed in the case of *Cox Investment Company* v. *Major Stave Company,* 128 Ark. 321, 194 S. W. 701, and *Robinson* v. *Bossinger,* 195 Ark. 445, 112 S. W. 2d 637.

Appellant's contention that the filing of a *lis pendens* took the place of a summons is untenable for the reason that a *lis pendens* becomes effective and operates only when a complaint is filed and a summons issued thereon. In *Burleson* v. *McDermott,* 57 Ark. 229, 21 S. W. 222, this court said: "Under our statutes a *lis pendens,* as to third persons as well as the parties, begins when a

complaint is filed and a summons is issued thereon. Mansfield's Digest, § 4967" (now § 1251, Pope's Digest).

In view of what we have said above, we find it unnecessary to consider other points raised by appellant.

The decree is affirmed.

RIPLEY *v.* KELLY.

4-7753 190 S. W. 2d 526

Opinion delivered November 26, 1945.

Wilson & Wilson, for appellant.

T. O. Abbott, for appellee.

MILLWEE, J. Appellants instituted this suit in the Union chancery court, First Division, seeking cancellation of a deed purporting to have been executed by Joel Kelly

and wife to John M. Kelly in 1872 conveying the southeast quarter, section 9, township 17 south, range 14 west in Union county, Arkansas. The sole ground relied upon for cancellation of the deed is that it was a forgery.

Appellees filed their motion to dismiss the complaint, alleging that the cause of action stated therein was adjudicated by the Union chancery court, Second Division, by a decree rendered on the 17th day of January, 1944, which decree was by this court affirmed on December 4, 1944, in the case of *Ripley* v. *Kelly,* 207 Ark. 1011, 183 S. W. 2d 793. It was also alleged in the motion to dismiss that the original deed which appellants seek to set aside as a forgery in this suit was introduced in evidence in the former suit in an effort to prove that said deed was a forgery; that the court in the former suit held the deed to be valid; and that same conveyed the fee simple title to John M. Kelly, the grantee therein.

The cause was submitted to the trial court on January 31, 1945, upon the pleadings herein and the following stipulation of the parties:

"1. That the parties to this suit are the identical persons who were parties to appeal No. 7482 to the Supreme Court of Arkansas from the Union chancery court, Second Division, and that this suit involves the title to 160 acres of land, and that the former suit which was decided by the Supreme Court of Arkansas, on the date of December 4, 1944, involved the title to 80 acres which is a part of the 160 acres involved in this suit.

"2. That the appellants in the trial of said former suit introduced testimony in an attempt to prove that the signatures of Joel Kelly and Mary Kelly, his wife, were forged to that certain deed to John M. Kelly, dated the 22nd day of January, 1872, and recorded in Book 87 at page 286 and recorded in Book 99 at page 508 of the deed records of Union county, Arkansas.

"3. That said original deed from Joel Kelly and Mary Kelly, his wife, to John M. Kelly was introduced in evidence in the trial of said former suit and the signatures of said grantors in said deed were compared with

the admitted signatures of said grantors by the trial court, and by said trial court held to be the genuine signatures of the said Joel Kelly and Mary Kelly, his wife.

"4. It is further stipulated that at the hearing of this case before Hon. G. R. Haynie, chancellor for the Union chancery court, First Division, on the motion of the defendant's counsel that defendants' motion to dismiss the complaint of the plaintiff herein was treated by the court as an answer to said complaint, and that all of the pleadings, the decree and the mandate of the Supreme Court in said former suit were considered as admitted in testimony in this suit and all before said trial court."

In the decree from which is this appeal the court made the following findings: "That this suit is between the same parties as those who were parties to said prior suit decided by the Union chancery court, Second Division, in said cause No. 6620, and that this suit involves the same subject-matter and the same issue as that raised, presented and decided by the court in said prior decision, and that for that reason the defendants' plea of *res judicata* in this cause is a complete defense to any cause of action stated by the plaintiffs in their complaint herein, and that said complaint should be dismissed for want of equity." This appeal is prosecuted from the decree dismissing appellant's complaint.

It is insisted by appellants that they are seeking cancellation of a deed conveying 160 acres of land in this suit, whereas, in the former suit the relief sought was an accounting of proceeds from the sale of oil and gas from 80 acres of land. It is argued that since the relief sought is entirely different in the two cases the doctrine of *res judicata* has no application.

The trial court correctly sustained the plea of *res judicata*. The general rule is stated in 30 Am. Jur., § 178, pages 920-923, as follows: "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively

settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject-matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief." Among the numerous cases cited in support of this principle are *Equitable Life Assur. Assoc.* v. *Bagley,* 192 Ark. 749, 94 S. W. 2d 722; and *Phillips* v. *Colvin,* 114 Ark. 14, 169 S. W. 316.

In *National Surety Co.* v. *Coates,* 83 Ark. 545, 104 S. W. 219, this court said: "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." See, also, *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78. This court has also held that the test of whether a particular point, question or right has been concluded by a former suit and judgment is whether such point, question or right was distinctly put in issue and determined by such suit and judgment. *Pulaski County* v. *Hill,* 97 Ark. 450, 134 S. W. 973.

An examination of the transcript of the former appeal reflects that appellants first filed their complaint claiming an interest in the entire 160 acres, but later amended their complaint so as to claim an interest only in the west half thereof. In that suit appellants alleged that the same deed which they seek to cancel in this case was altered and changed before it was filed for record.

It is admitted in the stipulation on this appeal that the exact question of the genuineness of the signatures of the grantors in said deed was passed on and determined by the trial court in the former suit. It is also admitted that the same parties are involved in this suit as were involved in the former suit. The same subject-matter is involved here, except the entire southeast quarter of section 9, township 17 south, range 14 west is involved in this suit while only the west half of said southeast quarter was involved in the former suit. But the deed which appellants seek to cancel as a forgery in this suit conveys the entire southeast quarter and is the same deed which was finally and judicially determined to be genuine and valid in the former suit. It is, therefore, immaterial that only the west half of said quarter section was involved in the former suit.

The issue whether or not the deed was a forgery was fully and fairly investigated and determined in the former suit. The decree in the former suit was a decision on the merits of the identical question involved in this suit, and between the same parties. The former decree is, therefore, conclusive of the issue and is a bar to the instant suit. The trial court was correct in so holding and in sustaining the plea of *res judicata.*

The decree is accordingly affirmed.

SEWELL *v.* THRAILKILL.

4-7754 190 S. W. 2d 521

Opinion delivered November 26, 1945.

McKay & McKay, for appellant.

Wade Kitchens, for appellee.

SMITH, J. This cause was submitted and tried upon an agreed statement of facts containing the recitals herein set forth.

On March 16, 1914, S. D. Thrailkill and his wife executed and delivered to their son, S. L. Thrailkill, a deed to certain lands in Columbia county. This deed recites that: "for and in consideration of one dollar and the love and affection which we bear to our son, Sterling L. Thrailkill, do hereby give and convey unto our said son, and his children, the natural offspring of his body, all the right, title, and interest, with the possession, of the following described land," the description of which followed. This deed contains the recital, "For construction of this deed see *Dempsey* v. *Davis,* 98 Ark. 570."

The case of *Dempsey* v. *Davis, supra,* construed a deed from a father and mother to their daughter, the granting clause of which recited that, "for and in consideration of the love and affection that we have to our daughter, Selestia Ann Jinett Dempsey, wife of John Dempsey, we do hereby give and bequeath and convey unto our said daughter and her children, the natural offspring of her body, all the right, title and interest with

the possession of the following property," which was described.

The identical language employed in the two deeds shows that the scrivener who wrote the deed in the instant case was familiar with, and had before him the deed in the Dempsey case, and the granting clause here must be given the same construction given it in the Dempsey case. This would be true even though the deed here had not so directed. A headnote in the Dempsey case reflects the construction of the deed, and reads as follows:

"Same—Fee Tail.—Where a deed conveyed land to the grantee and her children, 'the natural offspring of her body,' the effect thereof at common law was to create an estate tail, but under Kirby's Digest, § 735, a life estate was created in the grantee with fee in the person or persons to whom the estate tail would first pass at common law, to-wit, the heirs of the grantee's body; and if there be none such, the estate would revert to the grantor."

On March 26, 1920, S. L. Thrailkill in a deed in which his wife joined, reconveyed the land to S. D. Thrailkill, his father, "and unto his heirs and assigns forever." This deed recites a consideration of $6,000, paid by the father to his son, but it is stipulated that both the deed from the father to his son, and the reconveyance from the son to the father were made without monetary consideration. It is stipulated that, "Mrs. Sallie T. Thrailkill, wife of S. D. Thrailkill, died after her husband and no administration or division has ever been made of her estate."

On September 9, 1915, a son named Albert, was born to S. L. Thrailkill. This date is prior to the date of the deed from S. L. Thrailkill to his father, S. D. Thrailkill. On January 20, 1922, a daughter, Selmarie, was born to S. L. Thrailkill, which was subsequent to the date of the deed from S. L. to S. D. Thrailkill.

It is stipulated that upon receiving the deed from S. L., his father entered upon and remained in possession of the land until his death. S. D. died testate in 1932 and

by his will ignored the conveyance to his son, and the reconveyance to himself. It is further stipulated that on June 2, 1924, Sterling L. Thrailkill was confined legally as being mentally incompetent, in the State Hospital for Nervous Diseases of Arkansas, and remained in that institution until his death in 1942. S. L. Thrailkill was survived by his son and daughter above named, who brought this suit against the other heirs of S. D. Thrailkill. They alleged their ownership of the land described in the deed from their grandfather, S. D., to their father, S. L., and their right to its possession. The suit brought at law, was transferred to equity, where upon final submission it was decreed that plaintiffs are the owners of the land and entitled to its possession, and a decree was entered conforming to that finding, from which is this appeal.

The controlling question in this case is the one of law, whether the deed from S. D. to S. L. Thrailkill created a contingent or a vested remainder. Opposing counsel have cited and discussed a number of cases which distinguish these estates, but we think the opinion of this court in the case of *Jenkins* v. *Packingtown Realty Co.*, 167 Ark. 602, 268 S. W. 620, is decisive of the question. Chief Justice McCulloch there approved the following statement of the law taken from 2 Washburn, Real Property, § 1551, "Thus, upon the grant of an estate to A, with remainder to his children, he having none at the time, the remainder will, of course, be a contingent one. But the moment he has a child born, the remainder becomes vested as fully as if it had originally been limited to a living child." The Chief Justice further said: "This rule finds support among all the text writers. 3 Thompson on Real Property, pp. 191, 209; Tiedeman, Real Property, § 302." In the section next following the citation to Tiedeman on Real Property, § 303, it is said: "Whatever distinction may exist between a vested and a contingent remainder at their creation, they cease to be distinguishable when the uncertain event which rendered the remainder contingent has happened. After that, the contingent remainder is vested, and has all the characteristics which it would have had, if it had been vested *ab*

initio.'' See, also, *Landers* v. *Peoples Building & Loan Association,* 190 Ark. 1072, 81 S. W. 2d 917.

Here, as appears from the agreed statement of facts, a child was born to S. L. Thrailkill before he reconveyed to his father, and that child was then, and is even now living. The estate in remainder, therefore, vested and opened up to admit the other child of S. L. Thrailkill subsequently born, who is one of the plaintiffs in this action. It is unnecessary to decide what the effect of the conveyance from S. L. Thrailkill to his father would have been, had it been made prior to the birth of any child, and that question is reserved. The decree from which is this appeal accords with the views here expressed, and it is, therefore, affirmed.

STATE *v.* BALLARD.

4-7755 190 S. W. 2d 522

Opinion delivered November 26, 1945.

Guy E. Williams, Attorney General, and *Oscar E. Ellis, Assistant Attorney General,* for appellant.

Chas. F. Cole, for appellee.

McHaney, J. The sole question presented by this appeal is the jurisdiction of the Independence chancery court, or the judge thereof, to issue a writ of *habeas corpus* directed to the Superintendent of the Training School for Girls, commanding said superintendent to have the body of Agnes B. Misenheimer before him on a certain day therein named, and then and there state in writing the term and cause of her imprisonment, and to show authority for so doing.

The Arkansas Training School for Girls is located in Saline county, wholly outside the territorial jurisdiction of the judge of the Independence chancery court. Independence county is in the Eighth Chancery District and Saline county is in the Third Chancery District. Of these facts this court takes judicial knowledge.

On the petition of appellee the judge of Independence chancery court issued the writ to said superintendent and made it returnable before himself. On the day named, the Attorney General, acting for the state and the superintendent, appeared without the prisoner and demurred to the jurisdiction. The demurrer was overruled, the petition was heard and the prisoner was discharged. This appeal followed.

We think the question is settled by the plain provisions of our statutes on the subject. By § 6347 of Pope's Digest, it is provided that, "The writ of *habeas corpus* shall be issued upon proper application by the following officers: By a judge of the Supreme or of any chancery court during the sitting of their respective courts, or in vacation. The power of the Supreme, circuit or chancery courts to issue writs of *habeas corpus* shall be co-extensive with the state. . . ." So it will be seen that the judge of the Independence chancery court had the power to issue the writ directed to a person in whose custody a prisoner is detained anywhere in the state. But by § 6354 it is provided: "The writ shall be directed to the person in whose custody the prisoner is detained, and made returnable, as soon as may be, before the Supreme, circuit or chancery judge of the county in which it may be

served, if either be within the county. The writ shall specify the time and place to which it shall be returned."

The return on the writ shows that it was served "on Mrs. Goodman, superintendent of Girls Industrial School at Collegeville, Saline county," by the sheriff of Saline county. Under the above statute the writ should have been made returnable to either the circuit or chancery judge of the circuit or district in which Saline county is located, and not to the judge of the Independence chancery court.

In *Click* v. *Click,* 98 W. Va. 419, 127 S. E. 194, a case quite similar to this, the court held that the circuit court of one county may issue a writ of *habeas corpus* directed to a resident of another county not in the same circuit, but that the writ should be made returnable before the circuit court of such other county, or judge thereof in vacation, unless such judge or court is not available. The statute there provided: "The writ shall be directed to the person in whose custody the petitioner is detained, and made returnable, as soon as may be, before the court or judge ordering same, or any other of the said courts or judges." Code W. Va., c. III, § 2. Our statute above quoted is much more restrictive, as it very definitely requires the writ to be made returnable to one of the named judges "of the county in which it may be served, if either be within the county." Definitely it cannot be made returnable to the issuing judge, if the writ is directed to a person in a county outside the territorial jurisdiction of such judge. To the same effect, see *People ex rel. Ursoy* v. *Superintendent of New York State Training School of Girls at Hudson, N. Y.,* 120 Misc. 353, 198 N. Y. Supp. 432; and *State* v. *Glenn,* 54 Md. 572.

It follows, from what we have said, that the judge of the Independence chancery court had the power to issue the writ, but did not have the power to make it returnable before himself or to try and determine the issue raised by the petition. If it be conceded that the commitment of the prisoner is void, as appellee contends, even so, the power to hear and determine its validity and to discharge the petitioner is in another jurisdiction.

The judgment is, therefore, affirmed as to the issuance of the writ and in all other respects it is reversed and the cause remanded, with leave to petitioner to have another writ issued and made returnable as herein directed.

ADLER *v.* CITY OF HOT SPRINGS.

4-7744 190 S. W. 2d 528

Opinion delivered November 26, 1945.

C. Floyd Huff, Jr., House, Moses & Holmes, W. Horace Jewel, for appellant.

Wootton, Land & Matthews and *Jay M. Rowland,* for appellee.

McFaddin, J. This appeal grows out of an attempt by the appellant, Jack Adler, to collect the principal and accumulated interest on a bearer bond for $1,000, executed by the Hot Springs Water Co. on July 1, 1909, and due thirty years thereafter.

Appellant filed this suit on June 13, 1944, (18 days short of the period of limitation) naming as defendants the City of Hot Springs, Arkansas, and also the Hot Springs Water Co., a dissolved corporation. The Hot Springs Utilities Co. and Gus B. Walton, trustee, were permitted to intervene on a showing of liability for payment of any judgment rendered on the bond sued on. These interveners denied the valid issuance of the bond, and pleaded that it had been fully satisfied. They also cross-complained against the Central Arkansas Public Service Corp. for any judgment the interveners might be required to pay in this suit. The Central Arkansas Public Service Corp., by answer, made the same defenses against the bond as the interveners, and also pleaded laches. The Garland chancery court, after hearing the evidence, rendered its decree, dismissing the complaint of the plaintiff, and he has appealed.

At the outset, we point out that Arkansas adopted the Uniform Negotiable Instruments Law by Act No. 81 of 1913 (now found in § 10152, *et seq.,* Pope's Digest). Section 195 of the Uniform Negotiable Instruments Law is now § 10157 of Pope's Digest, and reads:

"The provisions of this act do not apply to the negotiable instruments made and delivered prior to the taking effect hereof."

The bond herein sued on is dated July 1, 1909, and was certified by the trustee, and delivered to the Hot Springs Water Co. in 1909. Therefore, the provisions of the Uniform Negotiable Instruments Law have no application to this case.

Stated chronologically, the facts herein are:

1. On July 1, 1909, the Hot Springs Water Co. (hereinafter called "Water Company") was a public utility owning and operating the water works system of Hot Springs, Arkansas; and already had outstanding $500,000 in its first mortgage 5 per cent. bonds. On July 1, 1909, the Water Company executed its deed of trust to the Commonwealth Trust Co. of St. Louis, Missouri (hereinafter called "Commonwealth"), to secure an additional bond issue of $1,000,000. These bonds were to be 6 per cent. first mortgage refunding bonds, payable to bearer, and to consist of 1,000 serially numbered coupon bonds, each for $1,000, and each to mature thirty years from date, with interest payable semi-annually as evidenced by attached coupons. These refunding bonds were to be certified by Commonwealth, as trustee, and to be issued when needed to retire the 5 per cent. first mortgage bonds, and also to provide additional funds for the water company. The bond here sued on is No. 216 of these first mortgage 6 per cent. refunding bonds. We will later set out some of the pertinent provisions of this bond, as well as of the deed of trust securing the bond. The decision herein will largely turn on the language of the bond and the deed of trust.

2. The bond, No. 216, here sued on was certified by the trustee, and was delivered to the Water Company in 1909, and in 1913 was surrendered by the Water Company to Commonwealth for cancellation.

3. On March 4, 1913, Commonwealth executed its power of attorney to the clerk of the circuit court of Garland county, Arkansas, authorizing him to satisfy of record the said deed of trust from the Hot Springs Water Co. to Commonwealth, dated July 1, 1909, and being the deed of trust securing the bond No. 216 here sued on.

The power of attorney was duly executed, acknowledged and delivered, and filed for record in the office of the circuit clerk and recorder in and for Garland county, Arkansas, on March 6, 1913, and duly recorded in Record Book 75 at page 583 of the records and deeds and mortgages of Garland county, Arkansas. Under that power of attorney, the clerk of the Garland circuit court duly satisfied the deed of trust by marginal endorsement on March 6, 1913.

4. The properties of the Water Company, in the intervening years from 1913 to 1943, passed through a series of ownerships, to-wit: Federal Light & Traction Co., Central Arkansas Public Service Corp., Gus B. Walton, Trustee, and Hot Springs Utilities Co. On October 11, 1943, the City of Hot Springs acquired the properties, and is now operating the same as a municipal plant. During all the years no demand was ever made by anyone for the payment of this bond No. 216, until appellant's attorney made demand on the City of Hot Springs, shortly before the filing of this suit. All of the coupons from July 1, 1920, to maturity are still attached to the bond No. 216. The records of the Water Company were destroyed in a fire in 1913.

5. At the trial of this cause in the chancery court the bond sued on was introduced; and, by stipulation, plaintiff's attorney was permitted to testify as to plaintiff's "ownership of the bond and how plaintiff came into possession of same, which stipulation is entered into due to absence of the plaintiff who resides in St. Louis, Missouri." Under that stipulation plaintiff's attorney testified "my client came in possession of the bond, which is a bearer bond, from his deceased father. The bond had only recently been discovered in a prayer book belonging to the plaintiff's father during his lifetime." The above quotation is the only explanation of where the bond might have been from 1913 to the filing of the suit, or how the plaintiff acquired the bond.

In the briefs, the following questions are discussed:

(a) whether the bond in question was ever validly delivered by the Water Company;

(b) whether the records of Commonwealth are admissible under the ancient documents rule; and

(c) whether the plaintiff is barred by laches.

We find it unnecessary to consider any of these questions, because, from the admittedly competent evidence, it is shown that the bond was satisfied by the trustee; and we hold that under the provisions of the deed of trust in this case, the satisfaction by the trustee was satisfaction by the bondholder. We elucidate:

I. *The Bond Made Apt and Sufficient Reference to All the Provisions Contained in the Deed of Trust.* The bond sued on contained on its face this language, *inter alia*:

". . . as provided in the said mortgage or deed of trust, securing the same, and reference is made thereto for a description of the mortgaged premises and the terms and conditions subject to which the said bonds are issued, with like effect as if said instrument were recited herein at length."

If it requires any citation of authorities to sustain the statement, that this language was sufficient to charge the holder of the bond with notice of all the provisions contained in the deed of trust, then the cases and treatises mentioned in the next section of this opinion are such authorities.

II. *The Deed of Trust in This Case Made the Trustee the Agent of the Bondholder to Receive Satisfaction and Issue Receipt and Release.* The deed of trust securing the first mortgage refunding bonds (of which bond No. 216 here sued on was one) was dated July 1, 1909. By its terms the Water Company transferred all of its properties to Commonwealth to secure the bond issue. The deed of trust is quite lengthy, but some of its salient provisions are here summarized (with references in each instance to the article and section in the deed of trust), to-wit:

1. No bond was valid until authenticated by the certification of the trustee endorsed on the bond, "and

such authentication shall be conclusive evidence that every bond which it has endorsed is duly issued . . ." (Art. I, § 2.)

2. The trustee was also the registrar and transfer agent of the bonds, in case any bondholder desired to have a bearer bond made a registered owner bond. (Art. II, § 1.) (The bond, No. 216, was always a bearer bond.)

3. In case any mortgaged property should be destroyed by fire and rebuilding be not undertaken, then the insurance money "shall be paid over to the trustee . . ." (Art. VI, § 2.)

4. The trustee had authority to release from the lien of the deed of trust any property of the Water Company, "provided . . . bonds of the issue hereby secured and . . . equal in amount to the value of the property released, shall be delivered to the trustee and be canceled at the time of the execution of any such release." (Art. VIII, § 1.)

5. If the Water Company and the trustee could not agree as to the value of the property sought to be released, then they might arbitrate by each appointing an arbitrator. (Art. VII, § 2.)

6. The execution by the trustee of any release of any property should "at all times be deemed and taken as conclusive evidence that the trustee was fully warranted in executing such relase, and the validity thereof shall not thereafter be questioned. . . ." (Art. VII, § 3.)

7. Any of the bonds might be called and redeemed by the trustee at any time prior to maturity. (Art. IX, § 1.)

8. ". . . in case, at the time named for redemption of any bonds, if the funds be deposited as aforesaid, and if such bonds be not presented, the trustee shall hold the funds provided for the redemption thereof as special deposit for and on behalf of the owner or holder of the bonds called for redemption, and such bonds and all unpaid coupons thereto belonging and returned on and

after the day named for redemption shall be null and void and not any longer secured by the lien. . . ." (Art. IX, § 4.)

9. In event of any default, the trustee had the right in its own name to institute and conduct suit on the deed of trust. (Art. X, § 4.)

10. "No bondholder . . . shall have the right to institute any suit at law or in equity, for the collection of the principal or interest of any of the bonds secured hereby . . . except in case of the refusal or neglect of the trustee to act . . ." (Art. XI.)

11. The deed of trust was to become void whenever ". . . sufficient money to pay all such indebtedness shall have been deposited with the trustee for and on account of the persons entitled thereto and payable to them on the surrender and negotiation of their respective evidences thereto; and thereupon, and upon such payment or deposit being made, the trustee, upon request of the mortgagor, shall . . ." execute a release and make satisfaction of the deed of trust. (Art. XII, § 1.)

There are other recitals of similar import in the deed of trust; but from those listed, we think it clear that by the terms of the deed of trust, the trustee was the agent of the bondholders to receive satisfaction and issue receipt and release. There are many well considered cases from other jurisdictions, each of which has reached the conclusion that when a deed of trust contained provisions substantially the same as the one here, then the trustee became the agent of the bondholders. Some of these cases are: *Morley* v. *University of Detroit*—first opinion, 263 Mich. 126, 248 N. W. 570, 90 A. L. R. 464; second opinion, 269 Mich. 216, 256 N. W. 861, 96 A. L. R. 1217; *Commercial Credit Co.* v. *Seymour National Bank,* 105 Ind. App. 524, 15 N. E. 2d 118; *Manchester* v. *Sullivan,* 112 Conn. 223, 152 At. 134; *The Inn at South Palm Beach* v. *Jacobs,* 115 Fla. 486, 155 Southern 835; *Hall* v. *Goldsworthy,* 136 Kans. 247, 14 Pac. 2d 659; In re *Church's Will, First Wisconsin Trust Co.,* v. *Schultz,* 221 Wis. 472, 266 N. W. 210; *Fidelity & Columbia Trust Co.* v. *Schmidt,*

245 Ky. 432, 53 S. W. 2d 713; *First Trust Co.* v. *Maryott,* 135 Neb. 679, 283 N. W. 518; *First National Bank of Portland* v. *Stretcher,* 169 Ore. 532, 129 Pac. 2d 830.

In *Hall* v. *Goldsworthy, supra,* the Supreme Court of Kansas, in explaining why the trustee was the agent of the bondholder, said:

". . . In other words, it is contended that the payment of the money to the trust company did not constitute a payment on the indebtedness but was merely a deposit. The solution to this question is found in the construction of the instrument. The note is made payable at the office of the trust company. The names of the bondholders are not disclosed. The company is the trustee. The trustee has the power, on payment of the indebtedness, to release and discharge the mortgage lien, and, in event of default, to maintain an action to foreclose the mortgage. It is more than a depository. It is in fact the plaintiff in this case. The bondholders are not parties. They are relying upon the terms of the instrument vesting the trustee with the power to enforce the obligation. It hardly seems consistent to permit the trustee to maintain an action to enforce collection and at the same time charge the mortgagor with the failure of the trustee to distribute the fund to the bondholders. In the case of *McCormick* v. *Johnson,* 134 Kan. 153, 4 P. 2d 421, this court held that the payment of the fund to the trustee relieved the mortgagor of the responsibility of the distribution of the fund. While the language of the trust deed in the case cited is much stronger with reference to payment than the language contained in the trust deed under consideration, yet there is a similarity in the two instruments, and they attempt to reach the same end. It appears that the plain intent of the parties was to vest the trustee with the power to receive payment and to make distribution thereof. Under such circumstances we are compelled to hold that the payment of the money to the trustee relieved the mortgagor from further responsibility, and that the bondholders must look to the trustee for the distribution of the fund."

The Annotations in 90 A. L. R. 467 and in 96 A. L. R. 1233 are on the question, whether the trustee in receiving payments is the agent of the mortgagor or the bondholder and in the last-mentioned annotation it is stated:

"The cases herein cited serve further to emphasize that the question whether a trustee in a mortgage securing bonds is the agent of the bondholders to receive payment depends upon the terms of the particular bonds and of the trust instrument in question, as well as upon the time and manner in which the particular funds reached the hands of the trustee."

In Jones on *Bonds and Bond Securities,* 4th Edition, § 766, in discussing whether the trustee is the agent of the mortgagor or the bondholder, the matter is tersely stated:

". . . In such cases the question resolves itself into one of agency, and this, in turn, depends upon the stipulations under which the bonds were issued. If, in a particular case, the trustee was the agent of bondholders to receive payment, moneys deposited with it by the corporation for that purpose, over which the corporation lost the right of control, would belong to the bondholders and its receipt by the trustee would constitute payment."

There are also general discussions of this question in 46 *Yale Law Journal,* 759 and 39 *Michigan Law Review,* 94.

Without citing further authorities, we conclude that in the case at bar the recitals in the deed of trust constituted the trustee, Commonwealth Trust Co., the agent of the bondholders to receive satisfaction and issue receipts therefor, and to release the deed of trust when the obligations had been satisfied.

III. *The Trustee has Received Satisfaction of the Bond Sued on and has Issued Receipt and Release.* The law is well settled that payment to a duly authorized agent is payment to the principal. *American Freehold Mortgage Co.* v. *Wood,* 140 Ark. 452, 215 S. W. 696 . See, also, 2 C. J. S., Agency, § 107, p. 1270, and 40 Am. Juris.

127, and 40 Am. Juris. 728, where, in discussing payment, the rule is stated:

". . . But if made to an agent having express authority to receive the particular payment, the obligation is discharged; and the debtor is entitled to his credit without tracing the fund through the hands of the agent and into those of his principal."

Having reached the conclusion—as we have—that the trustee was the agent of the bondholder to receive satisfaction and issue release, it necessarily follows that the payment and satisfaction made to the agent had the same effect as though made to the bondholder.

That the Commonwealth Trust Co. did receive full payment and satisfaction of the bond here sued on is clearly established by the recitals in the power of attorney executed by the Commonwealth Trust Co. on March 4, 1913, in which instrument the trustee empowered the clerk of the circuit court of Garland county, Arkansas, to satisfy in full the deed of trust which secured the entire bond issue, of which the bond here sued on was one. In the said power of attorney the trustee recited that all of the bonds (numbered 1-1,000, inclusive) had been delivered to it and satisfied and canceled; and acknowledged "payment and satisfaction in full of the said deed of trust." Acting under that power of attorney, the clerk of the circuit court of Garland county made a satisfacfaction on the margin of the record where the deed of trust was recorded, which satisfaction reads as follows:

"By virtue of power of attorney this day filed for record and duly recorded in Volume 75 at page 583, I hereby acknowledge full payment and satisfaction of the within deed of trust of July 1, 1909, of Hot Springs Water Company to Commonwealth Trust Company, and hereby release and discharge the property herein described from the consideration of this mortgage or deed of trust. This March 6, 1913. A. G. Sullenberger, Clerk."

The power of attorney has been duly of record in Garland county since March 6, 1913. We, therefore, hold

that the effect of this instrument by the trustee—in the absence of fraud, and none is alleged—is to establish that the bond herein sued on was paid on March 4, 1913, since the payment to the trustee under the provisions of the deed of trust here sued on was payment to the bondholder. The chancery court was correct in denying relief to the plaintiff—appellant here—and the decree is affirmed.

MARKS *v.* MOORE.

4-7802 190 S. W. 2d 524

Opinion delivered November 26, 1945.

John W. Moncrief, for appellant.

Buzbee, Harrison & Wright, for appellee.

GRIFFIN SMITH, Chief Justice. Claim was filed with Workmen's Compensation Commission against S. H. Moore, as employer, and Employers' Mutual Liability Insurance Company of Wisconsin. Matilda Marks, a colored woman, alleged she was the lawful widow of John Marks, and that her husband was killed when he fell from a truck then being operated on Moore's account. Other essential facts were asserted.

The defense was threefold: (a) The accident did not arise out of and in the course of employment; (b) death resulted solely because of intoxication; and (c) Marks had gone through the formality of marriage with a subsequent mate, and as to that transaction a presumption of validity attached—hence, it would be presumed John and Matilda had been divorced.

We only find it necessary to consider the contention that the decedent's misfortune was caused solely by his drunkenness—a finding declared by the Commission and sustained by Circuit Court.

In its summary, the Commission referred to the law's provision (Act No. 319 of 1939) denying compensation when injury or death would not have occurred if the employe had not been drunk—that is, as it was expressed, if Marks had been in possession of his normal faculties and there was no contributing cause."

Circumstances attending the accident were these: Moore's logging operations required that men be transported to a camp forty or fifty miles from Clarendon; and for this purpose he supplied trucks. The day Marks was killed Moore directed the men to leave Clarendon by noon. Bennie Whitley left with Moore in one truck and ordered Clyde Bass, a white man, to take another truck and get the workers into it. Bass let one of the negroes do the driving.

Ed Buie testified that on the day in question he was working for Moore and first saw Marks about six o'clock in the morning. Marks borrowed $1.75 and went toward a liquor store. Because of Marks' intoxicated condition it was difficult to get him into the truck, his insistence being that additional wine or liquor should be procured.

During the afternoon someone got off the truck, went into the liquor store, and bought a quart of wine. Seemingly, efforts to induce Marks to make the trip continued from around eleven or twelve o'clock until a little after four. He finally consented when it was apparent that the desired wine would be available. After the truck had been driven about four miles, Marks complained that some of

the men were using his wine allotment. He was then given half a pint, and probably drank it.

The truck carried an open "bed" or platform, with a toolbox near the cab. It is in evidence that the men, as a matter of precaution, endeavored to persuade Marks to lie down in this box, but he refused. Shortly after leaving Clarendon, the party met Moore. Willie Miller told his employer of the difficulty experienced in "getting the boys together." Moore directed that they proceed to camp. Miller testified: "We went on about three miles, when someone called, 'Stop—there is a man falling off!' [Marks] was drunk and I had begged him on two occasions to get into the toolbox"—a "five by six" box upon which six other men were sitting.

Substance of appellant's contention is that inasmuch as the men working for Moore found Marks at Clarendon in a drunken condition, he was then safe in respect of the tragedy that later occurred; and if left alone no injury would have resulted. But, it is urged, instead of doing this, Moore's servants spent nearly four hours cajoling and arguing with the intoxicated man, finally persuading him to accompany them when additional wine was procured—and, inferentially, when it had been promised as a reward for making the trip. The Compensation Commission made the following specific finding:

"Miller endeavored to have [Marks] enter a place of safety by going into either the cab or box on the truck, but this he drunkenly refused to do. Miller and Bass then drove the truck out of Clarendon and some miles from Clarendon the decedent and certain other employes of Moore became so rowdy while scuffling over the liquor that, as a safety precaution, Miller and Bass stopped the truck to allow them to finish drinking the liquor. At either this or a second trip, Marks got out of the truck, but in any event after the liquor had been consumed he was gotten back into the truck and when the party was preparing to continue the trip to the camp Miller and Bass, and perhaps other employes, made an effort to get the decedent to ride in the cab or toolbox of the truck, due to his drunkened condition. This, he drunkenly re-

fused to do and the driver continued the trip, decedent riding on the flat bed of the truck, he having refused to ride in a place of safety While riding in this position decedent was drunkenly engaging in drunken pranks and in so doing was attempting to punch one of the employes in front of him, and in so doing he fell from the truck and was killed."

The situation of Marks is not similar to that of S. L. Sullins, discussed in *Elm Springs Canning Company* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113. In that case it was not definitely shown that the event producing death was wholly traceable to intoxication, and the Commission's finding was against the defense that drunkenness, without a contributing cause, produced the result. In the appeal before us the Commission believed that Marks' conduct, while he was drunk, solely produced the fatal injury. But, it is urged, Moore's employes, with knowledge that their fellow servant was physically and mentally irresponsible, induced him to enter a place of danger, hence the master must be held accountable for the damage that followed: in other words, there was a contributing circumstance. This the Commission might have found; but it did not.

To overturn the order we would be required to find, as a matter of law, that the Commission acted upon insufficient evidence. Like a jury, the Commission may draw inferences from facts and circumstances; and finally it must say whether, in a particular case, the asserted right has been established, or that it has failed. When the controversy reaches this Court the inquiry is whether there was substantial testimony. Since the drunken condition of Marks is conceded, and the only claimed extenuation is that other acts intervened and contributed to the casualty, it must be held that there was substantial evidence for the Commission to reach its announced conclusion, and Circuit Court did not err in affirming the order.

DANIELS *v.* DANIELS.

4-7756 190 S. W. 2d 627

Opinion delivered December 3, 1945.

[redacted]

L. B. Smead and *Floyd E. Stein,* for appellant.

SMITH, J. A decree was rendered August 13, 1943, in a suit filed by appellee against appellant, who was then her husband, awarding her the custody of their three minor children, two girls and a boy, and requiring him to contribute $33 each week to the support of his wife and children. No divorce was prayed, but appellee later filed an amendment to her complaint in which that relief was prayed and granted, in a decree rendered September 13, 1943. This decree required appellant to pay appellee $33 each week.

Appellant defaulted in seven of these payments, and a citation issued requiring him to show cause why he should not be adjudged in contempt of court. In response to this citation appellant filed a petition for the modification of the order of September 13.

These pleadings were heard January 10, 1944, when it was adjudged that appellant was in default in his payments to the extent of $360, after credit had been given him for certain payments made appellee, and a credit of $201 allowed for money sent his children. Appellant was ordered to pay this deficiency in three equal installments

of $120 each, in 30, 60 and 90 days, and thereafter to pay appellee for the support of the children, the sum of $50, to be paid on the first and 15th day of each month, making $100 a month for the support of the children. It was ordered that these payments be made to the clerk of the court, to be by him remitted to appellee. Jurisdiction was retained for such further orders "as may be necessary and equitable." It was further ordered that, if these payments were not made, the clerk should report the fact to the sheriff. The clerk advised the sheriff "officially" that appellant had made default, whereupon the sheriff arrested appellant and placed him in jail, but released him when $120 was paid.

Appellant appears to have made no further payments, and on March 6, 1944, he was again cited to show cause why he did not comply with the order of the court made January 10, 1944.

In response to this citation appellant filed a motion praying the court to modify the decree rendered September 13, 1943, which awarded the custody of the children to appellee. Appellant filed also a petition for citation against appellee, in which he alleged that she had, without authority, or order of the court, removed, with the children, from this state to the state of Arizona, and prayed the appellee be required to present the children in court on November 24, 1944, and that she be adjudged in contempt of court if she failed to do so. On November 24, 1944, the cause was passed and reset by consent for hearing on January 8, 1945. Hearing was not had on these pleadings, however, until March 25, 1945, at which time the cause was heard upon appellant's petition for change of the custody of the children. Appellee did not appear at this hearing, and it is insisted that for this reason, if for no other, the custody of the children should be awarded appellant, as appellee was in contempt of court in removing the children from this state without a court order permitting her to do so, but the court had made no order requiring the presence of the children in court, or their return to this state.

Appellant offered testimony to the effect that since the decree awarding his wife a divorce, she had refused to allow him to see the children and had taught, and was teaching, the children to forget him. He offered in evidence a number of letters which he had received from his oldest child, a daughter then seventeen years of age, in which she expressed great affection for her father, but made no complaint of her mother save only that she wrote these letters surreptitiously for fear of displeasing her mother. These letters were somewhat artful, as most of them referred to money, which appellant appears to have remitted whenever requested, but the remittances were all for small amounts. Appellant testified that, since the divorce, he had contributed $3,000 to the support of the children, but he offered no evidence to that effect except his statement that he had done so.

Appellant complained also that his youngest daughter had been placed in a catholic school, contrary to his wishes, and that proper supervision of his son was not exercised, in that the son was not required to attend school. A sister of appellant testified that her brother was not allowed to see the children, and another lady testified that, while the son was enrolled in school, he sometimes played "hooky" from school.

Appellant has remarried, and he and his present wife testified that they were willing and anxious to have the custody of the children, and were prepared to give them the proper attention and would do so.

Appellee did not attend the trial when the decree was rendered, from which is this appeal, but she was represented by counsel, but no brief in her behalf has been filed on the appeal.

There was offered, without objection, a certificate from the pastor of a Baptist church in the city of Little Rock, reciting that the children were all enrolled in, and attended the Sunday School of that church. Appellant is of that faith. There was also offered in evidence a certificate of the principal of the school which the son attended in Little Rock reading as follows:

"May 2, 1944,

"Peabody School,

"Capitol and Gaines.

"Hendree W. Means, Principal

"This is to certify that Freddie Daniels' attendance record at Peabody School, shows only one day's absence this term.

"Freddie's conduct has been most satisfactroy and he has proven to be dependable. He is one of our monitors at Peabody.

"If he continues in school, his teacher reports he will be promoted to Junior High School at the end of this term.

"Signed H. W. Means,
"Principal of Peabody School."

The petition for the change of the custody of the children was denied, and from that decree is this appeal, and no other question is discussed in appellant's brief. No reason was assigned by the chancellor for the order made, but we assume that the testimony which related to the environment of the children, if the change of custody were ordered, was controlling. At any rate, it controls our action in affirming the decree.

The testimony is to the effect that appellant operates a night club on the highway from Camden to El Dorado, located about six miles from Camden. Appellant has there two buildings, about 100 feet apart, in one of which he resides with his present wife, while he operates the club in the other. A deputy sheriff testified that, between June 20, 1941, and March 2, 1944, 30 arrests were made in this club on charges ranging from murder to disturbance of the peace, but most frequently for gaming.

Another officer was asked, "what goes on in the dance hall?" and he answered, "they sell beer and drink and dance." Asked about gambling the officer an-

swered, "I feel sure there has been equipment torn up within two or three years, and there have been arrests made there." This is within 100 feet of the place to which appellant proposes to take the children. When asked by appellee's counsel if appellant had tried to operate a peaceable place, the officer answered, "that is the general idea," but he testified that the officers went there only when called.

We think the chancellor was correct in refusing to place the children in this environment, and the decree is, therefore, affirmed.

WILLIAMS, ADMINISTRATOR, *v.* LAUDERDALE.

4-7767 191 S. W. 2d 455

Opinion delivered December 3, 1945.

[redacted]

T. B. Vance and *Will Steel,* for appellant.

Shaver, Stewart & Jones, for appellee.

ROBINS, J. Appellant, as administrator of the estate of Mrs. Lena Neal, deceased, and as administrator of the estate of Miss Autie Neal, deceased, instituted this action against appellees, C. J. Lauderdale and his wife, to recover damages for each estate in the sum of $25,000 for conscious pain suffered by both intestates from injuries which caused the death of each of them. The deceased ladies were living in an apartment owned by appellees and they lost their lives in a fire which destroyed the apartment on the morning of January 18, 1945.

In his complaint appellant alleged that appellees, (1) negligently failed to have the electric wires in the apartment properly insulated, (2) negligently failed to have the hall equipped with an electric light burning through the night, (3) negligently failed to have the building equipped with fire escapes or knotted ropes as required by § 7201 of Pope's Digest, and (4) negligently failed to keep the equipment connected with the hot water heater in proper repair, thereby permitting gas to escape and to become ignited; and that said acts of negligence combined together to cause suffering and death of appellant's intestates.

The answer of appellees was a general denial.

On trial below the second and fourth grounds of negligence—failure to keep a light burning in the hall and failure to maintain properly the hot water heater connections—were apparently abandoned and no testimony tending to support them was introduced. For recovery appellant relied on the first and third grounds—that appellees were negligent in permitting the electric wiring in the apartment to remain in an unsafe condition and without proper insulation, and that they were negligent in not equipping the apartment with proper fire escapes or knotted ropes as required by law.

At the conclusion of the testimony offered by appellant, the lower court sustained appellees' motion for a peremptory instruction in their favor, basing this instruction on the ground that appellant had failed to prove conscious pain and suffering on the part of appellant's intestates. From judgment entered on the verdict thus rendered appellant prosecutes this appeal.

Under appellant's theory as to liability, before he could be entitled to have the case submitted to the jury, it was necessary for him to offer substantial testimony tending to prove:

(1) That appellees negligently failed to keep their property in a proper state of repair; or that the premises constituted a hotel or inn and was not equipped with ropes or fire escapes as required by the statute.

(2) That the fire was proximately caused by appellees' negligence in not properly maintaining the property; or that injury to the ladies from the fire was caused by appellees' failure to provide safety equipment prescribed by law.

(3) That as a result of said fire appellant's intestates were caused to undergo conscious pain and suffering prior to death.

Appellees owned a two-story brick building in Texarkana, Arkansas. On the lower floor of this building appellees were operating an electric appliance business. The upper floor, reached only by a wooden stairway from the front, was divided into ten rooms, rented out in apartments to different tenants. The front apartment, consisting of five rooms, including bathroom and kitchen, was occupied by Mrs. Lena Neal and her daughter, Miss Autie Neal, who rented it from appellees by the month. Appellees furnished all "utilities" except the telephone.

The fire occurred about 4 o'clock in the morning, and when the firemen, whose station was only about four blocks away, arrived, the building was full of smoke and was already badly damaged from the flames, which were coming from the upstairs windows and beginning

to break through the roof. After subduing the fire to some extent, the firemen entered the building and found the body of Miss Neal about ten feet from the top of the stairway, and the body of Mrs. Neal was found near one of the front windows. Both bodies were badly burned.

Considering the action of a trial court in directing a verdict for the defendant, Judge FRAUENTHAL, speaking for the court, in the case of *Wortz* v. *Ft. Smith Biscuit Company,* 105 Ark. 526, 151 S. W. 691, said: "In reviewing this ruling of the court directing a verdict, the evidence adduced upon the part of the plaintiff must be considered in the light most favorable to his cause of action. If under that evidence, however, with every reasonable inference of fact that is deducible therefrom, the plaintiff is not under the law entitled to a recovery, then the ruling made by the court is correct."

Section 7201 of Pope's Digest, violation of which by appellees is one of the grounds relied on by appellant herein, is as follows: "It shall be the duty of every person operating any hotel, or inn containing seven rooms or more, two stories high or more, within the State of Arkansas to have a rope not less than one-half inch in diameter and knotted not more than fifteen inches apart, and of sufficient strength to hold up five hundred pounds and long enough to extend within twenty-four inches of the ground. Said rope to be securely attached to the window sill, or wall of one window in each room about the first story of said building to be occupied by guest. Said rope to be kept in full view at all times. This section not to apply to hotels equipped with iron fire escapes, and any proprietor, lessee or manager of any hotel, or inn refusing to comply with the provisions of this act shall be guilty of a misdemeanor, and, on conviction, such proprietor, lessee, manager, agent or clerk in charge of said hotel or inn, whenever any violation of this act shall occur shall be fined not less than ten dollars nor more than fifty dollars, or imprisonment for a term not exceeding thirty days, or by such fine and imprisonment."

By its terms, the operation of this statute is limited to an "inn" or "hotel." In the case of *Pettit* v. *Thomas,*

103 Ark. 593, 148 S. W. 501, 42 L. R. A., N. S. 122, Ann. Cas. 1914B, 726, this court quoted with approval this definition by Mr. Bishop in his work on Non-Contract Law, § 1165: " 'An inn, hotel or tavern is a house for the general entertainment of travelers and strangers applying . . .' " "An apartment house is clearly not a hotel, each apartment therein being regarded as a separate dwelling of which its occupant is the tenant." 28 Am. Jur. 544. "An inn or hotel is essentially an establishment which provides lodging for transients . . ." 43 C. J. S., Innkeepers, § 1, p. 1128. "An apartment house is not a hotel, but is a building used as a dwelling for several families, each living separate and apart. . . ." *Satterthwait* v. *Gibbs,* 288 Pa. 428, 135 A. 862; *Pierce* v. *Kelner,* 304 Pa. 509, 156 A. 61. See, also, *Scanlan* v. *LaCoste,* 59 Colo. 449, 149 Pac. 835, L. R. A. 1915F 664, Ann. Cas. 1917A, 254.

There was no testimony in this case tending to establish that appellees were operating the property as a hotel or inn; and, therefore, no liability against appellees could be predicated on their failure to equip their building in accordance with the requirements of the above quoted statute.

As to the remaining charge of negligence—failure to maintain the electric wiring in a safe manner—it may be said that there was proof sufficient to authorize the jury to find that the building was wired in an unsafe manner—one likely to cause a fire—and that appellees had been warned of such danger.

But it was necessary for appellant to prove further that this faulty wiring was the cause of the fire. To discharge this burden appellant introduced Mr. Steve Walsh, chief of the Texarkana fire department, who reached the fire shortly after the alarm was given. After testifying that he had previously seen the wiring and found it "very bad" he detailed the condition of the wiring, which was "what they called romax cables—two wires and one sheathing and in place of having them put up with clamps, they had them nailed with a nail. It was in bad shape where it run over the partitions of the rooms.

It ran over the partitions without any insulation of any kind or protection from the wood. . . . The probable result of [such] wiring . . . would cause a fire. In my opinion, the condition I found there in regard to the defective wiring was the cause of the fire. . . . I could not tell after the fire whether the electric wires and conductors were fused together. The insulation was pretty well burned off. The wires in the center of the building were burned up and melted down. The wiring was there but the insulation was off. I do not remember whether the wiring was fused together. It could have been, the fire was hot enough." But Mr. Walsh said in his cross-examination: "Q. Now, chief, you said to Mr. Vance that the wiring could have caused that fire? A. Yes. Q. Is there anything else that could have caused it? A. Yes, a number of things. Q. Name some of them. A. A match or a lighted cigarette— Q. A match or a lighted cigarette or a pilot light or a hot water heater in the bathroom? A. Yes. Q. Any number of things could have caused it? A. That's right. Q. And the wiring was one of them? A. Yes. Q. But from your inspection you made, you don't know what did cause the fire? A. No, sir." The chief of the fire department did not testify as to any physical condition found by him in the damaged building that would, with that degree of certainty that excludes speculation, indicate that the fire was started by "bad wiring" or that would eliminate from consideration other possible causes.

Other witnesses for appellant testified as to the defective condition of the wiring, but none of them testified any more definitely as to the cause of the fire than did the chief of the fire department; and their testimony adds no additional weight or substance to the case as made out by Mr. Walsh's testimony.

We have then this situation: A building burned in the early hours of the morning; no direct proof as to the origin of the fire; proof that the electric wiring was faulty and liable to cause a fire; and the opinion of one testifying as an expert, but not detailing on what objective findings his opinion was based, that the fire was caused by this defective wiring. The force of the fire

chief's opinion, even if it were competent, is destroyed by the remainder of his testimony, which shows that his statement was more in the nature of a conjecture than the expression of a firm conviction based on findings in the physical situation made by the witness.

The weight of authority is that the cause of a fire is ordinarily not in the category of matters on which expert opinion is admissible as evidence.

The Court of Appeals of Kentucky, holding inadmissible testimony of chief of fire department that, in his opinion, "the fire had been laid by somebody," in the case of *King* v. *Ohio Valley Fire & Marine Insurance Company,* 212 Ky. 770, 280 S. W. 127, said: "His statement that he found the fire had been laid by somebody was objectionable. He should tell what he found, and let the jury draw the conclusion."

In the case of *Miller* v. *Great American Insurance Company,* 61 S. W. 2d 205 (Mo.), it was held that the trial court properly rejected the testimony of two fire chiefs of long experience in fighting fires to the effect that, in their respective opinions, the fire in question was an incendiary one. The court, in that case, said: "With the subject of inquiry having been one within the range of the common experience of people moving in the ordinary walks of life, there was no room for the admission of opinion evidence. . . ."

The Supreme Court of North Carolina, in the case of *Deppe* v. *Atlantic Coast Line R. Co.,* 154 N. C. 523, 70 S. E. 622, held inadmissible the testimony of certain witnesses that, in their opinion, a fire had resulted from a certain cause, saying: "The evidence admitted was not 'expert testimony' in any sense, as the facts are such that one person may as well draw conclusions from them as another."

To the same effect is the holding in the case of *Rodefer* v. *Grange Mutual Insurance Company* (Mo. App.), 91 S. W. 2d 112, in which the court said: "The issue of how the fire had been caused was one concerning which the jurors, as ordinary men, were fitted to draw

the correct conclusion from all the facts in evidence, and any opinion which the witness may have entertained upon that question was therefore properly excluded."

The Supreme Court of Iowa, in the case of *Walters* v. *Iowa Electric Company,* 203 Iowa 467, 212 N. W. 886, holding that opinion of witness, as to origin of fire alleged to have been caused by negligent maintenance and operation of electrical line, was inadmissible, quoted from the case of *Kelly* v. *Muscatine, B. & S. R. Co.,* 195 Iowa 17, 191 N. W. 525, saying: " 'We are committed to the rule that, when all the pertinent facts can be sufficiently detailed and described to enable the jurors to form a correct conclusion without the aid of opinions, no exception to the rule excluding opinion evidence will be tolerated.' "

An examination of the record discloses that there was adduced no substantial testimony from which it could be reasonably found by the jury that the cause of the fire was the defective wiring.

This holding precludes the application of the doctrine of *res ipsa loquitur,* which is invoked in this case by appellant. Before this rule may be applied it must be shown that the injury complained of was caused by an agency or instrumentality under the exclusive control of the one against whom liability is asserted, and, in such a case, it creates a presumption of negligence against the one in control of the agency or instrumentality causing the injury, where it is shown that, in the ordinary course of things, the injury would not have occurred if proper care had been exercised. *Arkansas Light & Power Company* v. *Jackson,* 166 Ark. 633, 267 S. W. 359; 45 C. J. 1193.

As was said by appellant's principal witness, Chief Walsh, the fire, in the instant case, may have been started by one or more causes, for which appellees could in no event be held responsible. In 38 Am. Jur. 1000, it is said: "Nor does it (the *res ipsa loquitur* rule) apply where an unexplained accident may be attributable to one of several causes, for some of which the defendant is not responsible." This rule was applied by us in the case

of *Oklahoma Gas & Electric Co.* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550.

The decision in the case of *Burt* v. *Nichols;* 264 Mo. 1, 173 S. W. 681, L. R. A. 1917E, 250, cited by appellant in support of his contention that the rule of *res ipsa loquitur* applies, is not controlling here, because liability in that case was predicated upon a violation of an ordinance requiring fire escapes, which was held to be negligence *per se.*

Since we have found that there was no substantial testimony to show liability on the part of appellees, it becomes unnecessary for us to consider the sufficiency of proof of conscious pain and suffering of the two ladies. If the judgment of the lower court was correct, it must be affirmed, even though we may not agree with the reason given by the lower court for its action. Thus, in the case of *Millsaps* v. *Nixon,* 102 Ark. 435, 144 S. W. 915, we affirmed the judgment of the lower court based on a directed verdict, although we held that the motion for peremptory instruction should have been sustained on a ground other than that upon which the trial court based it. In that case, it was said: "A judgment may be correct, although based on mistaken reasons." Another case in which the same ruling was made is: *New York Life Insurance Company* v. *Adams,* 151 Ark. 123, 235 S. W. 412.

Nor is it necessary for us to consider the question (not raised by the parties herein) as to whether a landlord may, in the absence of statutory requirement or contractual undertaking, be held liable for injury suffered by a tenant on account of the unsafe condition of the demised premises.

The judgment of the lower court is affirmed.

McFaddin, J., dissenting. The majority holding is not based on, and does not discuss, the issue of conscious pain and suffering; so I, likewise, forego any discussion of that question, although it was the basis of the decision in the trial court.

The majority opinion upholds the verdict, directed for the defendants, on the ground that there was no evidence that the fire was caused by the defective wiring. I respectfully dissent, because I believe there was sufficient evidence to take the case to the jury on this issue.

The rule governing lower courts in directing a verdict for the defendant is stated in *New York Underwriters' Insurance Company* v. *Stewart,* 190 Ark. 718, 81 S. W. 2d 844:

"It is the established law in this state that a verdict should not be directed by the trial court except in cases where, conceding the credibility of the witnesses testifying and giving full effect to all legitimate inferences deducible therefrom, it is plain and certain that the parties directed against cannot recover. *St. Louis, S. F. Ry. Co.* v. *Pearson,* 170 Ark. 842, 281 S. W. 910. *Graysonia, Nashville Lbr. Co.* v. *Carroll,* 102 Ark. 160, 143 S. W. 923."

In 53 Am. Juris. 316 the rule is stated:

"The trial court is bound to consider the reasonable inferences from the evidence, on a defendant's motion for a directed verdict. The evidence must be considered most favorably to the plaintiff; the inferences most favorable to him are to be drawn, and inferences in favor of the defendant rejected. . . . On a defendant's motion for a directed verdict, the evidence and inferences must be construed most favorably to the plaintiff, and most strongly against the defendant. Evidence for the plaintiff is assumed to be true. Otherwise stated, the court must take the strongest legitimate view of the evidence in favor of the plaintiff and disregard all countervailing evidence."

With these established principles in mind, we turn to the majority opinion, which says:

"An examination of the record discloses that there was adduced no substantial testimony from which it could be reasonably found by the jury that the cause of the fire was the defective wiring."

It is this quotation that impels this dissent.

In addition to the testimony of Walsh (mentioned in the majority opinion), there was the testimony of at least three other witnesses on the nature and effect of the defective wiring: (a) H. E. Gibbons testified that he had been twenty years in the electrical business and was familiar with the use of Romax wiring; that the National Electrical Code contained the rules as to the wiring of buildings, and was the recognized standard code by which all electricians were guided; and that rule 3206 of the Code provided that Romax wiring should be fastened to the wall only with an insulated staple, which was to be on the outside of the two insulated wires. Gibbons stated that to drive a nail between the two wires was very improper: "you can hardly drive nails between without breaking your insulation. It might stand up for a while, but in time it will give you trouble." Without objection, the following testimony was given by this witness:

"Q. When you drive a nail in there, it would, to a certain extent, damage the insulation? A. Yes, sir. Q. And it would weaken it at that point and make it come in contact with it or get close to it? A. And that would destroy the insulation. Q. And that, in your opinion and from your experience, would produce a fire ultimately? A. That's right."

. . . . .

"Q. Assuming that a wire like that was used, Mr. Gibbons, and the nail did come in contact with the wire, would that likely cause a short? A. If it came in contact with the wire, yes. Q. If it came in contact with the wire and caused a short, would that tend to destroy the webbing in those two wires in that Romax tubing? A. In the course of time. Q. If there was a short there, what would happen? A. That would cause your spark to start a fire. When you have a short, it is going to break down at the weakest point. Q. Two wires when they are uninsulated will fuse together? A. That's right. Q. Assuming that a building was wired in that manner and after the fire you found the Romax wires

fused together. What would be the cause of that? A. They got together or they wouldn't fuse together."

(b) Pat McDaniel testified that he had worked as an electrician for ten years and had lived in the Lauderdale Apartments, and that he was familiar with the type of wire used in the Neal apartment, that the wiring was Romax: "in other words, those two wires are wrapped together and insulated"; and that after the fire he made a personal examination of the Lauderdale building to see where the fire had burned the most, and that it was in the Neal apartment.

(c) Clovis Neal testified that he was an electrician of five years' experience, and that after the fire he examined the wiring in the Neal apartment; that he found several places where the Romax wiring was fused together, and that the wires would not have been fused together by the fire, but only by a short.

So, we have a case where it was shown: (1) that Romax wiring was used in the Neal apartment; (2) that the wiring was defectively installed and in violation of the National Electrical Code, in that the wiring was fastened by nails instead of insulated staples; (3) that Mr. Gibbons, an electrician of twenty years' experience, said that such a defective wiring was likely to cause the wires to fuse and result in a fire; (4) that a fire did occur in the Neal apartments where the defective wiring existed; (5) that after the fire the wires were found to have been fused; and (6) that it was testified that the wires would not have fused by reason of the fire but only by reason of a short circuit. What more evidence could have been offered as to what caused the fire than this testimony that was offered?

Only one additional bit of evidence could have been offered: and that was the electrical experts could have been permitted to testify that in their opinion, as experts, the fire was caused by the defective wiring. I think they should have been so permitted to testify. These witnesses were testifying as electrical experts as to what would be the effect of a short in electrical wiring. The

cases cited by the majority are cases where firemen were not permitted to testify as to what caused a fire. The situation here is whether experts in electricity should be permitted to testify as to the possible or probable result of a short in electrical wiring. But the majority says the electrical experts should not be permitted so to testify, and I pass that point without taking time to cite authorities.

However, I insist that if the electrical experts cannot say what in their opinion caused the fire, then certainly it is for the jury to answer the question. Surely, somebody should be able to give the answer to the question from all the evidence that was adduced. The majority holds that the experts cannot tell what caused the fire, and then goes further and says that the jury is not to be allowed to find what caused the fire. The reason assigned by the majority, for denying the jury the right to make a finding of fact, is that there was no evidence tending to show that the defective wiring caused the fire. In answer to the majority, I have quoted or sketched the testimony of the witnesses. This testimony impels this dissent.

BUSCH *v.* GECKS.

4-7760 190 S. W. 2d 625

Opinion delivered December 3, 1945.

Jay M. Rowland, for appellant.

Curtis L. Ridgway, for appellee.

McFaddin, J. The sole question is whether the appellant is entitled to interest.

Appellant, as plaintiff, filed suit against appellee in the Garland chancery court on March 16, 1945, alleging: (1) that in January, 1942, appellant, by written contract, sold certain real estate to appellee for $25,000; (2) "that there is now due the sum of $3,250 accumulated past-due interest which, after repeated demands, the defendant refuses and neglects to pay"; and (3) "that plaintiff has a right to foreclose her vendor's lien on the said property . . . in the amount of $3,250 interest and the amount of $25,000 principal, a total amount of $28,250." The prayer of the complaint was for a decree of foreclosure and an order of sale. The appellee (defendant below) denied any agreement to pay interest, and claimed that no interest was due under the contract. After hearing the evidence the chancery court sustained the defense of the defendant, and entered a decree dismissing the complaint for want of equity. The plaintiff prosecutes this appeal.

The evidence is practically uncontradicted. Appellant was the owner of certain real estate in Garland county, Arkansas. On January 14, 1942, she and appellee entered into a written contract, prepared without aid of an attorney. The instrument was entitled "A Rental-Purchase Agreement." We copy its salient provisions:

"Bertha J. Busch agrees to the following.

"1. To turn over to Anton J. Gecks two hundred and thirty (230) acres of land in Garland county, state of Arkansas, as recorded on pages of Land Records in

Court House, in Hot Springs, Arkansas, in which land is located the McClendon Springs and Housing Properties on the following basis:

"Rental rate,	First year	$25.00	per	month
" " "	Second year	30.00	"	"
" " "	Third year	35.00	"	"
" " "	Fourth year	40.00	"	"
" " "	Fifth year	50.00	"	"

"2. At the end of the fifth year, all rents paid by Anton J. Gecks, during this five-year period of time, will be applied as a credit on purchase price of this property which is now agreed upon as twenty-five thousand dollars ($25,000);

"3. At the end of the fifth year, when purchase price of property goes into effect, Bertha J. Busch agrees to give to Anton J. Gecks, a clear title to above property upon payment of said twenty-five thousand dollars ($25,000), minus rental credit as agreed upon in paragraph two (2). In the event that Anton J. Gecks is unable to pay the full amount agreed upon, Bertha J. Busch hereby agreed to grant to Anton J. Gecks, an additional period of five (5) years to complete payment for said property. Unpaid balance to be paid one-fifth (1-5) yearly. . . .

"Anton J. Gecks agrees to the following:

"1. To do everything within his knowledge, power to the best of his ability to create a market for the products of McClendon Mineral Springs and the land thereof.

"2. To make all monthly rental payments promptly when due at agreed rental rates.

"3. To make repairs to all properties as needed as quickly as conditions will permit. . . .

"9. Failure to pay monthly rental on time automatically cancels this contract and Anton J. Gecks must remove all personal effects from property within ten (10) days time. . . ."

It is admitted that Gecks made and is still making the monthly payments promptly and just as provided in the contract; that he has never paid any interest; that the contract has no provisions for interest; and that the parties made no agreement about interest. The plaintiff testified on direct examination:

"Q. And did he ever pay any interest on the contract? A. No. Q. Was there any agreement between you and him with reference to interest? A. No, he didn't say anything about it."

And, again, the plaintiff testified:

"Q. Was there any interest ever mentioned on any of it? A. No. Q. Did he ever say anything about interest? A. No."

In concluding his brief in this court, the attorney for the appellant says:

"We, therefore, respectfully submit that the judgment of the Garland chancery court should be reversed, and that the appellant have judgment for foreclosure of her lien by reason of the past-due interest."

Thus, it is clear that the only question is whether the appellee owes any interest on the monthly payments that were made promptly when due. We answer this question in the negative. In *Wilson* v. *Anthony,* 19 Ark. 16, this court held that a bond payable after date without any stipulation for interest, does not bear interest until it is due. Again, in *Joyner* v. *Turner,* 19 Ark. 690, this court held that a note payable twelve months after date does not bear interest until maturity, where there is no stipulation for interest. These cases, decided by this court in 1859, followed the rule announced in leading cases from other jurisdictions, in holding that when a contract is silent on the subject of interest and does not by implication exclude it on money due and payable under the contract, then the law implies interest should be paid only from the time the debt becomes payable. Some such earlier cases are: *Potter* v. *Gardner* (1831), 30 U. S. (5

Pet.) 718, 8 L. Ed. 285; *Richardson* v. *Flournoy* (1832), 30 Ky. (7 J. J. Marsh.) 155; *Simpson* v. *McMillion* (S. C. 1818) 1 Nott & McC. 192; *Buchanan* v. *Leeright* (Va. 1807), 1 Hen. & M. 211.

The weight of authority at the present time is to the same effect as these earlier cases. In 30 Am. Juris. 35, in discussing the time from which interest is computed in contract cases, the text states:

"As a general rule interest on money runs from the time when the money becomes due and payable, in the absence of any contract to the contrary."

In 33 C. J. 230, in discussing the time from which interest runs, the text says:

"The general rule is that interest on money runs from the time when the money becomes due and payable in the absence of some agreement providing otherwise. . . ."

The cases of *Roberts* v. *Wilcoxson,* 36 Ark. 355, and *Powhatan Zinc & Lead Mining Co.* v. *Hill,* 98 Ark. 519, 136 S. W. 669, in no wise conflict with the holding here. In each of those cases there was the question of interest *from maturity,* while here there is the question of interest *from date.* In the absence of any contract for interest from date until maturity, the interest does not begin until maturity of the obligation.

It is unnecessary for us to consider whether the contract here in issue is a rent contract, an option contract, or an executory contract of sale; because the only question here is whether the appellee owes interest. Under the authorities heretofore cited, it is clear that no interest is due on any monthly payment until the maturity thereof. Since it is admitted that all monthly payments have been made promptly when due, the chancery court correctly dismissed the complaint for want of equity.

Affirmed.

DENISTON *v.* BURROUGHS.

4-7765 190 S. W. 2d 623

Opinion delivered December 3, 1945.

[redacted]

Arthur D. Chavis, for appellant.

Coleman & Gantt, for appellee.

McHANEY, J. Lot 3 in block 50, of Tannehill & Owens' Addition to Pine Bluff, is the subject of this controversy. Said lot forfeited and was sold to the State in the name of Addie Silbernagel for the nonpayment in 1937 for the 1936 taxes. Not being redeemed it was certified to the State in 1939, after the two-year period of redemption had expired, and the State's title was later confirmed by a proceeding in chancery. On November 4, 1942, the State conveyed said lot to A. D. Chavis who later conveyed to appellant. These deeds constitute appellant's sole claim of title.

Said lot is located in two paving districts in Pine Bluff, No. 35 and No. 76. It became delinquent in each district and each brought a suit against it to collect the delinquent assessments which resulted in separate decrees

of foreclosure and sale to said districts, in No. 35 the sale was on March 12, 1936, and in No. 76 the sale was on September 5, 1944. Appellee purchased and received deeds from these districts to said lot and also holds under a deed from the original owners of said lot, Addie Silbernagel and her son, Louis Silbernagel. The question is, Who has the superior title?

The trial court answered this question in favor of appellee on the complaint of the latter seeking to cancel appellant's deed from the State as a cloud on his title, which was done.

We think the court correctly so held. The facts are undisputed, in fact stipulated, and are as above set out. The sale to Paving District No. 35 by the Commissioner in Chancery was on March 12, 1936, and said sale was approved and confirmed on April 13, 1936, and the commissioner conveyed by deed to the district on January 20, 1942, and by it deeded to appellee on October 27, 1944. The forfeiture and sale to the State were in November, 1937, for the taxes of 1936, and the State's title was confirmed by the decree of the Jefferson chancery court on March 22, 1941.

The State's lien for the taxes of 1936 did not attach until the first Monday in June, 1936. Section 13770 of Pope's Digest. At that time said lot had already been sold to Paving District No. 35 and the sale confirmed, and at the time of the tax sale to the State in November, 1937, the title to said property was still in district No. 35. So, as we have many times held, it was exempt from general taxation during the time said district held the title in its governmental capacity, as it did here. Also it is well settled that, in such a case, the power to sell for general taxes is lacking and that confirmation is ineffectual. We so held in the recent case of *Duncan* v. *Board of Directors,* 206 Ark. 1130, 178 S. W. 2d 660, where a headnote reads: "The sale to the State of land for delinquent taxes when the title to the land is in an improvement district, as a result of foreclosure of its lien, is void for want of power to sell the land." It was also held in that case that this is true even though the

improvement district has not received a deed from the commissioner making the sale, pending expiration of the period of redemption. See, also, *Baiers* v. *Cammack,* 207 Ark. 827, 182 S. W. 2d 938; *Pinkert* v. *Wilson,* 208 Ark. 587, 186 S. W. 2d 949.

Appellant says the sale to district 35 is void because at the time of said sale the title was in the State because of a previous forfeiture and sale to it in 1931. It has several times been held that Act 329 of 1939 is both curative and retroactive and that it validates previous sales for improvement district taxes while the title thereto was in the State. *Kaplan* v. *Street Imp. Dist.,* 208 Ark. 454, 186 S. W. 2d 670.

Also, it is suggested that the sale to district 35 is void because Addie Silbernagel was not a party to the foreclosure suit. Assuming that this is true, appellant is in no position to raise the question for her. Only she could have done so, and her right to do so passed to appellee by her deed and not to appellant.

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

PARKER STAVE COMPANY *v.* HINES.

4-7764 190 S. W. 2d 620

Opinion delivered December 3, 1945.

J. Ed Morneau and *Arnold & Arnold,* for appellant.

McRae & Tompkins, for appellee.

MILLWEE, J. The question to be determined by this appeal is whether appellee, John Dorris Hines, was an independent contractor or an employee of appellant, Parker Stave Company, at the time of his injury on

April 28, 1944, when a log rolled from a truck which was being loaded and struck appellee, crushing his foot. The claim for compensation was resisted by the stave company and its insurance carrier on the ground that appellee was an independent contractor, and not an employee, at the time of his injury.

At a hearing before a referee at Prescott, Arkansas, on October 19, 1944, it was held that appellee was an independent contractor and compensation was denied. Appellee then filed his application for review of the referee's decision before the Compensation Commission, which was held in Little Rock on November 20, 1944. No additional evidence was introduced at this hearing, but upon a review of the evidence heard by the referee, the full commission held that appellee was an employee of Parker Stave Company when injured, and compensation was awarded. On appeal to the Nevada circuit court, the findings of the commission were affirmed.

Appellee began work for the stave company in August, 1943, under a verbal agreement with its manager, Hugh Yoakum. The terms of the contract are not in dispute. Appellee agreed to use his truck and haul logs from the log woods to the company's mill for $7 per thousand feet. The company agreed to cut and load the logs. The agreement was to run for no specified time, and either party was privileged to terminate it at any time. Appellee's brother, Harold Hines, worked under a similar arrangement with the company. According to the testimony of witnesses for appellee, he and his brother would usually arrive in the log woods with the woods crew. If no logs were ready for hauling, which was often the case, they would "pitch in" and assist the woods crew in dragging the logs from the woods for loading by use of the winch truck. They would also assist in loading the logs and perform other work, which they were not obligated to do by the employment agreement, under the supervision and direction of the manager or woods foreman of the company.

It could serve no useful purpose to discuss the evidence in detail. It is summarized in part by the commis-

sion as follows: "We have the testimony of the claimant, the claimant's brother, and other workmen working for this respondent, that in addition to hauling logs, which the respondent had agreed to load, this claimant assisted in getting out logs from the woods, cutting trails through the woods for this purpose, building bridges, and seemingly in every way performing the same services for this respondent as did other workmen except that of the actual felling of trees. It is also the testimony of the claimant, the claimant's brother, and other workmen, that in the performance of the services rendered by this claimant that he was directed as to the manner and means by which these services were performed by both the manager and the woods foreman of this respondent. Mr. Honea, the woods foreman, testified frankly that at times he did direct the claimant in his work. Mr. Yoakum attempts to term the directions given by him as being mere suggestions for the benefit of the claimant; however, he himself frankly admits that he did direct the claimant's work when he was operating the winch for the company."

To reverse the judgment of the circuit court it is first insisted that the findings of fact made by the referee, as to whether appellee was an employee, or an independent contractor, are binding upon the commission, if supported by sufficient competent evidence. It is argued that the referee who heard the testimony had a better opportunity to determine the weight and credibility of the witnesses than the commission. Appellants also say that the commission had adopted a custom of sustaining the findings of the referee, if supported by substantial evidence, and that it stepped beyond its power when it failed to sustain the opinion of the referee. We do not agree with this construction of the Workmen's Compensation Law. (Act 319 of 1939, p. 777). By § 25 of the act an appeal may be taken to the circuit court from the final award of the "commission," and upon such appeal the findings of fact made by the "commission" within its powers are conclusive and binding in the absence of fraud. Section 44 of the Act provides in part: "It shall be the duty of the referee, under the rules adopted by the

Compensation Commission, to hear and determine claims for compensation, and to conduct such hearings and investigations and to make such orders, decisions and determinations as may be required by any rule or order of the Compensation Commission, under the Workmen's Compensation Law pursuant to the provisions of such law. The decisions of a referee on such a claim shall be deemed the decision of the Compensation Commission on its own motion or on application duly made to it, modify or rescind such decision." While the last sentence of the foregoing section is incompletely phrased, we think it authorizes the commission to modify or rescind the decision of the referee when it is not supported by what the commission conceives to be the applicable law or weight of the evidence. As between the referee and the commission the act makes the latter the final arbiter of the facts. The circuit court, as an intermediate court of appeal, and this court, on final appeal, must look to the findings of the commission, and not the referee, in determining whether there is sufficient competent evidence in the record to warrant the making of the award.

This court is committed to the rule that the findings of fact made by the commission are upon appeal entitled to the same verity as attaches to the verdict of a jury, or to facts found by the circuit judge sitting as a jury. Where the findings of fact made by the commission are supported by substantial evidence, such findings will not be disturbed by either the circuit court, or this court, on appeal. *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600; *J. L. Williams & Sons, Inc.,* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113. The question of the sufficiency of the testimony to support the findings of the commission is one of law which this court will review on appeal. *Bales* v. *Service Club No. 1, Camp Chaffee,* 208 Ark. 692, 187 S. W. 2d 321.

In determining whether one is an employee or an independent contractor, the Compensation Act is to be

given a liberal construction in favor of the workman, and any doubt is to be resolved in favor of his status as an employee rather than an independent contractor. *Irvan* v. *Bounds,* 205 Ark. 752, 170 S. W. 2d 674; 71 C. J., p. 449.

No hard and fast rule can be formulated to determine whether a workman is an employee or an independent contractor, and each case must be determined upon its own peculiar facts. In the case of *Irvan* v. *Bounds, supra,* the decisions from other jurisdictions on this question are reviewed, and the various rules employed by other courts in determining the relationship are discussed. There are many well recognized *indicia* of the status of the relationship, but the presence of one or more of them in a case is not necessarily conclusive of this status. In 27 Am. Jur. 486, it is said: "The most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. Broadly stated, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor." The following Arkansas cases involving common-law actions of tort, are cited in support of this statement: *St. Louis-San Francisco R. Co.* v. *Conly,* 160 Ark. 592, 255 S. W. 308; *Mississippi River Fuel Corp.* v. *Morris,* 183 Ark. 207, 35 S. W. 2d 607; *Hobbs-Western Co.* v. *Carmical,* 192 Ark. 59, 91 S. W. 2d 605; *C. M. Farmer Stave & Heading Co.* v. *Wharton,* 193 Ark. 708, 102 S. W. 2d 79; *Humphries* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492.

There are other *indicia,* or commonly recognized tests, of the relationship which are in issue in the instant case. These are: (1) the time for which the workman is employed; (2) the right to terminate the employment without liability; (3) the method of payment, whether by time, job, piece or other unit of measurement; (4) the obligation to furnish necessary tools and equipment. Consideration of these tests is important, but none of

them are conclusive or controlling of the relationship. Such tests, along with other so-called secondary tests, are important as guides to the broader question whether the worker is in fact independent, or subject to the control of the employer, and relate back to the primary test of whether the will of the worker or employer dominates the means and method of the work, except as to result. See Annotations, 42 A. L. R. 607, 75 A. L. R. 726.

The fact that appellee was paid by the thousand and furnished his own truck tends to indicate that he was an independent contractor. On the other hand, the fact that the employment was to run for no specified time, and the further fact that the stave company could terminate the relation at any time, without liability, are features which indicate that appellee was an employee.

This court has also recognized the rule that a workman may be an independent contractor as to certain work and yet be an employee, or servant, as to other work for the same employer. In the recent case of *Soltz Machinery & Supply Company* v. *McGehee,* 208 Ark. 747, 187 S. W. 2d 896, the following statement from Schneider's Workmen's Compensation Text, Vol. 4, Permanent Ed., § 1076, was cited with approval: "While in all ordinary transactions the existence of the relation of contractor as between two given persons excludes that of principal and agent, or master and servant, there is not necessarily such a repugnance between them that they cannot exist together, and an employee may be an independent contractor as to certain work, and yet be a mere servant as to other work for the same employer. The decisions recognize this principle.

"The employer, however, is responsible in damages only if the worker was injured while performing that portion of the work in which he was an employee. Indeed, there are fact situations where the worker may co-exist as an independent contractor and an employee within the compensation acts in his work for the employer, benefits being given or denied, according to the relationship of the worker at the time of the injury."

At the time of his injury, appellee was assisting the woods crew and his brother in the loading of the latter's truck. While there is no proof of specific orders given appellee on the day of his injury, the loading was being performed under the immediate supervision of the manager and woods foreman of the stave company. Under the employment contract, loading of the logs was to be performed by the company. As to this portion of the work, and other work done by appellee in the log woods over a period of several months, we think there was sufficient competent evidence to sustain the Commission's finding that the company retained and exercised a degree of control over the work of appellee which is entirely consistent with his status as an employee, and inconsistent with that of an independent contractor.

The judgment of the circuit court, sustaining the award of the Commission, is, therefore, affirmed.

DILL *v.* DILL.

4-7737 191 S. W. 2d 829

Opinion delivered December 3, 1945.

Rehearing denied January 7, 1946.

Bruce Ivy, for appellant.

A. F. Barham, for appellee.

GRIFFIN SMITH, Chief Justice. October 31, 1944, Johnnie Lee, Betty Jane, and Shirleen Dill were, respectively, fourteen, eleven, and nine years of age. Margaret R. and T. E. Dill—their mother and father—had separated. The husband's suit for divorce resulted in a favorable decree the following January. He was found to be ". . . a proper person to have the care and custody of such children," subject to the mother's right to visit them "at reasonable and proper times." The children were also authorized to visit their mother. Alimony of $50 per month was awarded, with directions that the plaintiff pay defendant's attorney the balance of a $400 fee.

By the appeal Margaret Dill seeks custody of the children and additional alimony, with appropriate allowances for maintenance of the minors.

Prior to her marriage to Dill in March, 1929, Margaret had been the wife of a man named Hall, by whom she had a daughter, Parmalee—now married, but only nineteen years of age when her deposition was taken in the case at bar.

When appellant and appellee first separated (January 12, 1944) they were living at Osceola in what had once been a luxurious residence. It was described as somewhat impaired by nearly thirty years of deterioration; but, according to G. L. Waddell who sold the home to Dill for $5,500, original cost was approximately $15,000.

Answering on cross-examination whether he had $50,000 in October, 1942, Dill said: "Well, I didn't, [but] the children did have—not that much, but they had 'a right smart little bit'—about $10,000 apiece, and they've still got it. I had $10,000 deposited to each of them; also $10,000 to my wife's credit. I took this out (it was in her name and mine) and paid my obligations."

Dill had previously testified that, when he married, his property consisted primarily of forty acres north of Highway No. 40. This was sold and another forty was bought "north of Alexander's." Dill purchased from the State certain tax forfeited lands, some of which—if not all—had been deeded to the children. Testimony is indefinite regarding the amount: whether 80 acres, 100, or more; nor is the value of this land satisfactorily shown. The home at Osceola was an estate by the entirety.

"Delta Queen," a roadhouse or "club" on Highway 61, was acquired by Dill during the latter part of 1935 or early in 1936. It was a place where "We danced, gambled, and drank." When asked to clarify this statement Dill replied, "I mean customers drank, gambled, and danced: I didn't."

But it seems conclusive that this personal denial is not entirely true. While the property was operated less than two years as a rendezvous for liberal entertainment, Mrs. Dill actively engaged in its management, notwithstanding the fact that the children were then eight years younger, and the mother was charged with their care—this in addition to the levies made upon one primarily in charge of a place of public reception, where drinks are sold and consumed.

Dill complained that his wife attended "parties" where unrestrained overtures were liquor-induced. Her friends, both men and women, were of the gay variety—individuals who had but little regard for social decorum; and flirtatious deportment occurred in circumstances most embarrassing. Mrs. Dill used liquor excessively, swore with pronounced emphasis, and sometimes applied vigorous epithets from a voluble vocabulary not lacking in the power of characterization nor indirect in respect of her husband's maternal lineage.

There was testimony that Mrs. Dill received letters from a soldier, bearing the salutation, "Dear Mom," and closing with the assurance that "love and kisses" were

being sent. But, in extenuation, it was disclosed that the young man in question was but twenty years of age when he joined the armed forces. He was a close family friend who had worked for the Dills. Envelopes bore name and return addresses; and they were directed to the street and house number where the Dills lived. When opened, these communications were left in conspicuous places. It was also insisted that they were intended for Parmalee, who was but slightly younger than the soldier.

After closing Delta Queen in 1937 the Dills continued for several years to live in the building. Private parties were given, miscellaneous guests were entertained, intoxication (or the condition immediately preceding it) lent vigor to the evening, and gambling was frequently engaged in.

An accusation directed to Mrs. Dill is that she was brought home one night—or, rather, early one morning—by a male neighbor. The man's wife, however, testified that her husband mentioned the incident; and, she continued, "I didn't think anything about it." This witness, in discussing her own domestic affairs, said that when drunk she became possessed of an irresistible urge to fight with her husband. To this she added, "We always fight." But Mrs. Dill, said the witness, did not drink to excess.

It is not necessary in this opinion to say whether Dill was, or was not, a "professional" gambler. That he was an habitual gambler is not disputed. He denies drinking to excess, but admits participation in designated affairs which strongly negative the presumption of sobriety. After filing his suit in January, Dill withheld affirmative action for several months, and in the meantime returned to the family home. He asserts that during this period conjugal relations did not exist; but Mrs. Dill just as positively swears that he either came to her room, or she went to his. During these visits sexual desires were accommodated, and past differences were either forgotten or forgiven.

In May, Mrs. Dill attended a party upon which appellee frowned. So, with return of the disobedient wife, doors were locked and windows were fastened. When Dill eventually appeared in response to the bell and other noises, he encountered Parmalee and her mother. He also ran into a barrage of flower pots and other paraphernalia intended as aids to entrance. Plate glass in the front door was broken, draperies were disarranged, and in other respects the premises bore mute evidence of family discord, plus material embellishment.

Eight hundred pages of testimony and pleadings deal with the husband's conduct upon the one hand and upon the wife's deportment upon the other. Dill concedes that when Margaret assisted him she was of exceptional value as a business aid, bookkeeper, and helpmate. During that period they made money and accumulated a substantial nestegg. While complaining that his wife drank, he admits sending her to a Negro (Will Bloom) for whisky; but, upon being recalled, testified, "I never sent her to Will Bloom's for whisky in my life."[1]

That neither the appellant nor appellee is entirely frank is clearly revealed when the testimony is compared and conduct of the principals is analyzed; and if interests of husband and wife were the only matters of consideration we would unhesitatingly affirm the decree because each, by personal behavior, has provoked the other to commit acts, or engage in excesses, inimicable to the relationship it was sought to create when marriage became a fact. Margaret cross complained and asked that a divorce be granted her, on the grounds of cruelty.

[1] There is the following testimony copied verbatim (except as to matters enclosed in brackets) from appellant's abstract, p. 85: "Q. The night you went out with Opal and Melvin Alexander: you say that is the night [Mrs. Dill] was drinking? A. Yes, sir—she knows where she got the whisky. Q. You sent her? A. I did—sent her over there [myself]. The reason for that was, [I] knew she was going around with parties I didn't approve of her going with, and having [drinks] charged. I just wanted to know for sure whether she would go. [I] paid for the liquor [later]. I told her to go to Willie Bloom and tell him to send me a quart of whisky."

Unfortunately, factors other than interests of T. E. and Margaret Dill are at stake—factors in which society has concern. Two of the three children testified for their mother; the other was not called. Neither, by any conspicuous evasion, sought to wholly justify the mother's outbursts of temper, or condone other acts unbecoming a parent. But the children are attached to her—even devoted; and these are ties that cannot be severed by a Chancellor's decree.

The education and so-called "lives" of these children must continue: their problems are to be dealt with, irrespective of the adversity brought on by parents. The father's proclivities for gambling and his propensities for diversions which kept him from home until early morning, or for days; his crude custom of repeating smutty jokes in the presence of the girls (or, if testimony is to be believed, teaching them ribald songs); his penchant for physical satisfaction to the seeming exclusion of essentials—these things and other products of the stratum in which we find him fall short of supplying any guaranty that in his exclusive care three girls will be protected and their requirements met in the sense that the situation demands.

Nor, in awarding custody to the mother, are we satisfied that the sorry conduct admittedly pursued will be abandoned. We can only hope—and in the light of that hope earnestly urge—that a *home* in the truest sense be provided: a home closed to the pernicious contacts so clearly disclosed by the record at hand.

In deciding between the contending parties we attach importance to wishes of the children who unequivocally urge that they be allowed to live with their mother. Some witnesses say that while Margaret swears and sometimes drinks, profanity is not used around the girls, and that Margaret's drinking falls substantially short of intoxication. Other testimony is that the liberties she takes with liquor and with language is wholly unrestrained.

Perhaps somewhere between these two extremes the truth may be found. Be that as it may, the complaining husband knowingly provided conditions and supplied the instrumentalities in which the conduct and vices he now decries had birth or flourished.

Delta Queen was not acquired in consequence of any homemaking mission by Dill; nor was Margaret placed in charge of the club's sales, its accommodations, and its forms of amusement, merely as a means of promoting domestic tranquillity. When Dill chose to gamble in the forum he purchased, and when like diversions were sought elsewhere, he willingly entrusted to his wife full fellowship in meeting and serving all comers to Delta Queen; and if, as a wife, she is deficient, that delinquency was knowingly contributed to, in whatever form it occurred.

That part of the decree dealing with the divorce and custody of the children is reversed. The order granting appellee a divorce is set aside and the denial of appellant's prayer for divorce on cross appeal is affirmed. Custody of the children is given the mother with the right of visitation by the father at all reasonable times. The alimony allowance of $50 per month and an attorney's fee are affirmed; but, in addition, the monthly sums of $50 for each of Dill's three children are to be paid to Mrs. Dill for their maintenance, until such time as the principals compose their differences; or until, in a supplementary proceeding, the Chancellor is convinced that appellee's financial condition requires reconsideration of the awards aggregating $200 per month. It is so ordered.

ANDERSON *v.* BURFORD.

4-7766 190 S. W. 2d 961

Opinion delivered December 3, 1945.

Rehearing denied January 7, 1946.

[redacted]

Arthur D. Chavis, for appellant.

Rowell, Rowell & Dickey, for appellee.

HOLT, J. Appellants own lot 16 in block 9 in Ringler's Addition to the city of Pine Bluff, Arkansas, and appellee owns lot 15 which borders lot 16 on the south, and also lot 14 immediately south of and adjoining lot 15. Lot 15 was approximately 50 feet wide and 146 feet long. On December 14, 1931, appellee, E. G. Burford, conveyed by warranty deed, the north 43 feet of lot 15 to appellants by metes and bounds description. At the time of this conveyance, there was a fence, extending the entire length, on what appeared to be the south boundary line of said 43 feet purchased by appellants. This fence has remained there continuously since; however, it was not on the true line at the time of the sale to appellants, but was located about 10 feet north of the south line of the said 43 feet, so that appellants had within their fence and enclosed only 33 feet of the 43 feet described in appellee's deed to them.

This litigation involves the title to the 10-foot strip of land, *supra,* and appellants on September 27, 1944, sued, asserting title and the right to possession. Appellee answered with a general denial and pleaded adverse possession for a period of approximately 14 years and laches. The trial court found the issues in favor of appellee and this appeal followed.

It appears that appellee has at all times, for a period of more than 13 years, asserted claim to this strip of land. He kept it enclosed by a fence, received rent from a tenant for its use as a driveway and placed a gate at the east end of this strip.

Appellant testified: "How long have you lived there? A. I have lived there thirteen years. Q. And you bought that lot from Mr. Burford? A. Yes, sir. Q. Was the fence there when you bought from Mr. Burford? A. Yes, sir. Q. About where it is now? A. Yes, sir. Q. Was there a fence around the place when you bought it from Mr. Burford? A. Yes, sir. Q. That's the part that's fenced now? A. Yes, sir. . . . Q. How much have you got enclosed by this fence, north and south? A. Thirty feet and eight inches. . . . Q. When you bought the lot from Mr. Burford, did you think the fence was on the line? A. Yes, sir, I sure did. . . . A. He never did say anything about the line to me, no, sir."

Both appellants and appellee thought the fence was on the dividing line or true line, where it has remained undisturbed for more than 13 years.

In these circumstances, we think that appellee's occupancy ripened into a title to the property in controversy by adverse possession for the statutory period.

Appellants argue that although appellee, the grantor of the strip of land in question, has remained in possession and has continued occupancy since his deed to appellants, there is a presumption that he has done so in recognition of their rights and in subordination to the title he has conveyed and not in hostility thereto. While this would ordinarily be true, there is an exception into which the case falls.

The general rule, which is recognized by this court in a case such as this is stated in 2 C. J. S., p. 824, § 216 f. "Occupancy by the grantor of realty obsolutely conveyed is generally presumed to be in subordination to the rights of the grantee. The presumption is not continuing, however, and its probative force diminishes with the lapse of time and with long continued possession may cease to exist. So the presumption may be rebutted by proof that the possession was adverse and that the grantee knew it." A number of Arkansas cases are cited in support of the text. In one of these cited cases, *Tegarden* v. *Hurst,* 123 Ark. 354, 185 S. W. 463, this court said: "We are also of the opinion that the evidence shows very clearly an intention on the part of Hurst to hold the land in hostility to any other claim, and that even if there was no right to reformation that Hurst's occupancy ripened into a title by adverse possession for the statutory period. On that branch of the case, the defendants invoke the doctrine that where a grantor remains in possession, there is a presumption that he does so in subordination to the title he has granted, and not in hostility thereto. While that is true, there is an exception where the occupancy continues unexplained for an unreasonable length of time and under those circumstances, the presumption is gradually overcome by lapse of time. *American Building & Loan Association* v. *Warren,* 101 Ark. 163, 141 S. W. 765. The fact that Hurst remained in undisputed possession of the land, openly and notoriously, for a period of fourteen years is sufficient to overcome the presumption that he was holding in subordination to his original grant. Such occupancy was, under the circumstances, sufficient notice to Tegarden as to the hostility of the possession," and in the more recent case of *Davis* v. *Burford,* 197 Ark. 965, 125 S. W. 2d 789, we said: "While it is true, as we have held, that where the grantor of land remains in possession, there is a presumption that he holds in subordination to his grantee, it is also true that such presumption fades away with the lapse of time where his occupancy is unexplained. *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; *Tegarden* v. *Hurst,* 123 Ark.

354, 185 S. W. 463; *Shelby* v. *Shelby,* 182 Ark. 881, 32 S. W. 2d 1071. In the Tegarden case 14 years' possession was held sufficient, and in the Shelby case 17 years. Here Cross held possession for 23 years and is still in possession." See, also, *St. Louis Southwestern Railway Company* v. *Fulkerson,* 177 Ark. 723, 7 S. W. 2d 789.

So here, since it appears that appellee has claimed and occupied this property openly and adversely for the statutory period, his occupancy has ripened into title, and the decree should be, and is affirmed.

STATE, EX REL COMMISSIONER OF REVENUES, *v.* HOLLIS & COMPANY.

4-7729 190 S. W. 2d 986

Opinion delivered December 10, 1945.

O. T. Ward and *R. S. Wilson,* for appellant.

Buzbee, Harrison & Wright, for appellee.

McHaney, J. Appellee is an Arkansas corporation with its principal office and place of business in Little Rock. It also owns and operates a branch store or place of business in Shreveport, Louisiana, having complied with the laws of that State relating to foreign corporations, § 1246 *et seq.*, Louisiana General Statutes, Annotated, 1939. It brought this action to enjoin appellant, Commissioner of Revenues, from attempting to collect from it an asserted demand for taxes on sales made by it from its Shreveport, Louisiana, store to purchasers in the State of Arkansas. It charged that the demand was illegal because all the sales upon which appellant claims a tax should be paid were sales made to Arkansas purchasers by its Shreveport store, all of which articles of sales were delivered to common carriers at Shreveport, consigned to purchasers and shipped in interstate commerce, and that the imposition of the tax demanded thereon would be in violation of § 8, Art. I of the U. S. Constitution, and of the equal protection clause of the 14th Amendment to said constitution.

Appellant answered admitting the demand and asserting that, because appellee maintains a place of business in Arkansas, it is liable for the sales tax on sales of merchandise made to purchasers in Arkansas, regardless of whether, in negotiating said sales, the orders were directed to appellee's place of business in Shreveport and regardless of whether such sales were consummated by acceptance of said orders in Shreveport, and by delivering merchandise so purchased to a common carrier in Shreveport, consigned directly to the purchasers in Arkansas.

The undisputed facts disclose that the Shreveport store of appellee is operated separately and independently of its Little Rock store; that the sales tax here demanded is based wholly on sales made by the Shreveport store to customers in Arkansas; that when orders for merchandise were received by the Shreveport store, it was there determined whether such orders would be accepted and the merchandise shipped, which depended

on the customer's credit and whether the goods ordered were in stock; that in some cases orders were declined; that all of the sales were consigned to customers in Arkansas and delivered to carriers in Shreveport on open bills of lading; that all sales were paid for at the Shreveport store; that said store employed traveling salesmen to take orders from Arkansas customers, who, during the period here involved, took orders for merchandise from Arkansas customers in the sum of $76,613.80; and that, during the same period, the amount of sales on orders received by mail, wire or telephone from Arkansas customers was $50,820.53. In a few instances, where the Shreveport store did not have the goods so ordered, such orders were sent to the Little Rock store and filled from that store, the total amount of such sales being $255.38. It was conceded the appellee owed the tax and penalty on this amount in the sum of $5.62 which it paid.

Trial resulted in a decree holding that all sales upon which appellant seeks to impose a tax against appellee, other than those mentioned next above, were sales, or transactions in interstate commerce and not subject to sales tax in Arkansas, and appellant was enjoined from attempting to collect said tax. This appeal followed.

The tax sought to be collected by appellant is based on Act 386 of 1941, p. 1056, the short title of which is "The Arkansas Gross Receipts Act of 1941." It is a sales tax and not a use tax act, and has been so treated by this court in all cases subsequent to its enactment. See *McLeod, Commissioner,* v. *J. E. Dilworth et al.,* 205 Ark. 780, 171 S. W. 2d 62.

We think this case is ruled in all respects adversely to appellant's contentions by the Dilworth case, *supra,* which was affirmed by the U. S. Supreme Court. *McLeod, Commissioner of Revenues,* v. *Dilworth,* 322 U. S. 327, 64 Sup. Ct. Rep. 1023, 88 L. Ed. 1304. We there pointed out the distinction between that case and the case of *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876, on which latter case appellant in the case at bar relies, in the

following language: "The distinguishing point between the Berwind-White Coal case and the cases at bar is that in the Berwind-White Coal case the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City; whereas, in the cases at bar, the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey. The rule still obtains that, in cases of this type, delivery to the carrier is delivery to consignee. We hold that the Berwind-White Coal case affords the appellant no ground for asking an overruling by this court of *Mann* v. *McCarroll.*"

So here, appellee's Shreveport store operated only in Shreveport. It did not make any contracts or actual deliveries in Arkansas. On the contrary, just as in the Dilworth case, the branch or store is in Louisiana, the sales were made in Louisiana, and the deliveries were consummated either in Louisiana or in interstate commerce with no interruption from Louisiana until delivery to the consignees essential to complete the interstate journey.

It is true that appellee owns and operates a store in Little Rock and that it is an Arkansas corporation. But the undisputed facts show that the Little Rock store had nothing whatsoever to do with the sales of merchandise here involved. The tax is laid upon the sales and not upon the company or person making the sales. The sales here involved were made in Louisiana where the transfer of ownership took place. As said by the U. S. Supreme Court, in affirming our decision in the Dilworth case, "In Berwind-White the Pennsylvania seller completed his sales in New York; and in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to

impose a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction.''

The citizenship of the seller is not controlling in determining whether a sale is taxable. It is the situs of the sale that controls. If the sale as here is consummated in Louisiana by a citizen of Arkansas to an Arkansas citizen, it is not taxable in Arkansas under our sales tax law, whereas, it might be taxable here, if we had a use tax law. See *Mann* v. *McCarroll, Com. of Rev.*, 198 Ark. 628, 130 S. W. 2d 721, where Mann and others had bought merchandise, machinery, etc., in other states and the right to collect a sales tax thereon was denied under Act 154 of 1937. Also, § 2 (c) of Act 386 of 1941.

There is no claim on the part of appellant that the establishment of the Shreveport store by appellee was a mere subterfuge to avoid the payment of taxes on sales made to Arkansas customers, nor is there any evidence in the record that such is the fact.

On the facts presented the decree is correct and is accordingly affirmed.

GABLER *v.* GABLER

4-7770 190 S. W. 2d 975

Opinion delivered December 10, 1945.

Ernest Briner, for appellant.

Jay M. Rowland, for appellee.

McFaddin, J. This is a divorce suit; and is the second attempt by the husband to obtain a divorce in Arkansas on the ground of three years separation (seventh subdivision of § 4381, Pope's Digest as amended by Act 20 of 1939). There is no occasion to recite the history and result of the first attempt; because we base our holding, here, on the lack of corroborative evidence in this case.

The present suit was filed in the Garland chancery court in June, 1944; and, as ground for divorce, the plaintiff (appellee here) alleged: "That he and the defendant were married in 1918 at Highland, Wisconsin, and that the plaintiff and defendant have been living separate and apart without cohabitation for more than three years next before the filing of this complaint." To this complaint, the wife (appellant here, and a resident of Indiana) filed answer, *inter alia,* denying three years separation without cohabitation. She also sought suit money and alimony. The trial in the Garland chancery court resulted in a decree granting the husband a divorce and

denying the wife's plea for alimony. This appeal challenges that decree.

I. *Corroboration.* In 20 C. J. S. 238, this is defined: ". . . in a legal sense as something which leads an impartial and reasonable mind to believe that material testimony is true; testimony of some substantial fact or circumstance independent of the statement of a witness."

In *Sutherland* v. *Sutherland,* 188 Ark. 955, 68 S. W. 2d 1022, Chief Justice JOHNSON said: "It is the established doctrine in this State that a divorce decree will not be granted upon the uncorroborated testimony of one of the parties. *Darrow* v. *Darrow,* 122 Ark. 346, 183 S. W. 746; *Johnson* v. *Johnson,* 122 Ark. 276, 182 S. W. 897; *Arnold* v. *Arnold,* 115 Ark. 32, 170 S. W. 486; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Rie* v. *Rie,* 34 Ark. 37."

In 17 Am. Juris. 338, in discussing the sufficiency of corroboration in divorce cases, it is stated: "It is difficult to lay down a general rule as to what corroboration is required in a divorce case. . . . The general rule is more significantly stated that where a particular fact or circumstance is vital to the complainant's case, some evidence of the same, in addition to the complainant's testimony, will be required. If an essential fact is difficult of proof, corroboration may be sufficient though weak. The corroboration must, of course, relate to material testimony and must be something of probative weight. Evidence which is hearsay or irrelevant is insufficient."

See, also, Annotation in 65 A. L. R. 169 on the character and sufficiency of evidence required to corroborate testimony of plaintiff in divorce suit.

With the foregoing principles in mind, we come to the evidence in this case. All of the husband's testimony on the ground of divorce is found in the following: "Q. When and where were you and the defendant married? A. On March 18, 1918, at Highland, Wisconsin. Q. You lived together until when? A. Until January 1,

1931. Q. Have you been living separate and apart without cohabitation since that time? A. We have. Q. That is more than three years next before the filing of this suit that you have been living separate and apart without cohabitation? A. Yes, sir."

E. C. Shelton was the only corroborative witness; and his entire testimony is as follows: "Q. Your name is E. Carroll Shelton? A. That's right. Q. Where do you live? A. 133 Garland Avenue. Q. What is your occupation? A. Deputy Collector of Internal Revenue. Q. Are you acquainted with Mr. Arthur L. Gabler? A. I am. Q. How long have you known Mr. Gabler? A. About six years. Q. Where did you first become acquainted with him? A. In Little Rock, Arkansas, when we were both employed by the Farm Security Administration. Q. Have you ever met or seen Mrs. Ella R. Gabler? A. I have not. Q. During the time that you have known Mr. Gabler, he has not been living or cohabiting with Mrs. Ella R. Gabler? A. Not so far as I know. Q. Do you know whether or not Mr. Gabler has been residing in Hot Springs, Arkansas, for the past few months? A. Yes. Q. You have seen him here frequently during that time? A. Yes. Q. Do you know what his street address is here? A. No, I do not. Q. Do you know if he lives up at the Mattar Apts.? A. I have seen him in that neighborhood and between there and the Farm Security Office. Q. His work makes it necessary for him to go out of town frequently? A. Yes."

When we take into consideration: (1) that the witness did not know the appellant; (2) that the witness did not know where the appellee resided; (3) that the witness admitted that the appellee was away from Hot Springs on frequent trips; and (4) that when asked if the appellee had been living or cohabiting with the appellant, he answered "not so far as I know"—when we weigh this evidence as we do in chancery appeals—we reach the conclusion that the witness failed to corroborate the appellee on the material and essential point of three years separation without cohabitation. Since there was no corroboration, the divorce should have been denied.

II. *Alimony and Suit Money.* Notwithstanding the denial of the divorce, the chancery court had jurisdiction, and we have on appeal, to award suit money and alimony to the wife. *Tarr* v. *Tarr,* 207 Ark. 622, 182 S. W. 2d 348; *McDougal* v. *McDougal,* 205 Ark. 945, 171 S. W. 2d 942. Before filing her answer, the wife filed a petition for suit money, attorney's fee, and maintenance. The chancery court granted $50 attorney's fee and $15 suit money, but reserved the question of maintenance until final decree: at which time alimony was denied. In this court, the wife renews her request for alimony, and also asks for additional suit money and attorney's fee. The suit money items are covered in the costs in this case, and we now allow a reasonable attorney's fee in this court, which we fix at $100, in addition to the $50 allowed by the chancery court.

There remains the question of alimony: which was denied by the chancery court, but which we think should have been granted. It was shown: that the husband earned approximately $6,000 per year; that the wife was a woman 53 years of age; that she was compelled to work daily for her living, and had no source of income except from her own work; that she was in need of financial assistance from her husband; and that her house rent and utilities totalled $44 per month. On this showing, we think the chancery court should have made the wife an award of alimony at the rate of $50 per month from January 9, 1945 (the date of such showing), and to continue until otherwise ordered. We make that order here; and this is without prejudice to either party to apply to the Garland chancery court for change of amount upon proper application and showing.

It follows that the decree of the Garland chancery court awarding a divorce to the appellee is reversed, and the appellee's action for divorce is dismissed; that the appellant have judgment here for all costs in the lower court and this court, and for an attorney's fee of $100 in this court in addition to that allowed in the lower court; that the appellant's prayer for alimony is remanded to the Garland chancery court with directions to

enter a decree awarding appellant judgment for alimony at the rate of $50 per month from January 9, 1945; and that the said alimony continue at that rate each month until changed by the Garland chancery court upon proper application and showing.

MARTIN *v.* WINSTON.

4-7730 190 S. W. 2d 962

Opinion delivered December 10, 1945.

Rehearing denied January 7, 1946.

Taylor Roberts, for appellant.

Henry Donham and *John F. Park,* for appellee.

GRIFFIN SMITH, Chief Justice. A strip of ground along part of the north side of Lot Seven[1] is claimed by Vaughan Winston and his wife because, as he says, it has been adversely used as a driveway for more than the time necessary for the easement to ripen into title by prescrip-

[1] Legal description is Lot Seven, Block Five, C. S. Stifft's Addition to the City of Little Rock.

tion. The Winstons owned Lot Six, which is equal in size to and lies immediately north of Lot Seven.

In their complaint the Winstons concede that George R. Martin and his wife are owners of Lot Seven. Serving Lot Six there is a driveway leading to Rosetta Street. This was used by the Winstons in reaching their garage at the rear of the property. Suit was commenced when the Winstons sought to enjoin the Martins from erecting a stone wall ". . . running from the front of defendant's property . . . west, along the north side of [the Martin] property to the back . . ." It was then alleged that if the wall should be erected "it would destroy for any further use about a foot and a half of the south side of said driveway next to defendant's property and would leave less than six feet of driveway . . ."

In addition to these allegations it was stipulated that the proposed wall would be located wholly on Lot Seven, and "plaintiffs do not dispute the correctness of the survey."

Vaughan Winston's testimony is that in 1937 he purchased Lot Six from W. A. Jackson. At that time Lot Seven was vacant. When Winston bought, a driveway south of the residence on Lot Six was being used. It was graveled, and there was a ditch on the south side. Street curbing had been cut as a means of ingress. In 1941 Jack Tucker owned Lot Seven, and during that year built a house on it. While the residence was being erected, or soon thereafter, Winston talked with Jackson regarding the driveway, and "If Jackson claimed any part of the [strip in question] he didn't do anything to gain possession." "But," said the witness, "Tucker had to tear down part of the house foundation, and [I] told him [I] would continue to use the driveway as my right until stopped."

After Tucker completed the residence, Kenneth Satterfield occupied it, but did not claim the driveway was on Lot Seven.

On cross-examination Winston first testified he had always "felt" that the easement was on his land, adding,

"There never was any doubt in my mind that it was a part of my property."

There is this significant testimony by Winston: "Q. Until Tucker started building . . . it did not occur to you that the driveway was not on Lot Six—is that right? A. Absolutely. Q. And that's the reason you were claiming it as yours? A. Yes, sir."

Jackson testified he used the driveway because he thought it was a part of Lot Six; *nor did he intend to sell the Winstons anything not embraced within the boundaries of Lot Six.*

About the time Tucker began building, Mrs. Winston asked if Lot Seven was for sale or if a part of it could be bought. Her explanation was that the improvements "might obstruct their driveway."

We do not think the testimony of Jackson, who owned Lot Six from 1926 until 1937, is sufficient to sustain a holding that he was claiming the property irrespective of the true line and actual ownership. In his deposition Jackson affirms that the driveway "was there" when he bought the property; and, while he says he used it "as a matter of right," and not permissively, support for that right, as he saw it, was a belief that Lot Six embraced the wider area. In effect there is a concession that if the legal description did not extend as far south as the Winstons would now have it, it was not his (Jackson's) intention to sell the strip. This witness was asked by cross-interrogatory (a) if he thought the driveway was [wholly] on Lot Six; (b) whether he thought he had a right to use it, "even though not on your property," and (c) "[Was it] your desire to appropriate some other person's property for your own use and benefit?" Answers to (a) and (b) were "Yes"; to (c), "No."

Likewise, appellees disclaim a purpose to appropriate something not theirs. They only contend for affirmance because, believing the driveway to be entirely on Lot Six, a purchase followed. Jackson did not personally or by agent point to boundaries. The plat shows each

lot to be 50 x 140 feet. There is nothing in the record indicating that surveys were confused, or that corners could not be ascertained.

We have two lines of decisions in respect of which the analogy of law and fact is pertinent. The case at bar touches a borderline of each. On the one hand there are results like those reached in *Murdock* v. *Stillman,* 72 Ark. 498, 82 S. W. 834; *Goodwin* v. *Garibaldi,* 83 Ark. 74, 102 S. W. 706; *Couch* v. *Adams,* 111 Ark. 604, 164 S. W. 728, and *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489, where it was said that if, through mistake, one takes possession of adjacent lands, intending to claim only to the true boundary, the act is not adverse. On the other hand, it was said in *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444, that if a landowner, acting under a mistake as to the true boundary, takes possession believing the property to be his own, the act is adverse. In the Shirey-Whitlow opinion Mr. Justice RIDDICK cited *Wilson* v. *Hunter,* 59 Ark. 626, 28 S. W. 419, 43 Am. St. Rep. 63; 1 Cyc. 1037: ". . . but this would not be so if [the non-owner's] intention was to claim only to the true line, wherever that may be, for then the possession would not be adverse beyond that line."

In *Smart* v. *Murphy,* 200 Ark. 406, 139 S. W. 2d 33, Mr. Justice MEHAFFY, defining for the Court some of the essentials of adverse possession, quoted from a text on page 793, v. 1, § 2, American Jurisprudence: ". . . [Adverse possession] is commenced in wrong and is maintained in right."

Mr. Justice BATTLE's opinion in the Wilson-Hunter case states the law to be that "No right or title can be gained against the owner by mere possession." In order that an action by the record owner may be barred, says Judge BATTLE, ". . . the possession must be actual, open, continuous, hostile, exclusive, and be accompanied by an intent to hold adversely and 'in derogation of' and not in 'conformity with' the rights of the true owner." Thus (quoting from *Alexander* v. *Wheeler,* 69 Ala. 340), "[If one intends] to claim . . . only to the real or

true boundary line, . . . such possession would not be adverse or hostile to the true owner."

A witness named Newman testified that as driver of a candy truck he frequently "parked" on Lot Seven. This practice continued over a period of years, preceding the building of a residence on the property. No objection was made by either of the Winstons when Newman used the driveway, nor did anyone else complain.

While in no sense conclusive of an original, a continuing, or a subsequent intent to hold adversely, nevertheless purchase proposals by Mrs. Winston, or overtures seemingly having that purpose in view (made before use by the Winstons had continued for seven years), were circumstances postulating that when Tucker began building in 1941 the hostile attitude subsequently asserted by the owners of Lot Six did not exist. Mr. Justice RIDDICK held in the Shirey-Whitlow case that evidence of this nature is admissible, although he was dealing with the defendant's recognition of rights inferentially acknowledged after the statutory period had run.

With the exception of litigation arising through claims of public easement or right of way, most adverse possession litigation arises because landowners in rural areas do not at the time object to what is later asserted to be an encroachment.

In the case at bar the evidence is unsatisfactory regarding extent to which the driveway was defined, although admittedly it was partially graveled. Its constant width was not precisely given, although in general terms the distance south of the Winston residence is spoken of as seven and a half feet.

We think that Vaughan Winston's testimony, and evidence in his behalf, satisfies this proposition: that Jackson, without intending to infringe upon the property of his neighbor, but acting at a time when use of the land did not offend the true owner, curved the course of his driveway; but by this conduct there was no conscious or subconscious intent to "raise the flag of claim," or to

commit an improper act. When the Winstons purchased, they merely presumed that the driveway was on Lot Six; and, continuing to utilize it in this manner, no adverse design was entertained until 1941. It is true one of the appellees testified that use made of the property was "as a matter of right," and there were other similar expressions. All these must be read in connection with the particular circumstance, with other testimony by the same witness, with relationship of the parties, and then compared with what they did and said. Our conclusion is that the so-called hostile notice to appellants and their predecessors in title (if in fact the result now sought was ever contemplated) was not actual in the sense that it gave information; and the acts were not of a nature to give constructive warning.

The decree is reversed. The cause is remanded with directions to dissolve the injunction.

LeCroy *v.* Sigman.

4-7751 191 S. W. 2d 461

Opinion delivered December 10, 1945.

Rehearing denied January 21, 1946.

C. T. Cotham and *Curtis L. Ridgway,* for appellant.

A. T. Davies, Bessie N. Florence and *Scott Wood,* for appellee.

HOLT, J. J. K. LeCroy, September 5, 1940, brought suit against Elzie W. Sigman to restrain Sigman from closing an alleged alley fronting approximately 25 feet on Olive Street and extending south approximately 80 feet, and widening to about 30 or 35 feet at its south end, along the east side of that portion of lot 6, block 56, in Hot Springs, owned by Sigman. That part of lot 6 which Sigman owned was 80 feet wide fronting Central Avenue and 140 feet on Olive Street which included the alley way in controversy.

Appellant, B. L. Riggs, owned the remaining 54 feet of lot 6 fronting on Olive Street on which was erected a stone garage extending the full length of the alleged alley way, the west wall of said garage constituting what was claimed to be the east boundary of said alley. The

south end of the alley is inclosed by a fence and just west of this fence is a 12 foot gate which is on the line of lot 5, owned by J. K. LeCroy. Lot 5 adjoins lot 6 on the south and fronts 70 feet on Central Avenue.

J. K. LeCroy alleged in his complaint in substance that he and other property owners bordering said alleged alley, together with the public, had used it for more than seven years openly and adversely prior to the filing of this suit and that said usage has ripened into an easement in said alley as a means of ingress and egress.

Sigman's answer was a general denial and contained the further defense that the use of the alleged alley was permissive and not adverse and that appellants acquired no rights therein. A temporary restraining order was granted September 5, 1940. While this temporary order was in effect, both J. K. LeCroy and Elzie W. Sigman died sometime in 1943, and thereafter on May 16, 1944, the cause was revived in the name of Rosa E. LeCroy, widow of J. K. LeCroy, as plaintiff and owner below and one of the appellants here, and Mary I. Sigman, widow of Elzie W. Sigman, defendant and owner below and appellee here. May 16, 1944, Mary I. Sigman, appellee, filed motion to vacate the temporary injunction, *supra,* granted September 5, 1940.

June 27, 1944, appellant, Byron L. Riggs, intervened and alleged that on November 27, 1943, he purchased the stone garage, *supra,* fronting 54 feet on Olive Street and in effect adopted all allegations set out in the original complaint filed by J. K. LeCroy, and say appellants, Rosa E. LeCroy and Byron L. Riggs: "Both claim a legal right to the use of the alley because it has been open and dedicated to the public for a period of time ranging from at least seven years up to as much as forty years. It is not claimed and has never been claimed by either plaintiff or intervener that they have title to this alley through deed, but rather they claim the right to the use of same by prescription and by adverse possession for a period of time required by law to perfect their

right to an easement over and through said alley or way."

On the same day that this intervention was filed, appellant, Rosa E. LeCroy, filed an amended complaint in which she alleged that in June, 1942, about two years subsequent to the granting of the temporary injunction, *supra,* her husband, Elzie W. Sigman, and J. K. LeCroy made a settlement of the west boundary line of the alleged alley which was binding on appellee.

Appellee's answer to this amended complaint was a general denial.

The cause was heard by the trial court June 27, 1944. The testimony presented by the parties was voluminous. It covers approximately 274 pages of a record containing 323 pages. At the conclusion of the trial, the court made the following findings of fact: "(1) Prior to the fire of 1905, the owners of the lots which are now owned by Rosa E. LeCroy and by Byron L. Riggs, respectively, did not claim or use a way across the lot that is now owned by the defendant, Mary I. Sigman. (2) In February, 1905, there was a general conflagration in the area of the properties in controversy, which burned all of the improvements in the entire block where said property is situated. After the 1905 fire, the lot which is now owned by the defendant was purchased by the Central Methodist Church South, and a church building was erected thereon, which covered nearly the entire area of the lot which now is owned by Mrs. Sigman. There was another general fire in that area, which occurred on the 5th day of September, 1913, which burned all of the buildings in block 56. (3) The east wall of the church was on the space that the plaintiff and intervener are now claiming as an alley. (4) After the said second fire, a filling station was erected on the said property that is now owned by the defendant. The building on the plaintiff's property was erected about the year 1927. (5) From the time that the erection of the building on the plaintiff's property was started until the present time, the plaintiff, her tenants, the plaintiff's customers, and customers of her

tenants have driven across all of the unoccupied portion of the lot that is now owned by the defendant. (6) The said use of the defendant's lot was not confined to the fifteen feet at the east end thereof, but included the entire unused portion of the defendant's lot. (7) Those who used the unoccupied portion of the defendant's property drove across it to the rear end of the plaintiff's building in the most direct and convenient way. (8) Prior to the said use of the defendant's lot, which began about 1927, the owner of the lot which now belongs to the plaintiff did not use or claim any way across the lot which now belongs to the defendant. (9) Prior to the 1905 fire, Henry Fellheimer and his tenants used a private way across the lot which then belonged to Henry Fellheimer's wife, Fannie Fellheimer, which way ran from Olive Street to the rear of Henry Fellheimer's property, part of Henry Fellheimer's said property being the lot that is now owned by the plaintiff. The way that was used by Mr. Fellheimer and his tenants was east of the lot that is now owned by the defendant. (10). The owners of the lot that is now owned by the defendant never at any time objected to having the LeCroys and their tenants drive across the unused portion of their lot, and there was no notice that the LeCroys or their tenants were claiming the right to drive across the defendant's lot. (11) The tenants of the lot that is now owned by the intervener also used the unoccupied portion of the Sigman lot for the purpose of working on trucks, tractors, etc., but no notice was given to Mr. or Mrs. Sigman that such use of the back end of their lot was under claim of right, or that it was adverse to the defendant's title. (12) The deed from Henry Fellheimer, under which the LeCroys claim title, did not mention any way or alley as being appurtenant to the lot that was conveyed. This deed did not mention any way or alley at all. (13) In all of the deeds that are in the defendant's chain of title, the property was described by metes and bounds, which included the land over which the plaintiff is claiming a right of way. All of these deeds were general warranty deeds which did not except any way or easement, and did not

mention any burden on the property whatever. (14) The defendant's property was under lease down to the year 1934, and this suit was filed in 1940. (15) There was never any public alley, way, or easement at the point where the plaintiffs are claiming a right of way. The Sanborn map of block 56 and the picture of the church that were put in evidence both show that there was no alley where plaintiff is claiming an alley to be. The Mitchell map of the city of Hot Springs which was introduced in evidence shows that there was no alley there."

Thereafter, on January 23, 1945, a decree was entered holding that neither of the appellants "owned any right of way or easement in said land; that such use was permissive and not adverse; that such did not give to the plaintiff, Rosa E. LeCroy, or the original plaintiff, J. K. LeCroy, or to the intervener or his grantor any right of way or easement in the defendant's land; that the defendant and the original defendant had the right to put an end to such use," and dismissed the complaint of appellant, Rosa E. LeCroy, and the intervention of B. L. Riggs for want of equity, and dissolved and canceled the temporary restraining order, *supra*.

This appeal followed.

In short, the issues presented are: (1) Was the use of the alleged alley in question permissive only, as contended by appellee, or was its use "adverse, hostile and as a matter of right" as contended by appellants? (2) Was there an agreement and settlement of the west boundary line of the alley in the lifetime of the original parties to this litigation, J. K. LeCroy and Elzie W. Sigman, and is appellee estopped to deny appellants' claim of an easement?

Both issues turn on a question of fact. While we try the case *de novo*, we must affirm unless it appears that the findings and decree of the trial court were against the preponderance of the testimony.

(1) On the first proposition, it could serve no useful purpose, and we do not attempt, to detail the testi-

mony. We have reviewed the testimony and are unable to say that the preponderance thereof does not support the decree. The effect of the testimony as a whole, we think, supports the trial court's findings upon which the decree was based, and that is that appellants' use was permissive and not adverse.

The facts here disclose that block 56 is approximately 420 feet from north to south, that this alley fronting on Olive Street extends south approximately 80 feet where it comes to a dead end. It has never been paved and is not inclosed. The great preponderance of the testimony, if not the undisputed testimony, is that this alley was never platted or dedicated to the city for public use and the city has never claimed it. Appellants make no claim to it by grant or deed. It is conceded that appellee's deed covers this alleged alley. The alley is of irregular width. It varies from 20 to more than 30 feet. There is no evidence that the owners of adjoining buildings set their buildings back or made any allowance for this alleged alley. While it is true that the evidence shows that the employees of appellant, Riggs, were using this alley way as a matter of convenience for repairing tractors and trucks and the occupants of other business houses facing Central Avenue drove over it and through a 12 foot gate west of the south end of the alley into the rear of the LeCroy lot, the preponderance of the evidence shows that such use, though for more than seven years, was not under any claim of right or adverse to the title of appellee nor such as would put appellee on notice that such use of the way was under such claim and hostile to her ownership.

In these circumstances, we think that the rule announced in the case of *Boullioun* v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986, is controlling here. There this court said: "During all this time, as well as now, the lands were uninclosed, and we do not think it was the duty of the owner, in order to preserve his title intact, to be continuously on his guard or to forbid his neighbors from using the property for their convenience. A num-

ber of cases are cited in the 5th note to § 39, 9 R. C. L., chapter on Easements, which support this view, and the rule that the use of uninclosed lands for passage is to be presumed permissive and not adverse is stated to be that supported by the weight of authority and based on the fact that it is not the custom in this country, or the habit of the people, to object to persons enjoying such privilege until there is a desire to inclose. Were the rule otherwise, there would be but few vacant lots in our cities and towns and uninclosed property in the country which might not be burdened by easements of passageways, as it is a matter of common knowledge that by the indulgence and good nature of the owners people are allowed to go across these uninclosed properties at will and until such time as the owners may desire to inclose them. . . . Where the easement enjoyed is across property that is uninclosed, it will be deemed to be by permission of the owner, and not to be adverse to his title," and quoting headnote 2, we held: "To acquire a private way by prescription, the evidence must show a continuous use of a definite way for seven years, under a claim of right known and assented to by the owner of the land."

This case was quoted from with approval by this court in *Bridwell* v. *Arkansas Power & Light Company,* 191 Ark. 227, 85 S. W. 2d 712.

In 17 American Jurisprudence, page 980, § 71, the text writer states the rule in this language: "The prevailing principle seems to be that while a way may be acquired by user or prescription by one person over the uninclosed land of another, mere use of the way for the required time is not, as a general rule, sufficient to give rise to the presumption of a grant. Hence, generally some circumstance or act, in addition to, or in connection with, the use of the way, tending to indicate that the use of the way was not merely permissive is required to establish a right by prescription." See, also, *Martin* v. *Winston, ante,* p. 464, 190 S. W. 2d 962.

(2) We think the contentions made by appellants in the second proposition, *supra,* are untenable and not supported by the preponderance of the testimony. As to an alleged settlement of the boundary line between the original parties approximately two years after the temporary injunction was obtained in 1940, there is evidence that Elzie W. Sigman erected a building on the east end of his property, the east wall built of tile being in the alley way in question, about 15 feet from the west wall of the stone garage building of Riggs; that before he erected this building, he had a conversation with J. K. LeCroy which was overheard by two or three witnesses, in which it appears that Sigman asked LeCroy if it would be all right to place the tile wall to his proposed building on a certain line, pointing it out, that LeCroy said it would be entirely satisfactory. This conversation took place while the temporary injunction was in full force and effect. It appears that Mr. Sigman had consulted his attorney about closing the alley and was advised that while the temporary injunction was in effect, Mr. LeCroy could not be denied egress and ingress to his property, that Mr. Sigman claimed all the alley and the right to build on it, but being in immediate need of the building, he placed the east wall where there would be no complaint from LeCroy that he was violating the injunction. This being the effect of the testimony as we view it, it falls far short of an agreement or settlement of the west boundary line of this alley.

On the question of estoppel, we think little need be said. We find no evidence that any of the buildings on this alley way were erected with reference to the creation and establishment of this alleged alley. In fact, the stone garage built by Riggs' predecessor in title, the west wall of which forms the east line of the alley in question for its entire length, covers all of Riggs' lot contained in his grant. In other words, when this stone garage was built, it covered Riggs' entire lot, the west wall being at appellee's (Mrs. Sigman's) east line, with no allowance for an alley. What we have said above on the first contention of appellants applies with equal force here. Appellee

had not been put on notice of any adverse or hostile claims of appellants or anyone else to the alley way and, therefore, cannot be held to be estopped.

A great many cases are cited by appellants in support of their contentions; however, we think all are clearly differentiated on the governing facts.

Finding no error, the decree is affirmed.

JENSEN *v.* FORDYCE BATH HOUSE.

4-7771 190 S. W. 2d 977

Opinion delivered December 10, 1945.

Jay M. Rowland, for appellant.

Wootton, Land & Matthews, for appellee.

MILLWEE, J. This is a suit by appellee, Fordyce Bath House, to restrain the collection of personal property taxes charged against it upon the tax books of Garland county for the year 1931. The cause was submitted to the trial court upon the pleadings and the following agreed statement of facts:

"1. That the plaintiff is a partnership consisting of Lillian P. Fordyce, Edward W. Fordyce, Downs L. Fordyce, Ruth Fordyce, and Samuel W. Fordyce, III, copartners doing business as the Fordyce Bath House in the City of Hot Springs, Arkansas.

"2. That Fordyce Bath House, a corporation, was dissolved on February 2, 1942, and that the business has thereafter been conducted by said partnership.

"3. That the Levying Court of Garland county, Arkansas, met pursuant to law in 1931, and included among its proceedings was the following resolution: 'That this court levy a .0087 mill tax for State purposes for 1931, payable in 1932.'

"4. That the County Clerk of Garland county, Arkansas, extended an 8.7 mill levy for State purposes on

the personal books of said county; and for the year 1931 extended taxes against the plaintiff's property in the sum of $2,772 on an assessed valuation of $63,000, said levy consisting of millages in the following amount: State of Arkansas 8.7 mills, City of Hot Springs 9.3 mills, Hot Springs School District No. 6 18.0 mills, Road and Bridge Tax 3.0 mills, General Garland County Tax 5.0 mills.

"5. On January 12, 1945, Ray Jensen, as Delinquent Tax Collector of Garland County, Arkansas, delivered to the plaintiff a demand that he pay personal taxes for the year 1931 in the amount of $2,772, together with a penalty in the amount of $277.20 and an additional sum of $304.93 for said collector, as provided in Act No. 342 of the year 1941.

"6. That the plaintiff tendered to Ray Jensen, the Delinquent Tax Collector of Garland county, Arkansas, the sum of $663.31, which constituted the amount due the State of Arkansas under the 8.7 mills levied for State purposes, together with the penalty thereon, the cost, and $60.30 for the Delinquent Tax Collector of Garland county, Arkansas, in full settlement of all of the 1931 personal property taxes as per the attached letter, and that said tender was refused.

"7. That the plaintiffs have pleaded the statute of limitations and laches to all levies for the year 1931, and deny that they are indebted in any amount for said taxes."

In its decree, the trial court held all of the levies set out in the agreed statement, except the levy for the State of Arkansas of 8.7 mills, barred by the general statute of limitations. Appellant, as Delinquent Tax Collector, was given judgment on his cross-complaint against appellee for $663.31, the amount of the 8.7 mills state levy and penalty, which was determined to be the full extent of appellee's liability for 1931 taxes. The costs of the suit were adjudged against appellee.

The first question for consideration is whether a general statute of limitations runs against the collection

of that part of personal taxes which is levied and assessed for county, city and school purposes. It does not appear that such question has been heretofore passed on by this court. Contrary to the situation existing in many states, we have no statute restricting the time within which actions for the recovery of delinquent personal taxes may be instituted. On the contrary, the following provisions are found in §§ 13840-41 of Pope's Digest:

"13840. The collector may collect at any time all delinquent personal property tax in his county, or that may be sent from another county, by the sale of property or otherwise, and shall make returns of the amount so collected to the proper counties and officers. . . .

"13841. The delinquent list, together with the fees allowed thereon to any collector, shall be delivered to his successor, and the same shall be returned to the clerk of the county court by the outgoing collector for that purpose, and so on until the whole shall be collected. Provided, after said list has been returned two years the county court shall have power to strike off all names of persons who, in the opinion of such court, own no property out of which the taxes due on said list can be made by sale or otherwise."

In the absence of a specific provision in that regard, there is a diversity of opinion among the authorities as to the application of general statutes of limitation to the subordinate political subdivisions of a state. In a discussion of the question in 34 Am. Jur. p. 309, it is said: "It has been said that the maxim '*nullum tempus occurrit regi*' is an attribute of sovereignty only, and cannot be invoked by counties or other subdivisions of the state. In many cases, probably a majority, a distinction is drawn between cases where a subordinate political subdivision or agency is seeking to enforce a right in which the public in general has an interest and those where the public has no such interest, and it is held that the statute of limitations, while applicable to the latter character of actions, cannot be interposed as a bar where the municipality is seeking to enforce the former type of action.

In these decisions, the view is taken that the plaintiff, in seeking to enforce a contract right, or some right belonging to it in a proprietary sense, may be defeated by the statute of limitations; but as to rights belonging to the public and pertaining purely to governmental affairs, and in respect to which the political subdivision represents the public at large or the state, the exemption in favor of sovereignty applies, and the statute of limitations does not operate as a bar."

It is well settled in this state that the statute of limitations may be interposed against, or in behalf of, counties, cities and school districts where the enforcement of mere private or proprietary rights are involved. *Clark* v. *School District,* 84 Ark. 516, 106 S. W. 677. The rule has been made applicable to municipal corporations in cases involving adverse occupancy of streets and alleys. *City of Ft. Smith* v. *McKibbin,* 41 Ark. 45, 48 Am. Rep. 19; *El Dorado* v. *Ritchie Grocery Company,* 84 Ark. 52, 104 S. W. 549, 120 Am. St. Rep. 22; *Madison* v. *Bond,* 133 Ark. 527, 202 S. W. 421. It was also applied in an action by a taxpayer to surcharge and correct the accounts of the county treasurer in the case of *Sims* v. *Craig,* 171 Ark. 492, 286 S. W. 867. It is conceded that some of these cases involve the enforcement of certain public rights, but none of them concern the exercise of the sovereign right of the state to collect those revenues which are absolutely essential to the maintenance of organized government. The case of *Clark* v. *School District, supra,* was an action to recover funds illegally paid upon school warrants by the county treasurer. Mr. Justice Wood, in the opinion, emphasizes the fact that the school district was not acting in a sovereign capacity and said: "The state is not a party here, and the school district in seeking to recover funds illegally paid out on the warrant of its directors is not exercising any of the functions of the sovereign power."

The general rule with respect to the time within which proceedings may be instituted for the collection of taxes is stated in 51 Am. Jur., p. 867, as follows: "In general it may be said that unless other provision is

made by law the obligation to pay a tax persists until the tax is paid. It is well established that statutes of limitation do not run against sovereign states unless by the terms of the limitation statute it is made applicable to the state; nor as a general rule do the statutes of limitation run against municipal corporations and counties in actions involving their public or governmental rights and duties. The existence of a time limit beyond which the government may not sue to recover unpaid taxes is therefore dependent upon some express statutory provision, and provisions limiting the time for the collection of taxes are strictly construed in favor of the government."

In actions for the collection of taxes a majority of the courts seem to hold that a plea of the general statute of limitations is not available in proceedings instituted on behalf of either the state or its political subdivisions. In the case of *Greenwood* v. *Town of LaSalle,* 137 Ill. 225, 26 N. E. 1089, the court said: "A town, under our township organization system, is but a civil division of a county and exists as a municipal corporation merely for the purpose of carrying on the state government. It can only levy and collect taxes for the purpose of carrying on that subdivision of such government. It must be admitted that town taxes may be levied for purposes in which the public generally are directly interested, such as 'constructing or repairing roads, bridges, or causeways' within the town. Section 40, art. 4, c. 139, Rev. St.; *City of Alton* v. *Transportation Co.,* 12 Ill. (38) 60 (52 Am. Dec. 479). Other improvements may also be lawfully paid for out of a town tax, in which the public at large have as much interest as those residing within the boundaries of the township. We entertain no doubt that the right here sought to be enforced is of such a public nature that no statute of limitations could be interposed against it."

This holding was reaffirmed in the later case of *Brown* v. *Trustees of Schools,* 224 Ill. 184, 79 N. E. 579, 115 Am. St. Rep. 146, 8 Ann. Cas. 96, where the court said: "The rule that statutes of limitation do not run against the state also extends to minor municipalities

created by it as local governmental agencies, in respect to government affairs affecting the general public. The exemption extends to counties, cities, towns and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, but, as to matters involving private rights, they are subject to statutes of limitation to the same extent as individuals."

In *Hagerman* v. *Territory,* 11 N. M. 156, 66 Pac. 526, the court said: "Under our system of government a county is a civil subdivision of the territory and exists as a municipal corporation merely for the purpose of carrying on the territorial government; and it is well settled that the plea of the statute of limitations is no defense to those actions by such corporation involving public rights, such as taxation, unless the statute expressly so provides." (Citing authorities.)

Anderson v. *Ritterbusch,* 22 Okla. 761, 98 Pac. 1002, was a proceeding for a writ of prohibition against a county treasurer to restrain him from proceeding to collect certain taxes, and it was held that in collecting taxes the county was merely the agent of the state; and, as the state was the real party in interest, the statute did not run. The following rule found in *Simplot* v. *Chicago, M. & St. P. R. Co.,* 5 McCrary 158, 16 Fed. 350, 5 McCrary 158, is cited with approval in many cases: "The true rule is that when a municipal corporation seeks to enforce a contract right, or some right belonging to it in a proprietary sense, or, in other words, when the corporation is seeking to enforce the private rights belonging to it, as distinguished from rights belonging to the public, then it may be defeated by force of the statute of limitations; but, in all cases wherein the corporation represents the public at large or the state, or is seeking to enforce a right pertaining to sovereignty, then the statute of limitations, as such, cannot be made applicable."

In the case of *Wasteney* v. *Schott, Treas.,* 58 Ohio St. 410, 51 N. E. 34, it was held that actions for the recovery of personal taxes, while required to be brought in

the name of the county treasurer, are prosecuted for the benefit of the state, and the plea of limitations was not available. The court said: "Taxation is a recognized, constitutional, and lawful means of raising such revenues for most, if not all, public needs; and the courts will take notice that general taxes levied by the state directly, or through local agencies to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid or collected by suit, they go partly to the general funds of the state, for its disbursement in the administration of public affairs, and are in part disbursed, in the due course of local administration, by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, although local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools, and other purposes of a public nature pertaining to the state government."

In the case of *Brink* v. *Dann,* 33 S. D. 81, 144 N. W. 734, it was held that, unless the statute specifically so provides, a statute of limitations cannot apply to a county to prevent it from performing a public duty, such as the collection of taxes.

The power to tax is one of the primary attributes of sovereignty. Personal property taxes are levied and collected under the authority of the state in the exercise of its sovereign powers for governmental purposes of a public nature. The fact that the taxes are levied by local agencies, to which the power to tax has been delegated by the state under our constitution, does not lessen the force or nature of the sovereign power involved in the transaction. The sovereign does the taxing and collects the tax through the office of a delinquent tax collector created for that purpose by Act 342 of 1941, which empowers such officer to "issue and serve all writs and

other process now provided by law for enforcing the collection of delinquent taxes."

It is our conclusion, therefore, that the general statute of limitations has no application and may not be pleaded in defense of proceedings to collect any part of the delinquent taxes involved in this suit. This view is strengthened by the provisions of §§ 13840-41, Pope's Digest, *supra,* under which the obligation to pay apparently persists until the taxes are paid, except as to those persons found by the county court to be insolvent. Whether or not some provision specifically limiting the time for enforcing such collections should be made, as has been done in many states, is a matter for the lawmaking power.

Appellee also pleaded laches. In 61 C. J.,, § 1394, p. 1059, the textwriter says: "Delay in prosecuting a suit for delinquent taxes will not constitute a bar to their recovery where defendant has been uninjured by the delay." We find nothing in the agreed statement of facts which indicates any injury sustained by appellee merely because of the delay in instituting the proceedings to collect the taxes. The only change in position of the parties is that appellee was a corporation when the taxes were levied and is now a partnership. The rights of intervening innocent purchasers are not involved. It may be conceded that private rights may arise in consequence of laches on the part of public officers of a more persuasive force than those of the public in a particular case, but we do not find that situation existing in this case.

That part of the decree which holds appellee liable for payment of the state levy of 8.7 mills, penalty and costs, is affirmed. So much of the decree which holds the levies for the city of Hot Springs, Hot Springs School District No. 6, road and bridge tax and general county tax barred by the statute of limitations is reversed, and the cause remanded with directions to enter a decree

for appellant for the full amount of the taxes, penalty and costs, including the costs of this appeal.

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

UNION LIFE INSURANCE COMPANY *v.* PRITCHETT.

4-7773 190 S. W. 2d 968

Opinion delivered December 10, 1945.

E. M. Arnold, for appellant.

David L. Ford, for appellee.

ROBINS, J. Appellant challenges the correctness of trial jury's finding that appellant had failed to establish its defense to appellee's suit for amount of insurance policy on the life of Mrs. Rena Pritchett, deceased wife of appellee. Appellant denied liability on the ground that Mrs. Pritchett was not in sound health when she applied for and when she received from appellant a policy of life insurance for $300, payable at her death to appellee.

There was testimony by lay witnesses and also by a physician tending to establish that Mrs. Pritchett was in good health when she applied for the insurance and when the policy was delivered to her. This testimony was to some extent contradicted by evidence offered by appellant; but the case was submitted to a jury, on instructions not complained of here, and the jury's finding in favor of appellee on the disputed fact question is conclusive and binding on us. *Houch* v. *Lynch,* 17 Ark. 478; *Smith* v. *Van Gilder,* 27 Ark. 592; *Cogswell* v. *McKeogh,* 46 Ark. 524; *W. T. Rawleigh Co.* v. *Thurman,* 131 Ark. 593, 197 S. W. 1154; *Collier Commission Company* v.

Wright, 165 Ark. 338, 264 S. W. 942; *American Equitable Assurance Company of New York* v. *Showers,* 195 Ark. 521, 113 S. W. 2d 91; *The Sovereign Camp W. O. W.* v. *Sams,* 194 Ark. 557, 108 S. W. 2d 1089.

The judgment of the lower court is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* TAYLOR.

4-7741 190 S. W. 2d 968

Opinion delivered December 10, 1945.

Hardin, Barton & Shaw and *Joseph R. Brown,* for appellant.

Ben Shaver, C. E. Johnson, Cecil E. Johnson, Jr., and *Abe Collins,* for appellee.

SMITH, J. Appellee recovered a judgment for $40,000 to compensate a personal injury which he sustained, from which judgment is this appeal.

Appellant states the facts out of which the litigation arose as follows: Appellee was injured February 24, 1944, while employed by appellant as a locomotive fireman. The accident occurred in defendant's Texarkana, Texas, yard about 10:15 p. m. The moon was not shining and the night was dark, but it was not raining.

Defendant's freight train No. 42, operating north between Shreveport, Louisiana, and DeQueen, Arkansas, stopped in the yard to set out some cars and to pick up others. There were in this yard in addition to the main line track, six switch tracks, all of which except switch track No. 6, were connected with the main line track by another track referred to as the lead track, or cross over track.

"After the cars were set out, and while the engine proceeded to the water tank in the north part of the yard, swing brakeman Floyd lined No. 4 switch. He then walked south to switch track No. 3. He shone his lantern light upon a metal hopper, or gravel car, the first car on said switch track No. 3, and concluded the engine on the lead track could pass said hopper car on its backward movement from the water tank to switch track No. 1. He joined conductor Malone and rear brakeman Johnson at switch track No. 1, where the cars to be picked up were spotted.

"Train No. 42's engine No. 804, after taking water, was backed along the lead track, in route to switch track No. 1, at a speed of 5 miles an hour. Since the engine was a road engine, it had no rear headlight. Engineer Thomas received a signal from brakeman Floyd at switch track No. 1, to continue backing. He saw identical signals given by conductor Malone and brakeman Johnson. The signals indicated the lead track was clear. Engineer Thomas relied upon the signals and continued backing his engine.

"Head brakeman White, on the right rear engine-step, on the engineer's side, relayed Floyd's back-up signal. Upon approaching cars on No. 3 switch, and when only a car length away, White saw, for the first time, the hopper car. He shone his lantern light on the car. In the brief interim he had to act, he concluded it was in the clear. He therefore made no effort to stop the engine. The clearance, however, proved insufficient by 2 or 3 inches. The engine cab was torn off by the sideswipe, and fireman Taylor was injured.

"Engineer Thomas immediately stopped the engine. He ran to the fireman's side and found plaintiff had been thrown to the ground. Plaintiff was rushed to the hospital in an ambulance. He suffered temporary injuries and his right leg was severely crushed. It had to be amputated above the knee.

"Fifteen minutes prior to the accident, a Texas & Pacific switch engine delivered cars to defendant's yard. In so doing, it backed along the lead track, and cleared, without difficulty, the hopper car on No. 3 switch.

"The rear portion of engine 804's tender, the water tank, was round; whereas, the front portion next to the engine, the oil tank, was square. The oil tank was somewhat broader than the water tank. Just before the accident both engineer Thomas and fireman Taylor, plaintiff, heard a scraping noise. It was the upper rim and grab-iron, or hand-hold, of the hopper car scraping against the oil tank. The noise continued while the

engine ran 6 feet, the length of the oil tank. It ceased for a perceptible period, the time it took for the engine to run the length of the deck, before the hopper car grab-iron and rim struck the engine cab. The lead track at No. 3 switch was on a curve. As the engine rounded the curve, the left rear cab-corner projected two or three inches over the side of the lead track. It was this two or three inch protrusion that struck the hopper car grab-iron and rim.

"Plaintiff testified he was looking to the rear as the engine approached switch No. 3. He did not see the light from brakeman White's lantern. He did see brakeman Floyd's lantern, but it disappeared as the engine rounded the curve. The ceiling light over the engine deck was burning, and its rays spread over the oil tank portion, or rear, of the tender, as well as on the left side. Plaintiff stated this deck light blinded him.

"Defendant submits the judgment should be reversed because the court erred in giving plaintiff's instructions Nos. 1 and 4, and refusing defendant's instructions Nos. 8 and 10. Furthermore, the argument and remarks of plaintiff's counsel were flagrantly improper and highly prejudicial, and necessarily influenced the jury in returning the grossly excessive verdict."

Appellant insists that the judgment should "be reversed because the court erred in giving plaintiff's instructions Nos. 1 and 4, and refusing defendant's instructions Nos. 8 and 10. Furthermore, the argument and remarks of plaintiff's counsel were flagrantly improper and highly prejudicial, and necessarily influenced the jury in returning the grossly excessive verdict."

Plaintiff's instruction No. 1 above referred to reads as follows: "If you find from a preponderance of the evidence, under the instructions of the court, that plaintiff, W. E. Taylor, was injured while in the employment of the defendant, The Kansas City Southern Railway Company, and in the discharge of his regular duties, when both were engaged in interstate commerce, and

while he was at his post of duty as a fireman on a locomotive, and in the exercise of ordinary care for his own safety and that defendant acting through its servants other than plaintiff negligently spotted a cut of cars loaded with gravel at a point on switch number three in its yard at Texarkana, where they would not clear the locomotive on which plaintiff was working as it backed along the lead track in said yard; or that Brakeman L. M. White, or Brakeman DeLoss Floyd, failed to use ordinary care to discover that said gravel cars would not clear said locomotive or negligently signaled W. H. Thomas, engineer of said locomotive, to continue backing same along said lead track when it would not clear said gravel cars, until it collided with them; and that such negligence of the defendant or its servants, if any, was the proximate cause of the injuries, if any, sustained by plaintiff, then your verdict will be for the plaintiff, W. E. Taylor."

Appellant's insistence is that this instruction is erroneous for the reason that brakeman White was guilty of no negligent act which proximately contributed to the injury, and cases are cited holding as does the case of *K. C. S. Ry. Co.* v. *Diggs,* 204 Ark. 150, 167 S. W. 2d 879, that ". . . all acts of negligence charged and submitted to the jury must be supported by substantial testimony, and if not, reversible error is committed. This is true, because as said in *St. L.-S. F. Ry. Co.* v. *Lane,* 156 Ark. 465, 246 S. W. 494, 'Otherwise the jury might have found for plaintiff upon allegations of negligence of which there was no proof.' See other cases there cited."

It remains, therefore, to determine whether or not the submission of the question of White's negligence was an abstract question supported by no testimony of a substantial nature. It will be remembered that while the "back up" signal was not first given by White, it was repeated by him. White was the brakeman nearest the engine, and it was upon White's signal that the engine began to back up. It was not necessary that White should repeat or continue to give this back up signal, as

it remained effective, after having been given, until it was annulled.

Now White himself testified as follows: "Somebody gave us a back up signal. I observed the signal and relayed it to the engineer. I only saw one back up signal. That signal meant to come on back down the lead track, and that conditions were safe to come on. That was what it was intended for. I had no other light besides my switchman's lantern as we approached the gravel car with which we collided. There was not a thing in the world between me as I stood there on the rear step of the tank car, and this gravel car to keep me from seeing it. I did see it approximately a car length before it collided with the locomotive. My idea of the car was it looked to be in the clear to me. That is all I can say. Naturally a brakeman had some idea whether the car was close or not, but I thought it was clear. I also thought it was fairly close; however I didn't give the engineer a signal to stop and investigate to see if it was close. I could have done that but I didn't. I had no thought of finding a car not in the clear at that point. I accepted the back up signal I saw and relayed it to the engineer, and the locomotive continued in the direction it was going until the collision.

"I was standing on the step on the engineer's side from the time I left the water tank until the impact. This track 3 was on the fireman's side as we backed up. After the accident I observed the position of this car we collided with. The lights of the conductor and brakeman were in a fairly close group near the head car of our pick up. All these lights were in my view and I had seen one back up signal from one of them. I do not know whose signal that was. It was pretty dark.

"In moving at night in a case like this, the only thing to do is stick the lantern out toward the object and if you think it is clear, all right; and if it is not, flag down. We use our judgment. I didn't go over and make the test, for it was my judgment that the car was clear. After plaintiff was taken to the hospital and I got back

down where the collision occurred, I went and measured and very much to my regret found that the car was not in the clear. I was thirty feet nearer the car we collided with as we approached it than the engineer and fireman. I could barely touch the car with my fingers when I made the test on it. When I consider that the rim and handle was on the car, it was not in the clear. It wasn't in the clear or the engine wouldn't have hit it."

We think the jury was warranted in finding from this testimony that White had a duty to perform and that he was riding on the rear of the engine for the purpose of performing that duty. He was 30 feet nearer the car with which the engine collided than was either the engineer, or fireman. He saw the car with which the engine collided and the jury might have found, and, in fact did find, that if there were any doubt as to whether the engine would clear and not strike the car, ordinary care would have required that White give the engineer a stop signal (which he did not do) until he knew that the engine could pass the car without a collision. White testified that he thought that the engine would clear the car, but he was mistaken, and we cannot say that the jury should not have found that had White exercised ordinary care he would not have taken this chance. According to all the testimony the engine was moving at a speed of only 4 or 5 miles per hour, and could have been stopped almost immediately. We conclude, therefore, that instruction No. 1 was not abstract.

Instruction No. 8 asked by appellant would, if given, have told the jury that there was no evidence upon which a finding could be made that White was guilty of any negligence. It was for the reason just stated, properly refused.

Appellant's instruction No. 10, which was refused, was substantially to the same effect as instruction No. 8.

Appellee's instruction No. 4, to which objection was made, was on the measure of damages, if it were found that plaintiff was entitled to recover damages, and

authorized the jury to find and allow the value of an artificial leg, which appellee had purchased, but was unable to use for reasons later to be discussed. It is insisted that it was error to permit the jury to find and allow as damages the cost of the leg, which was $181. We think the inclusion of this item was proper, as it was part of the medical expenses.

Objections were made to certain arguments of appellee's counsel in presenting his case to the jury. Objections to these arguments were sustained when made, but it is insisted that notwithstanding that fact, they were calculated to induce the jury to return a verdict for a larger amount than would otherwise have been done, or than was authorized by the testimony. This brings us to a consideration of the question whether the verdict was excessive, and not sufficiently sustained by the evidence, and this is the difficult question in the case.

We have never sustained a verdict for a sum so large as the verdict in this case, for the mere loss of an arm or leg, and we would not do so here, if no other element of damages were shown. But not so. There are other elements of damage which must be considered. Appellee was all but killed and owes his life to his youth, his physique and fine physical condition. Pictures of appellee in the record show that he was a powerful, well built man. He was 33 years of age at the time of his injury, and had a life expectancy of 38.53 years. He was earning $300 per month at the time of his injury, and had the prospect of promotion to the employment of an engineer, with higher wages, as he was shown to have been a competent fireman, an occupation in which he can never again engage. He had only 8 months in a junior college, and had had no training which would enable him to earn a living, except with his hands, and according to the testimony in his behalf, he is incapacitated to do any ordinary manual labor.

The question of appellee's contributory negligence was submitted to the jury, and on this issue the jury was told that such negligence, if any were found, "goes by

way of diminution of the damages in proportion to his negligence as compared with the combined negligence of himself and the defendant, if any." Evidently the jury did not find that appellee was guilty of any negligence contributing to his injury, and that finding, if made, is fully sustained by the evidence.

The cab in which appellee was riding when the collision occurred was torn from the engine and appellee received the injuries presently to be discussed. His right leg was crushed and was twice amputated, first below and then 6 inches above the knee.

Four doctors testified in the case; two of these are surgeons in the employment of the railroad company, and they testified in its behalf. The other two were doctors engaged in private practice, who testified in behalf of appellee. There was no great difference in the testimony of these witnesses, as to conditions found, but the usual difference of opinion appeared when they testified as experts as to the prognosis of appellee's condition.

Appellee sustained a 4 inch fracture of the skull, and he complains of headaches and dizziness, and inability to sleep, and he has a large scar on his forehead. His collar bone was shattered and broken, and all the doctors admitted it is out of alignment. He sustained a broken rib and was badly bruised and sustained a great nervous shock.

One of the company doctors testified that the stump of appellee's leg had healed, although there was a rear tenderness which he thought could be remedied by a simple operation, and that appellee could thereafter use his artificial leg. It was shown, however, that appellee was unable to use his artificial leg. It could be availed only by the use of a strip attached to it which extended over his shoulder, but this strip extended over his broken collar bone and caused considerable pain. Appellee has crutches which he uses with difficulty, the difficulty being occasioned by the pressure of the crutch under his right arm which causes pain in the collar bone.

The point about which the doctors differed most widely was that of the treatment for the broken collar bone. One of the company doctors admitted that the X-ray pictures showed the fracture was not aligned but is united by callus and the arch of this callus as shown by the X-ray picture is apparent to one not familiar with the reading and interpretation of such pictures. The company doctors thought this could be relieved by a simple operation, but all the doctors were apparently agreed that the operation would be required before appellee could use his artificial leg or his crutches in a satisfactory manner. One of the doctors testifying in behalf of appellee stated that he was himself a surgeon, and that he would not advise the operation. He testified, "the callus in the bone in the shoulder will be there always. You can cut down on it, and fix these bones so you could have union, but I don't believe I would do it; I am a surgeon, but I would not have it done. The chances are you won't have a good bone."

Another reason why appellee cannot use his crutches is the condition of his right forearm and also that of his left hand. Tests made by the company doctors in the presence of the jury, by pricking plaintiff with pins, caused these doctors to admit that appellee was totally disabled at that time. One of the doctors stated that rest and cessation of the attempt to use the crutch was the only thing he could recommend to relieve this condition, but he admitted this condition might be permanent. Appellee has a tenderness in his back which a company doctor testified could be relieved by a minor operation. Appellee's doctors expressed the opinion that this condition was permanent.

Appellee abandoned all effort to use his artificial leg after trying to use it for 6 months and getting a fall which broke two bones in his hand. It is of some significance that appellee remained under the care of the company doctors from the time of his injury in February, until August and neither of them suggested the operations they now advise. In addition to his other handicaps

in using his crutches and artificial leg, it was shown that appellee has a partially paralyzed condition of his left hand and is unable to properly hold his crutches.

Without further review of the testimony, we announce the conclusion that it warranted the finding by the jury that appellee's condition is permanent and that he is wholly incapacitated to perform manual labor, and that his suffering has been and is even yet, very great.

We are unable, therefore, to say that the verdict is excessive. Upon the whole case we find no error, and the judgment must be affirmed, and it is so ordered.

MILLWEE, J., nonparticipating.

SHOOP *v.* STATE.

4398 190 S. W. 2d 988

Opinion delivered December 17, 1945.

Howell & Howell, for appellant.

Guy E. Williams, Attorney General and *Oscar E. Ellis*, Assistant Attorney General, for appellee.

MILLWEE, J. Appellant was charged in the Circuit Court with the crime of receiving stolen property in two informations filed by the prosecuting attorney on May 31, 1945. In the first information it was charged that appellant, on March 15, 1945, received four cases of spinach of the value of $10, the property of Joe Salsman, doing business as the Arkansas Canning Company, knowing said property to be stolen. The second information accused appellant of receiving eight cases of spinach on May 27, 1945, in the same manner. The cases were consolidated for trial. The court instructed the jury that a misdemeanor, only, was involved in the first information, since the testimony showed the value of the four cases of spinach involved in that charge to be less than $10. The jury acquitted appellant on the felony charge, but found him guilty of a misdemeanor on the charge contained in

the first information, leaving the punishment to the court. This appeal is prosecuted from the judgment of the trial court fixing appellant's punishment at six months imprisonment in the county jail.

Jim Dubberly was the warehouse foreman of the Arkansas Canning Company in Van Buren, Arkansas. His duties were to supervise the storage, labeling and shipment of canned vegetables. He was authorized by his employer at various times to sell damaged or "salvaged" canned goods that might be on hand. Mr. Salsman testified that he would point out the salvaged products to Dubberly who would make the sale and turn in the money on the same day. He also testified that Dubberly was never authorized to sell No. 1 spinach, or any products other than salvaged canned goods. These salvaged products were in bent or rusty cans, or cans which had sustained water damage from floods. The spinach exhibited in evidence was No. 1 spinach which was identified as the property of the canning company by the can and code number.

Dubberly testified that in March, 1945, he took four cases of No. 1 spinach from the warehouse, without authority, and delivered it to appellant who paid for the spinach in money and whiskey. When he delivered the spinach he asked appellant, "to keep quiet and not let anybody know 'cause it might get me in trouble." Dubberly made two or three sales of canned goods to appellant before the sale in March. He had authority to make these sales and, for that reason, he did not warn appellant to keep quiet about them. At no time did he have permission or authority to sell No. 1 spinach and he entered his plea of guilty to grand larceny for taking 14 cases without authority.

Vol Russell, chief of police of Van Buren, testified that he discovered several cases of spinach in the garage of Underwood's Taxi Stand covered with seat covers. After questioning some of the employees of the taxi stand, he went to appellant's apartment across the street and questioned him. Appellant told the officer the spin-

ach in the garage was his, and that he got it from a truck driver whose name he did not know. After questioning Dubberly, the officer took appellant into custody and procured a search warrant for his apartment, where two cases of No. 1 spinach and part of a third case were found. Dubberly was then arrested and confessed to taking the spinach without authority.

Appellant testified that he bought canned goods from Dubberly three or four times. He bought three cases of spinach in March, 1945, which were delivered to his room by Dubberly. He denied that Dubberly told him to keep quiet about the sale, or that he had any knowledge that Dubberly had no right to sell the spinach. Appellant first admitted, and then denied, that he told the chief of police that he got the spinach found in the garage from some truck driver. He and Dubberly were good friends and Dubberly owed appellant for taking him to Fort Smith to get whiskey.

The first assignment of error urged by appellant for reversal of the judgment is that the trial court erred in overruling his challenges for cause to the prospective jurors, Charlie Vyles and Clyde Watts. If it be conceded that the court erroneously refused to excuse the two prospective jurors for cause, still there is no showing in the record that appellant exhausted his peremptory challenges. Where a defendant fails to exhaust his peremptory challenges, he waives any error the court may have committed in not excusing a juror for cause. *Benton* v. *State,* 30 Ark. 328; *Wright* v. *State,* 35 Ark. 639; *Caldwell* v. *State,* 69 Ark. 322, 63 S. W. 59; *Holt* v. *State,* 91 Ark. 576, 121 S. W. 1072; *Smith* v. *State,* 205 Ark. 833, 170 S. W. 2d 1001.

Appellant's next assignment of error challenges the sufficiency of the evidence to support the verdict. In instruction No. 4 the court told the jury that the burden was on the State to prove beyond a reasonable doubt: first, that the property was stolen; second, that it belonged to the party alleged in the information; third, that the defendant received it in his possession; fourth, that

when he received it he did so with the knowledge that it was stolen; fifth, that he had the intention at the time he received it to deprive the true owner of his property and continued the larceny of it. This instruction covered every element of the offense charged. *Bryan* v. *State,* 179 Ark. 216, 15 S. W. 2d 312.

It is admitted by appellant that he received the spinach from Dubberly and had it in his possession. It is also admitted that the spinach belonged to the canning company, but it is earnestly insisted that the testimony is insufficient to show that the property was stolen, or that it was received by appellant with knowledge that it was stolen. It is argued that, since Dubberly was authorized by his employer to sell canned products which appellant had bought on other occasions, he had a right to assume that Dubberly had authority to sell the spinach involved in the charge upon which he was convicted. This argument fails to take into account the testimony on behalf of the State to the effect that Dubberly was without authority to sell No. 1 spinach of the type involved in this case. In view of this evidence, the association of the parties, and the further evidence that Dubberly requested appellant to keep quiet about the delivery of the three or four cases in March, 1945, we cannot say there was a lack of substantial evidence to support the verdict of the jury on this issue.

This court has long followed the rule that the possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction either of larceny or receiving stolen property. *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029; *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398; *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833; *Bowser* v. *State,* 194 Ark. 182, 106 S. W. 2d 176; *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93; *Krokrich* v. *State,* 208 Ark. 208, 185 S. W. 2d 922. It was for the jury to determine the weight to be given the testimony of the witnesses and the inference to be drawn therefrom. The reasonableness and sufficiency of the explanation given by appellant of his possession of the property was a matter for the jury.

In his contention that the evidence is insufficient to prove the spinach was stolen, appellant argues that, even if the testimony of Dubberly is to be believed, he was guilty of embezzlement, not larceny, and appellant could not, therefore, be found guilty of the crime of receiving stolen property by receiving the embezzled property. In the case of *Atterberry* v. *State,* 56 Ark. 515, 20 S. W. 411, it was held that the felonious taking of goods from the owner's store by a clerk who had custody of them was larceny, and not embezzlement. The court said: "The articles taken were kept for sale by their owner in a store in which E. C. McBel had authority to be present and sell the goods. They were legally in the possession of the owner, even if for a time left in the custody of the salesman; and an appropriation of them by the latter was a trespass on the possession of the former, within the meaning of the law defining larceny."

It is also held generally, that one who knowingly receives property which has been embezzled is guilty of receiving stolen property where a statute in effect makes embezzlement a species of larceny, 53 C. J. 504. By § 3151, Pope's Digest, embezzlement of his employer's property by an employee is made a species of larceny and the statute provides that such employee "shall be deemed guilty of larceny, and on conviction shall be punished as in case of larceny." So in this case we think it is competent to convict for the crime of receiving stolen property whether Dubberly be deemed guilty of embezzlement or larceny in taking his master's property.

Appellant relies on the case of *Jones* v. *State,* 85 Ark. 360, 108 S. W. 223, in support of his contention that the evidence is insufficient to support the verdict. In that case Jones had purchased from one Ellison, cattle which belonged to Dr. Neice. Neice admitted in his testimony that, before he found the cattle in the possession of Jones, Ellison informed Neice that he had traded them to Jones and that he, Neice, consented to let the trade stand. Ellison also testified that he had authority from Neice to trade with Jones and that Neice sold some of the cattle received from Jones in the trade. This court

held the evidence insufficient to prove that Jones knew Ellison had no authority to dispose of the cattle, or that he received the cattle with the felonious intent to deprive the owner of his property. A mere recital of the above testimony from the Jones case is sufficient to demonstrate the lack of similarity between the facts of that case and the one at bar.

Appellant's last contention is that the court erred in refusing to give his requested instruction No. 1 as follows: "The court instructs you that before you can find the defendant guilty as charged in the information on which he is being tried you must find beyond a reasonable doubt that the defendant bought or received the property in question knowing that it had been stolen, and in this connection the court tells you that if you find from the evidence that the prosecuting witness, Jim Dubberly, at the time it is alleged that he sold defendant the goods in question that he was employed by the Arkansas Valley Canning Company, in the capacity of foreman, and had been for several years prior thereto, and had with the knowledge and consent been selling the products of said company to any and all persons that wanted to buy and that the defendant knew that he had been selling spinach and other commodities, then the defendant had a right to assume that he had a right to sell same and the defendant would not be guilty of any offense by buying the spinach in question, and your verdict should be for the defendant."

The first part of this instruction was fully covered in other instructions given. The effect of the second part of the instruction was to tell the jury that appellant had a right to assume that Dubberly had authority to sell the No. 1 spinach because of previous sales to appellant and others of salvaged or damaged canned goods. The instruction was peremptory. It precluded a consideration by the jury of evidence adduced on behalf of the State which, if believed, would have justified the jury in distinguishing between the authority of Dubberly to sell salvaged canned goods and goods of the kind appellant was convicted of receiving unlawfully. It was proper for

the jury to consider the matters set out in the instruction, along with all the other facts and circumstances, in determining whether the property was received by appellant with guilty knowledge, but the court may not tell the jury what inference it may draw from disputed facts. That is the province of the jury. The trial court properly refused the instruction.

Finding no error, the judgment is affirmed.

MILLER *v.* MILLER.

4-7742 190 S. W. 2d 991

Opinion delivered December 17, 1945.

Botts & Botts, for appellant.

McFADDIN, J. This appeal presents questions arising subsequent to a final divorce decree.

On September 25, 1944, the Chancery Court of the Southern District of Arkansas county rendered a decree of divorce in favor of Mrs. Dessie Miller (original plaintiff and appellant here) against Byron P. Miller (original defendant and appellee here). In addition to awarding a final divorce to Mrs. Dessie Miller, the said decree also found that Byron P. Miller had personal property of the value of $4,000 which he had converted into cash and bonds and other securities, and that Mrs. Dessie Miller was entitled to 1/3 of this property; and the decree stated:

"It is further ordered and directed by the Court that the defendant pay unto the plaintiff the sum of $1,333.33 and that the defendant pay all cost of this proceeding, . . ."

On March 26, 1945, (at a subsequent term of the court) Byron P. Miller filed his unverified motion in the same cause, and, *inter alia,* said:

"The defendant further states that the plaintiff knew of his financial situation, and that he was only possessed of a few hundred dollars, and therefore knew that the testimony and proofs submitted to the Court upon the subject of property division in this cause of divorce was wholly untrue, and knew that the court was being falsely informed as to the value of any and all property possessed by the defendant. . . . Wherefore, defendant prays that the decree be modified, and that so much thereof as declares financial responsibility upon the defendant in favor of the plaintiff, be set aside and vacated."

On the same day that the motion was filed, the court made the order here appealed from and which we copy in full:

"Now on this 26th day of March, 1945, is presented to the court the motion of the defendant, Byron P. Miller, to modify the judgment heretofore rendered in this cause on the 25th day of September, 1944, as to alimony; defendant appearing by his attorney of record, Mr. A. G.

Meehan, and the plaintiff appearing not in person nor by attorney; no evidence being submitted to the court on the hearing of the motion.

"Said motion being filed on the 26th day of March, 1945, and without any notice to the plaintiff herein said motion is considered by the court on said day and the court being well and sufficiently advised as to all matters of law and fact set forth in said motion doth find that said motion should be granted.

"It is therefore ordered, by the court, that the decree heretofore rendered in this cause on the 25th day of September, 1944, be and the same is hereby modified as to the provisions set forth therein concerning alimony and that portion of said decree is by the court set aside on this the 26th day of March, 1945, same being the first day of the regular March, 1945, term of this court and said original decree having been rendered September 25, 1944, the first day of the regular 1944 term of this court."

Mrs. Dessie Miller, by timely appeal to this court, seeks to have the said order of March 26, 1945, reversed, vacated, and held for naught, because (1) rendered without notice, and (2) rendered without proof. That these two points are true, the order so recites.

I. *The Order of March 26, 1945.* If we treat this order as one vacating or modifying a portion of the decree of September 25, 1944, then it is a proceeding under either the fourth or the seventh subdivision of § 8246 of Pope's Digest; and § 8248 of Pope's Digest would apply to either subdivision. This section reads:

"The proceedings to vacate or modify the judgment or order on the grounds mentioned in the fourth, fifth, sixth, seventh and eighth subdivisions of § 8246 shall be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On the complaint, a summons shall issue and be served, and other proceedings had as in an action by proceedings at law."

Since the motion filed on March 26, 1945, was not verified, and since no notice was issued and no proof taken, it follows that the order of March 26, 1945, granting the motion was contrary to the statute. Even if we treat this order as one modifying alimony, still it was rendered without notice; and we held in *Schley* v. *Dodge,* 206 Ark. 1151, 171 S. W. 2d 851 that notice must be given before hearing on a motion to modify alimony. The question of alimony will be considered later. We merely cite the Schley case to show that at all events the order of March 26, 1945, was void because it was made without notice.

In *Taylor* v. *Bay St. Francis Drainage District,* 171 Ark. 285, 284 S. W. 770, we held that an appeal would lie from a void judgment. Mr. Justice HART, speaking for this court, said:

". . . It is now well settled that a void judgment or order is appealable. In *Alexander* v. *Crollott,* 199 U. S. 580, 26 S. Ct. 161, 50 L. Ed. 317, it was said that the fact that the judgment may have been void will not prevent its reversal upon appeal. In a case-note to 33 L. R. A., N. S. 733, it is said that the prevailing opinion, as attested by the collated cases, is clearly to the effect that the appellate court will so far take cognizance of the void entry as to reverse it and restore the parties to the position they originally occupied.

"To the same effect see note to 20 Ann. Cas., p. 277, Hayne on New Trial and Appeal, vol. 2, pp. 950, 979, and 1069, and Elliott on Appellate Procedures, § 110."

So, here, whatever might have been the purpose and intent of the chancery court in making the order, and whatever might be its intended effect, still, it is void for the reasons claimed by appellant. Whether we consider this as an appeal, a *certiorari,* or some other form of supervisory procedure, the result is the same, to-wit: the chancery court is directed to cancel, set aside and hold for naught its order of March 26, 1945, herein appealed from.

II. *Motion for Attorney's Fee and Alimony.* Mrs. Dessie Miller has filed in this court a motion for $200 additional attorney's fee, and for alimony at the rate of $50 per month. This motion must be—and is—denied. Omitting from the consideration the question of the propriety of filing the motion in this court in the first instance, we hold that the motion for alimony cannot be granted. In the original decree of divorce granted to Mrs. Dessie Miller on September 25, 1944, there was no provision or direction for the monthly payment of alimony. There was the provision that she receive $1,333.33 as a property division, but this is separate and distinct from alimony, as was pointed out by Mr. Justice Wood in the case of *Williams* v. *Williams,* 150 Ark. 319, 234 S. W. 169. In the case of *Nelson* v. *Nelson,* 146 Ark. 362, 225 S. W. 619, this court said:

"It follows also that the allowance of attorney's fees must be reversed. At § 49 of the article on Alimony in 1 R. C. L., at page 902, the law is announced as follows: 'As a general rule, an action for alimony cannot be brought after the rendition of a judgment for divorce, even though the decree is silent on the matter; for, as the question of alimony might, and should, have been litigated therein, such decree operates as *res judicata* as to the question of alimony.' See, also, 7 R. C. L., page 792.

"The original decree undertakes to settle, and did adjudicate, the marital rights of the parties. The divorce granted was an absolute one, and terminates the husband's liability for his wife's obligations. He would thereafter be no more liable for her lawyer's fees than he would be for any other contractual obligation which she had incurred."

In *American and English Annotated Cases,* vol. 40 (Ann. Cas. 1916B), page 875, there is an extensive note or annotation on "Doctrine of *Res Judicata* as Applicable to Divorce Proceedings"; and on page 898 of that annotation, the rule is stated:

"All questions concerning alimony which are or ought to be determined in a divorce proceeding are *res*

judicata in a subsequent proceeding in the same jurisdiction."

See, also, 17 Am. Juris. 442, 482, 484. There was no language in the divorce decree of September 25, 1944, reserving the question of alimony for subsequent disposition. When Mrs. Dessie Miller failed, either to have monthly payments of alimony provided in the decree of divorce, or to have the question of alimony reserved for further consideration, she allowed the decree to become *res judicata* on the question of alimony; and it is too late for her to seek alimony at this time in a motion filed in this court, and claiming no unavoidable casualty. Likewise, the quotation from the case of *Nelson* v. *Nelson, supra,* precludes Mrs. Miller from recovering additional attorney's fees on this present appeal.

It follows that the order of the Chancery Court of March 26, 1945, is reversed, set aside, and held for naught, and that the appellant recover all her costs herein; and that her petition for monthly payments of alimony and for additional attorney's fees be, and the same is, hereby denied.

HAZELIP *v.* TAYLOR.

4-7723 190 S. W. 2d 982

Opinion delivered December 17, 1945.

John C. Sheffield, for appellant.

A. M. Coates, for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether custody of Riley Ray Taylor should be taken from the father and awarded foster parents who are anxious to adopt. The child was between seven and eight years of age when Circuit Court granted the writ of *habeas corpus,* and on hearing directed that the boy be delivered to the petitioning father.

Appellee is forty-six years of age and has ten children. An eleventh child died at birth in 1939; and so did appellee's wife. Thereafter, for several months, Taylor (the father) was unable to provide for the smaller children. Four were placed in an orphanage. Riley Ray was taken by Taylor's brother-in-law and remained in Mississippi for several weeks, but was returned to Helena when the relative found himself burdened with the undertaking. The boy was then placed with Tom and Mamie Hazelip, husband and wife, who are childless. Intention upon their part, seemingly, was that Riley Ray would be reared as a son. They testified that on several occasions Taylor agreed that they might legally adopt, but kept delaying the formality. At one time the Hazelips, apparently feeling that Taylor did not intend to carry out his promise, returned Riley Ray to his father, who in turn placed the child with a family named Tennett. One of the appellants, in describing this move, explained that Taylor would be "in and out": sometimes in Mississippi, at other times in Oklahoma, or elsewhere; but ". . . finally he came back and took the little boy to Walter Tucker's cafe and beer joint and turned [Riley Ray] over to a girl, who took him to Marvell where we found him. He was neglected and dirty and sick, . . . and we took him back home."

Taylor's testimony is that when his wife died in 1939 the economic depression was such that he could not find steady employment, and through necessity surrendered custody of some of the children. He worked at WPA jobs, and hauled wood, but was unable to make a

living for so large a family. When drafted as a soldier he served approximately eight months. Allotments were made for the dependent children. However, it appears that payments extended over a period of less than four months. The Hazelips testified that money received in this manner through the government was invested in bonds in Riley Ray's name, and that none of the income was used by them or spent for the boy's support.

Taylor has remarried and lives at Fresno, California. He testified that he had bought city lots and was constructing (and had nearly finished) a seven-room house, with modern conveniences, etc. The new wife testified that she would bestow a mother's care on Riley Ray.

We think the case turns on the Court's refusal to allow the Hazelips time to procure evidence. Petition for the writ was filed November 20, 1944. The respondents were commanded to have Riley Ray in Court at ten o'clock the morning of November 22nd. When the Hazelips—who had so generously taken the half-orphan into their home—moved through their attorney for a continuance until certain witnesses could be procured, or until depositions could be taken, the Court allowed a period of three hours. The judge felt, no doubt, that protraction of the proceedings would work a hardship upon Taylor and his wife, who were preparing to return to California the following day with a serviceman.

If the case had to be disposed of on the evidence adduced within the limited period given, our holding would necessarily be that no error was committed. Witnesses testified to Taylor's good character, and the Court did not believe the evidence of abandonment was sufficient to deprive the natural father of his child; nor was it. Although (as was said in *French* v. *Graves,* 205 Ark. 409, 168 S. W. 2d 1108) the paramount consideration in determining custody of a child is the infant's welfare, yet at the same time rights and feelings of a parent must also be weighed; and due regard must be given to natural desires. We said in *Verser* v. *Ford,* 37 Ark. 27, "It is one of the cardinal principles of nature and of law that, as against strangers, the father—however humble and

poor—if able to support the child in his own style of life, and [if the father be] of good moral character, cannot, without the most shocking injustice, be deprived of the privilege, . . . however brilliant [the advantages offered] may be."

So, in the instant case, Taylor will not be deprived of his legal and natural rights unless it be convincingly shown (a) that as a father he has forfeited his claim or that circumstances make it impossible for him to fulfill the parental obligation, and (b) that the child's welfare requires alienation. The Hazelips are shown to be excellent people. They are devoted to the boy and appear able and anxious to administer to his needs and to bestow that degree of supervision and helpfulness in the fullest sense that sincere adoptive parents are capable of.

The only evidence we regard as essential to the record relates to Taylor's situation in California. True it is that Taylor's wife testified, as did other relatives. But no opportunity was given appellants to have an independent investigation made; time was lacking in which to ascertain facts, if they existed, to impeach or contradict the interested witnesses.

Whether Taylor's failure for so long a time to provide for four of his children who were in the orphanage, and for Riley Ray, was due to economic conditions he was unable to cope with, or whether, after leaving Arkansas, he negligently permitted the child to remain with appellants, would, in the circumstances, be matters in respect of which the trial court's discretion would be accepted on appeal. If there were no so-called "unknown quantities," and no probability that Taylor and his witnesses, in testifying, at least did full credit to the father's claims, we might say that issues were fully developed. But in a sense the testimony concerning Taylor's status in California, his habits, and his ability to care for so large a family, is *ex parte*. There is no reasonable certainty, based upon a course of conduct fairly established, that Taylor may not again conclude that Riley Ray is burdensome.

Hyatt on Trials, vol. 1, p. 154, says the general practice is that in divorce cases applications for continuances are to be treated more liberally than in certain other kinds of litigation. "The reason for this rule," says the commentator, (page 204, § 166) "is that . . . public policy is involved," there being three interested parties: the plaintiff, the defendant, and the state.

The editorial staff of American Jurisprudence (vol. 27, p. 828, § 107) concurs in the view that where infants are involved the state has a duty to assert its power as *parens patrae,* ". . . so as to prevent injury to the child and to society by the wrongful and negligent conduct of the parent in failing to exercise the proper control"; and, inferentially, in failing to supply necessities.

Since Riley Ray is presumptively with his father in California, no injury other than possible inconvenience can come to Taylor if the judgment is reversed and the cause remanded with directions that reasonable time be allowed the Hazelips to develop their proof. It is so ordered.

R. S. Biggers & Company *v.* Norman.

4-7778 190 S. W. 2d 984

Opinion delivered December 17, 1945.

Sidney Kelley, for appellant.

H. A. Northcutt, for appellee.

HOLT, J. July 8, 1935, H. H. Norman and Miriam B. Norman, his wife, executed their note in the amount of $99.63, in favor of appellant, R. S. Biggers & Company, due May 1, 1936, and bearing interest at the rate of 10 per cent. per annum until paid. To secure payment, the Normans executed a mortgage on the following described real estate: "The southwest fractional quarter, section 12, lying south of Spring River and west of Bee Run Creek, except what has been sold off heretofore and deeded to Andrew Dailey, W. L. Garner and James Garner, and said tract being described by metes and bounds, and containing 26.37 acres, more or less, being further described as the Serbaugh Place, township 19 north, range 5 west." This mortgage was recorded July 12, 1935.

On the back of the note, the following credits appear: "Aug. 19, 1936—$10; Sept. 7, 1936—$10; July 7, 1937—$14.91; Dec. 1, 1937—$7.07; Aug. 2, 1939—$5." No notation of any of these payments or credits was ever entered on the margin of the mortgage record where the mortgage was recorded.

August 9, 1936, the Normans sold the land covered by the mortgage herein under a "contract for sale of land" to appellees, H. S. McClesky and Mrs. H. S. McClesky. This contract was recorded November 28, 1936, and had been fully consummated by deed from the Normans to the McCleskys, some two or three years before the present suit was filed.

May 30, 1944, appellants brought this suit to recover balance due on the above note and to foreclose its mortgage lien. The Normans filed no answer. Separate answer was filed by the McCleskys in which they defended on two grounds, (1) that the description in the mortgage was void for uncertainty, and (2) that appellant "has failed, refused and neglected to place any credits on the margin of the record on which the mortgage is recorded for a period of over eight (8) years, . . . in compliance with § 9465 of Pope's Digest, etc.," and "this statute is a complete bar to the recovery of the plaintiff (appellant)."

The trial court found in favor of appellees, H. S. McClesky and wife, on the second ground. The decree recites: "The question is raised by the defendants as to the sufficiency of the description of the real estate in the mortgage, but I am not deciding this question. A decision of the other question is decisive of the issues in this case. That other question is whether or not the note and mortgage of the plaintiff is barred by statute in so far as the defendants, McCleskys, are concerned. . . . The plaintiff's right of action is barred under Pope's Digest, § 9465."

This appeal followed.

The facts upon which the decree was based are undisputed. It is our view that the decree is in conflict with

the recent decision of this court in *Jimerson* v. *Reed,* 202 Ark. 490, 150 S. W. 2d 747.

In the instant case, when the McCleskys purchased the land involved on August 9, 1936, from the Normans, it was covered by a mortgage dated July 8, 1935, and recorded July 12, 1935, executed by the Normans in favor of appellant, which was not barred as shown by the mortgage record. The McCleskys, therefore, bought subject to this mortgage, and their plea of the statute of limitations, in the circumstances, was unavailing, since the debt here was kept alive by payments, though not entered upon the margin of the mortgage record. By their purchase, the McCleskys stepped into the shoes of their grantors, the Normans, and took subject to this mortgage. In the *Jimerson* v. *Reed* case, this court said: "If one buys land upon which there is a mortgage not barred as shown by the mortgage record, he buys subject to the mortgage, and may not plead the statute of limitations if the debt was not, in fact, barred, having been kept alive by payments not entered upon the margin of the mortgage record. . . . When one buys land which the record shows is under a valid mortgage, he buys only the equity of redemption. He takes no other or greater title than his grantor had, which is the right to redeem. In vol. 2, Jones on Mortgages (8th Ed.), p. 1038, it is said: 'A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance; and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor. . . . A purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period

of limitation is no bar to a foreclosure of the mortgage.' ''

While appellees' first ground alleged as a defense was not decided by the court below and is not argued here, and, since this cause must be reversed for the error above pointed out and comes to us for trial *de novo,* we hold that the description contained in the mortgage was not void for uncertainty. We think the description is sufficient to designate and identify the land sought to be foreclosed. ''It is a maxim of law, that that is sufficiently certain which can be made certain.'' (*Montgomery and Wife* v. *Johnson, et al.,* 31 Ark. 74.)

It will be noted that the last clause of the description of the 26.37 acre tract sought to be foreclosed here is in these words: ''Being further described as the Serbaugh Place,'' and this alone under decisions of this court was sufficient to describe and identify the land here involved. In *Martin* v. *Urquhart,* 72 Ark. 496, 82 S. W. 835, it was held: (Headnote). ''A deed which conveys 'the property known as the J. J. Martin plantation, embracing' certain lands, of which a particular description is given, and containing certain exemptions and reservations, embraces a tract of land which is part of such plantation, though not particularly described,'' and in the body of the opinion, it was said: ''The words 'the property known as the J. J. Martin plantation,' used in the deed, were sufficient to describe the tract of four acres.'' See, also, *McGehee* v. *State, Use, Etc.,* 39 Ark. 57.

In *Jenkins* v. *Ellis,* 111 Ark. 220, 163 S. W. 524, we held: (Headnotes 1 and 2). ''The language used in a deed will be interpreted most strongly against the grantor. If by any reasonable construction a deed can be made available, that construction will be adopted.''

There was testimony identifying the land here by a survey and by its name, that is ''The Serbaugh Place.''

For the error indicated, the decree is reversed, and the cause remanded with directions to proceed to foreclose the mortgage.

SHAY *v.* WELCH.

4-7780 191 S. W. 2d 253

Opinion delivered December 17, 1945.

E. D. Vincr, for appellant.

T. J. Carter and *W. M. Thompson,* for appellee.

ROBINS, J. Appellees filed in the county court of Sharp county a petition, setting forth that the signers thereof constituted fifteen per cent. of the qualified electors of that county, and praying that an election be called, as provided for in Initiated Act No. 1, adopted on November 3, 1942, (Acts of 1943, p. 998) for the purpose of voting on the question of the manufacture, sale, bartering, loaning or giving away of intoxicating liquors in the county.

On July 25, 1945, the county court heard the petition, and, finding that it was signed by the requisite number of voters, ordered the election to be held on Au-

gust 22, 1945. Appellants, Shay and Wiles, licensed liquor dealers of the county, filed a motion asking the county court to make them parties to the proceedings, so that they might prosecute an appeal from the order calling the election. They averred that the Act under which the election was called had been repealed or amended by Act No. 135 of the General Assembly, approved February 27, 1945, providing that men in the armed forces should "have 60 days . . . in which to vote," and that the proposed election could not lawfully be held on the date fixed, since it was to be held less than sixty days after the order therefor. It was further alleged by said appellants that the petition was not signed by fifteen per cent. of the qualified voters of the county, and that the county court had before it no proper record from which to determine the number of qualified electors in the county. The county court entered an order making these appellants parties to the proceedings and granting them the right to appeal from the order theretofore made.

After transcript of proceedings in the county court had been lodged in the circuit court a number of citizens of the county then serving in the armed forces of the United States filed in circuit court an intervention, asking to be made parties. In their intervention they adopted the pleadings filed by appellants, Wiles and Shay, and they further alleged that, because the time (elapsing from the date of call to date of election) as fixed in the Initiated Act was so unreasonably short as to prevent them from voting, the Act was unconstitutional and void, and also that the order fixing date of the election was contrary to the provisions of Act 135 of the General Assembly of Arkansas, approved February 27, 1945. No objection to the filing of this intervention, on the ground that new parties to the proceedings could not properly be made except in the court where the proceedings originated, was made below or is urged here by appellees.

The circuit court found that the petition was signed by fifteen per cent. of the voters of the county, and or-

dered that the matter be certified back to the county court, to the end that the election might be called as provided by law.

For reversal of the circuit court's order, appellants urge:

I. That voters absent from the county in the armed forces were by the proceedings below denied their constitutional right to vote in the election.

II. That the provisions of Initiated Act No. 1 of 1942, pertaining to time of calling the election were repealed or amended by Act No. 135 of the General Assembly of 1945, so as to require the elapsing of at least sixty days between the call for the election and the holding thereof.

III. That there was no proper record from which the names and number of qualified electors of the county could be determined; and that for this reason the court was without power to call the proposed election.

I.

Appellants' first contention was settled adversely to them by our decision in the case of *Lienhart* v. *Bruton,* 207 Ark. 536, 181 S. W. 2d 468. In that case Mr. Justice Knox, speaking for the court, said: "Appellant's further contention is that since, during the war, service men will have little opportunity to participate in the local elections which may be held under authority of the Act [Initiated Act No. 1, adopted November 3, 1942], such Act violates the above-mentioned provision of the constitution. The contention is entirely without merit. No elector in the armed forces is, has been, or will be prohibited from voting by any provision of this Act. It is the war and the necessity for winning it which has taken them away from their homes. This Act had nothing to do with it."

II.

The Initiated Act here involved directs that the election provided for therein be held not less than twenty

nor more than thirty days from final determination that a proper petition has been filed; and appellants argue that this portion of the law has been repealed or amended by the last clause in § 1 of Act 135 of 1945, enacted to facilitate voting by persons absent from the state in the armed forces of the United States, which is as follows: "Provided said ballot may be sent any time within 60 days prior to the election, but must be received by the county clerk before 6:00 p.m. on the day of election."

There is no reference to the Initiated Act authorizing the local option election in said Act 135 of 1945, so that, if there has been a repeal or amendment of any provision of the former by the latter Act, such repeal or amendment must arise by implication. The rule as to implied repeals is thus stated in 59 Corpus Juris, p. 914: "It is a general rule that an act is not impliedly repealed because of conflict, inconsistency, or repugnancy between it and a later Act unless the conflict, inconsistency, or repugnancy is plain, unavoidable, and irreconcilable."

In the case of *Kendall* v. *Ramsey,* 179 Ark. 984, 19 S. W. 2d 1020, we said: "The courts have always leaned against repeals by implication, and subsequent laws do not abrogate prior ones unless they are irreconcilably in conflict. In other words, it is a rule of universal application that there must be a plain, unmistakable repugnancy before the courts will hold that a later act of the Legislature repeals a former act by implication. *Chamberlain* v. *State,* 50 Ark. 132, 6 S. W. 524; *Mays* v. *Phillips County,* 168 Ark. 829, 274 S. W. 5, 279 S. W. 366; *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649; *Cordell* v. *Kent,* 174 Ark. 503, 295 S. W. 404; *Taylor* v. *Rogers,* 176 Ark. 156, 2 S. W. 2d 56; *England* v. *State Highway Commission,* 177 Ark. 157, 6 S. W. 2d 23; and *Johnson County* v. *Hartman,* 177 Ark. 1009, 8 S. W. 2d 469. . . . In the application of the rule, this court has held that a general affirmative statute does not repeal a prior particular statute or the particular provisions of a prior statute on the same subject, unless there is an invincible repugnancy between the two. In *McCord* v. *Louisville & Nash-*

ville Rd. Co., 183 U. S. 483, 22 S. Ct. 165, 46 L. Ed. 289, it was said: 'Repeals by implication are not favored, and are only allowed to the extent that repugnancy exists, and in order to give an act, not clearly intended as a substitute for an earlier one, the effect of repealing it, the implication of the intention to do so must necessarily flow from the language used, bearing in mind the necessity and occasion of the law.' "

When the two Acts involved herein are considered in the light of the rule enunciated in the above authorities it cannot be said that there is such inconsistency and repugnancy between them as to justify a holding that the language of Act No. 135 of 1945 reflects a legislative intent to repeal or change any portion of the Initiated Act invoked in this case.

It may be further observed that to sustain appellants' contention on this phase of the case would not prevent the holding of the proposed election, but would only require that same not be held earlier than sixty days after the final call therefor, which, as far as the record shows, has not been made by the county court pending this appeal.

III.

While no exact copy of the list of voters on file in the office of the county clerk was introduced in evidence, it did appear from the testimony that this list had been certified by the acting sheriff, but not sworn to by any officer. It, therefore, did not comply with the requirements of § 4696 of Pope's Digest, and under our former decisions, could not be regarded as conclusive evidence of the voting qualifications of those listed therein. It appears that the list was delivered to the clerk by the collecting officer within the proper time, was accepted by the clerk and by him duly certified and spread upon the proper county record. This voters' list, bearing the clerk's certificate of authenticity, was printed for the use of election officials, as required by law. The record, in which this voters' list had been recorded, was introduced in evidence in the trial below by the clerk, its lawful custodian.

By the terms of the Initiated Act the court is required to call the election, if the petition is found to be signed by fifteen per cent. of the affected territory's voters, "as shown on the poll-tax records of the county." Now the record introduced by appellees was a county record, and it purported to show the list of poll taxpayers. While this list was imperfect on account of lack of proper verification, and might not, under our decisions, be competent or final evidence for all purposes, we hold that, for the purpose of determining the sufficiency of the petition involved herein, the lower court had a right to accept it as at least a *prima facie* showing of the identity and number of qualified electors.

The lower court offered to permit appellants to prove by the original assessment lists, if they could, that this record did not contain a true list of the voters, but they declined to do so, contenting themselves with relying upon the technical invalidity of the list because the sheriff did not swear to it.

Certainly the exercise of such a vital democratic process as the right to call an election authorized by law on the demand of the proper number of electors may not be entirely thwarted by the mere failure of a sheriff to swear to the list of poll taxpayers. *Henderson* v. *Gladish*, 198 Ark. 217, 128 S. W. 2d 257; *Hargis* v. *Hall*, 196 Ark. 878, 120 S. W. 2d 335.

Since the sufficiency of the petition was shown by the only available county record, and the correctness of the contents of this record was not in any manner challenged by appellants, the lower court did not err in granting the prayer of the petition.

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

EATON *v.* HUMPHREYS.

4-7757 190 S. W. 2d 973

Opinion delivered December 17, 1945.

Paul Talley, Ben D. Roland and *Walter M. Purvis,* for appellant.

Miles & Amsler, for appellee.

SMITH, J. On August 2, 1941, appellee obtained a clerk's tax deed to a 40 acre tract of land, to which one Robert Eaton had the original title. After getting this deed, appellee proceeded to acquire, by quitclaim deeds, the title of the Eaton heirs whose respective interests varied from a fifth to a fortieth of the whole title. Appellee filed suit against two of the Eaton heirs then in possession of the land, in which he alleged his ownership of the land under his tax deed, but he alleged also, that if the deed was not valid, and did not vest title, he nevertheless owned three-fourths interest, while the defendants together owned the remaining one-fourth interest. He prayed partition of the land, and the sale thereof for that purpose, if the tax title were not valid. In the alternative he prayed judgment for the taxes which he had paid, including those for which the land sold.

One of the Eaton heirs had mortgaged her interest, and two others had sold theirs. This mortgagee and these vendees were made parties. All of the Eaton heirs were finally made parties, and numerous collateral issues were raised before the final rendition of the decree awarding appellee a lien for the taxes paid, and ordering the land sold in its satisfaction. The finality of this decree ordering the sale of the land is not questioned, except that certain of the Eaton heirs, who had conveyed their respective interests to appellee, filed cross-complaints against him, in which they alleged that the deeds from them to him had been fraudulently procured.

The land was sold under the decree above mentioned, and appellee became the purchaser of the entire title, for the consideration of $6,200. This sale was confirmed without objection, but cross-complainants insist that they should share in the distribution of the proceeds of this sale in proportion to their respective interests in the land, upon the theory that their deeds to appellee had been fraudulently obtained. These cross-complaints were dismissed as being without equity, and this appeal is from that decree, and no other question is presented.

We are asked to dismiss the appeal for non-compliance with Rule 9, and this might well be done on account of the incomplete manner in which the record has been abstracted, but we think also that the case may be and should be affirmed upon the record as abstracted.

The testimony of five witnesses who testified in behalf of appellee is abstracted in a single paragraph of the brief, which states merely that their testimony is more favorable to appellee than is the testimony of two other witnesses which is abstracted.

The testimony of Rebecca Coppage, one of the Eaton heirs, is abstracted, and she stated very emphatically and positively that she never signed a deed to appellee. As we understand the record, it is not insisted that she had done so; however, she is not an appellant.

George Thomas, one of Robert Eaton's heirs, did appeal, and his testimony is abstracted. As a grandson

of Eaton, he had inherited a one-twentieth interest in the land. This witness, a negro, shows himself to be a man of intelligence, who reads and writes. He was employed as a freight car oiler by the Missouri Pacific Railroad, and had been employed in that capacity for 39 years. He owns his home and has it paid for, and owns a small tract of land in addition to his home. He did not know appellee, and never discussed the sale of his interest with appellee, but he was visited by appellee's attorney and a real estate agent, who had been employed by appellee to purchase the interest of the Eaton heirs. The agent spoke to him on several occasions about selling his interest, and he finally sold it for $75. This small price in comparison with the actual value of the land is the only circumstance which lends any support to the contention that this deed was fraudulently obtained. The witness was familiar with the land and knew it was worth more. He stated that fact to the agent, and demanded a larger price, which the agent refused to give. He made the significant admission that the agent said to him that appellee ". . . had bought the land and wanted the money or the place," but neither this witness nor any of the other Eaton heirs proposed to accept the redemption offer.

The witness was probably more familiar with the land than was appellee or his agent, and he knew its value was greater than the price offered, and the deed was executed after consultation with the other heirs, four of whom joined in the deed which Thomas and his wife executed.

There had been litigation over this property between the Eaton heirs. Robert Eaton, the ancestor died testate July 9, 1901. By his will he devised a portion of the land to his daughter, Rebecca Coppage. The balance of the land was devised to two sons and a daughter, for their natural lives, with the remainder at their death to the Eaton heirs. This will was contested and broken. Apparently the Eaton heirs were unwilling and unable, by cooperation, to redeem from the tax sale, and no suit was brought to cancel the tax deed. However, the decree rendered July 13, 1944, under which the land was sold, gave

appellee a lien for the taxes paid by him, and ordered the land sold in satisfaction thereof. Thomas did testify that appellee's agent, who negotiated the purchase of Thomas' interest, stated that if he, Thomas, did not accept the offer made, he, Thomas, would get nothing. No attempt was made to show that this agent knew this statement was not true. It may have been, and would have been true if the tax sale was not invalid, and no suit had been brought to have it declared void. There was no relation of trust or confidence in the case, and no fact was concealed from Thomas.

For the reversal of the decree appellants cite and rely upon the case of *Barnett* v. *Morris,* 207 Ark. 761, 182 S. W. 2d 765. A headnote in that case reads as follows: "A written instrument may not be set aside on ground of fraud in its procurement except upon clear, satisfactory, cogent and convincing testimony, a mere preponderance thereof not being sufficient."

In our opinion the court below was warranted in finding that the testimony did not meet this requirement, and the decree is therefore affirmed.

HARRIS *v.* HARRIS.

4-7783 191 S. W. 2d 465

Opinion delivered January 7, 1946.

John W. Nance and *Vol T. Lindsey,* for appellant.

Claude Duty and *F. O. Butt,* for appellee.

SMITH, J. The parties to this litigation have each been married three times, and both have been twice divorced. They were married to each other December 7, 1937, and on August 22, 1944, appellee, the wife, filed this suit for divorce, and for division of property and for judgment based upon a loan and other transactions with appellant, her husband. There was a decree for divorce and judgment for certain debts, and a division of the husband's property was decreed pursuant to the provisions of § 4393, Pope's Digest, and from that decree is this appeal.

The complaint alleged indignities on the part of the husband, which rendered appellee's condition as his wife intolerable. An answer was filed denying all these allegations.

Much testimony was taken. Twenty witnesses testified on behalf of the wife, and sixteen others on behalf of the husband. A large part of the testimony is more or less trivial, relating to quarrels which apparently were soon forgotten. The testimony shows that appellee was addicted to strong drink, and this unquestionably was the cause of much of their trouble, but she testified that she had abandoned that habit, and did not now drink at all. Appellee amended her complaint to allege desertion, but the divorce was not granted on that account. The chancellor reviewed the testimony at great length in a written opinion, without referring to the alleged desertion. The testimony which the chancellor stated he believed to be

true, and which he found was such an indignity as to entitle appellee to a divorce, related to the paternity of her last child. As has been said, she was married twice before and she had one child by each husband.

The testimony concerning the paternity of the child was to this effect. Appellee testified that she received a letter from appellant in which he disclaimed the paternity. But she did not produce this letter. She testified that she was so ashamed and humiliated that she destroyed it. This, under ordinary circumstances, might not have been an unusual thing to do, but here the parties had discussed and were contemplating a divorce. They were living apart and, according to appellee's testimony, they remained apart for more than a year. But they corresponded and a number of letters from appellee are in the record. These letters are more or less facetious, but express affection and her willingness and desire to return to his home and resume the marital relation. In some of these letters appellee chided appellant about his conduct toward her, but in none of them is there an intimation that she had received the letter in question. Other testimony tending to show that appellant had made this charge of infidelity was given by an itinerant farm hand, who had been discharged by appellant.

We do not intimate that the witness was suborned, but we do announce our opinion that the testimony was not true. The circumstances under which the conversation was reputed to have occurred between appellant and the witness are such as to cause us to discredit it, and, so far from corroborating appellee's testimony, it causes us to give her testimony less credit.

Appellant categorically and emphatically denied making or writing any such statement, and we think it highly improbable that he would have made it to a farm hand. Many witnesses testified as to many conversations with and between these parties, and no one of them ever heard appellant express any doubt as to the paternity of the child.

If he made the statement, it was the highest indignity he could have offered his wife. No greater insult could

be offered a proud and spirited woman than to have her husband tell her he was not the father of her child. But we do not believe he made the statement. He testified that he had never suspected that his wife was unfaithful and that he had never doubted that he was the father of her child.

Appellant and his wife resided in a hotel which he owned in the city of Rogers, which he testified he sold at a sacrifice to remove his wife from the hotel environment, because of her drinking, and by mutual consent he had carried her to Searcy. On the night before leaving for Searcy they agreed upon a separation, but neither apparently regarded the separation as final. They did not discontinue the marital relation. Appellant visited appellee in Searcy on April 22, 1943, and it was during this visit that the child was begotten. Appellee notified appellant of her pregnancy in August, 1943, following, and he took her from Searcy to Little Rock, where extensive and expensive purchases were made in preparation for the baby. This was condonation and no ground for divorce was shown since its occurrence. *Buck* v. *Buck,* 205 Ark. 918, 171 S. W. 2d 939; *McDougal* v. *McDougal,* 205 Ark. 945, 171 S. W. 2d 942.

While a separation was shown, desertion was not proved. Appellant paid the cost of repairs and improvements on a house in Searcy which appellee had inherited from her mother, and she moved into and resided in this house until the suit was filed. Desertion was not then alleged as a ground for divorce, and that allegation was not made until an amended complaint was filed January 16, 1945.

When appellee was carried by appellant to Searcy, he began the construction of a residence on a farm which he owned, and in this home rooms were provided for appellee and her children. Appellant testified that "we talked it over, and she decided that she wanted to come back as soon as we got the property fixed, and it was agreeable to me." But he did not invite her to return, although she expressed her willingness and desire to do so in several letters which she wrote him. If he does not

invite and permit her to return, a cause of action will arise for desertion. But we think no grounds for divorce existed when the decree was rendered from which is this appeal, and that decree will be reversed and the cause vacated. Any cause of action which might have existed when the suit was filed was condoned and none has occurred since, although the right to divorce may be maturing on the ground of desertion.

We see no reason why these parties should not resume their marital relation. We are impressed that they have not lost their respect and affection for each other. But if the reconciliation does not occur, she would have the right upon the remand of the cause to ask alimony for herself, and provisions for the support of the child of which appellant is the father.

The decree will be reversed and all costs will be assessed against appellant.

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

4-7788 191 S. W. 2d 467

Opinion delivered January 7, 1946.

[redacted]

Thomas B. Pryor, Thomas Harper and *Harrell Harper,* for appellant.

Howell & Howell, for appellee.

McHaney, J. Appellee brought this action against appellants, who are the trustee for the railroad company and its engineer, Perry, to recover damages for personal injuries sustained by her when she was forced to jump from a railroad trestle over Clear Creek, in Crawford county, to avoid being struck by a train. The negligence alleged and relied on is that the engineer failed to keep an efficient lookout, failed to exercise ordinary care in this regard, and that he either discovered the perilous position of appellee or, by the exercise of ordinary care, could have discovered her peril in time to have prevented injury. Appellant's defenses were a general denial, a plea of contributory negligence, and that she was a trespasser.

Trial to a jury resulted in a verdict and judgment for $5,000, from which is this appeal.

The principal assignment of error urged by appellants is that the court erred in refusing to direct a verdict for them. This necessitates a statement and discussion of the facts, which, briefly, are as follows: The train in question was running from Van Buren east to Little Rock, and was making about 65 miles per hour. Between Van Buren and Alma the track crosses Clear Creek, which has two prongs at that point with a space of dry land between, and there is a trestle across each prong. The west bridge, or first bridge coming from Van Buren, is approximately 300 feet long. The east, or second bridge is approximately 260 feet long. Between the two bridges is a dirt fill approximately 200 feet long. As the track approaches the west bridge it makes a curve to the north,

which some of the witnesses describe as a little curve and others as a sharp or bad curve. This curve ends in the west bridge, and from there on for a considerable distance beyond the point where appellee was injured the track is straight.

Appellee had, on March 31, 1944, been working in a field adjacent to the railroad right-of-way. She had started home, and had climbed on the railroad embankment near the east end of the east bridge, and started walking west across said trestle, and had reached a point near the middle thereof, when she heard the whistle of the approaching train. She started to return to the east end, but before she could do so she was forced to jump to the ground some 20 feet below, and received serious and painful injuries.

We will not attempt to review the evidence relating to the distance to the west the engineer could have seen appellee's perilous position on the trestle, as to do so would unduly extend this opinion. Suffice it to say that there was abundant substantial evidence to show that if he had been keeping a proper lookout he could have seen her a half-mile or more away, and could have either stopped his train before overtaking her or slowed it down sufficiently to enable her to reach a place of safety or of less danger than where she was forced to jump. As we said in *Missouri Pacific R. R. Co.* v. *Severe,* 202 Ark. 277, 150 S. W. 2d 42, to quote a headnote, "When testimony has been offered sufficient to sustain a reasonable inference that the injury could have been averted if an efficient lookout had been kept, the burden devolves upon the railroad company to show by a preponderance of the evidence that such lookout had been kept." This statement of the law is based on our lookout statute, § 11144 of Pope's Digest, which provides that a recovery may be had for a violation of this statute, "notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril, and the burden of proof

shall devolve upon such railroad to establish the fact that this duty has been performed."

The court instructed the jury to this effect, and that appellee was a trespasser, and was guilty of contributory negligence as a matter of law, and we think the evidence was such that a question of fact was presented for the jury, and its verdict must be permitted to stand.

Another assignment of error is based on the action of the court in sending the jury to the point of injury to view the scene, over appellants' objection. Our statute, § 1518 of Pope's Digest, provides that the court may permit a view. The assignment is based on the alleged misconduct of the jury in violating the instructions of the court not to separate. In an affidavit of the deputy in charge of the jury on the trip to the scene, it is shown that the jury was taken there in three separate cars, and that on arrival some of them went east of the east bridge, while others went west of the west bridge, and that those who went to the east did not go to the west, nor did those who went west go to the east. We fail to see that this action constituted misconduct of the jury, or that appellants were prejudiced in any way thereby. We are cited to the case of *Fitzgerald* v. *LaPorte,* 67 Ark. 263, 54 S. W. 342, where the court used this language: "There is considerable conflict in the decisions of the different courts on this point. But we are of the opinion that the view of the premises by the jury is a species of evidence, and must necessarily operate to some extent on the minds of the jury. The verdict must be supported by other evidence than the view, but we do not think the court erred in refusing to tell the jury that they must not base their verdict in any degree upon such an examination." Here, the evidence was sufficient to support the verdict without the view, and we fail to see that, because some of them viewed the scene from opposite directions, this constituted misconduct on the part of the jury. It is not shown in the affidavit that the jury made tests or experiments, and the cases cited condemning the practice do not apply.

We have carefully examined all the instructions given and refused, and are of the opinion that the court fully and fairly instructed the jury.

Affirmed.

ROBERTS *v.* BURGETT.

4-7775 191 S. W. 2d 579

Opinion delivered January 7, 1946.

Wilson & Starbird, for appellant.

Bob Bailey, Jr., and *Bob Bailey,* for appellee.

McHANEY, J. Appellee brought this action to quiet her title to a 160-acre tract of land in Johnson county against appellants who, in addition to Roberts and his wife, were her two brothers, Charley Jones and Robert Jones, and their respective wives. In his lifetime Henry W. Jones, father of appellee and appellants Charley and Robert Jones, owned the tract here in controversy, re-

ferred to herein as the "Home Place," and two other tracts, one of 105 acres, referred to as the "Lillie Burk Place," and one of 120 acres, referred to as the "Mountain Farm." He died testate in 1925, but the three Jones heirs contested the will and it was set aside. His widow continued to reside on the "Home Place" until her death in 1929. In April, 1930, appellee moved on to the "Home Place," and has continued to reside there with her family since that time, has paid all the taxes accruing thereon from 1931 to the present time, has made valuable improvements, and no one has questioned her rights to said land. In 1929, Charley Jones, being in the penitentiary on a conviction for felony, and being desirous of getting out, conveyed a one-third interest in the "Home Place" and in the "Lillie Burk Place" to appellant Roberts, the deed reciting a consideration of $500, but the real consideration being for getting him released from the penitentiary.

Appellee claimed title to the "Home Place" by virtue of an oral agreement with her brothers in 1929, whereby she should have that place, and that Charley should have the "Lillie Burk Place," and Robert the "Mountain Farm." Robert lives in Kansas, and has for many years. She testified to such an agreement, which was disputed by the others. She also relied on adverse possession, laches and estoppel, and pleaded the statute of limitations as to adverse possession.

Trial resulted in a decree in her favor. The court found that she entered into possession of the disputed tract "under what she, in good faith, thought was a family settlement, and has held the undisturbed possession thereof for approximately thirteen years prior to filing her suit and has paid the taxes thereon at all times except upon a one-half interest paid by Robert Jones in 1931 for the taxes of 1928, 1929 and 1930." As to the conveyance by Charley Jones to Roberts the court found that Roberts "seems never to have asserted any title to this 160-acre tract until after this suit was filed, or to have asked for any accounting for rents or profits, or paid or offered to pay any taxes thereon."

We think the trial court was correct in these findings. It appears to us that Robert Jones and Charley Jones, or his grantee, Roberts, virtually abandoned any right, claim or interest in this land. While her testimony as to an agreement for division of the land is strongly disputed, the fact that she took possession of the "Home Place" shortly after her stepmother's death, and has remained in possession, paying the taxes, making improvements, and otherwise exercising all the acts of exclusive ownership, such as placing a mortgage thereon, paying no rent, leasing it for coal mining, which lease was placed of record, permitting Charley Jones to occupy for a time a rent house on the land—all are very persuasive that she did have such an understanding with her brothers. But, whether she did or not, she went into possession, claiming to be the owner, and her possession has been open, notorious, exclusive and continuous for a period of more than seven years, and that notice of her adverse claim was brought home to appellants, and under the statute of limitations, § 8918 of Pope's Digest, her possession has ripened into title.

Appellants complain because appellee did not plead said statute or adverse possession until after submission of the case to the court. This was done by way of reply to appellants' cross-complaint seeking to recover their alleged two-thirds interest in said land and for an accounting for one-third of the use, rents, government subsidies, and timber removed from the land, less the taxes paid by her. There was no error in permitting this reply to be filed. The court could have treated the complaint as amended to conform to the proof. Moreover, in equity it is not necessary to plead the statute, for, as said in *Riley* v. *Norman,* 39 Ark. 158, "it has always in chancery been considered as affecting the equity of a bill, upon the principle that the court will not readily interfere to enforce rights upon which claimants have long slept." Here, Roberts has slept since his deed from Charley Jones in 1929, and Robert Jones since 1931, when he paid one-half the delinquent taxes for 1928, 1929 and 1930. Never did they take any action tending to show that they claimed any interest in the "Home Place," never paid

any taxes, never demanded any rents, until this action was filed by appellee to quiet her title.

We think they slept too long and that the statute now bars them from a recovery on their cross-complaint.

Affirmed.

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

4-7789 191 S. W. 2d 580

Opinion delivered January 7, 1946.

[redacted]

Thomas B. Pryor, Thomas Harper and *Harrell Harper,* for appellant.

Howell & Howell, for appellee.

ROBINS, J. Appellee, "extra gang" laborer, while working on appellant's track, was struck and severely injured by a block of ice which fell or was thrown from a passing troop train. In his suit for damages against appellant a jury awarded him verdict for $4,000; and from judgment entered thereon this appeal is prosecuted.

These grounds for recovery were set up by appellee in his complaint:

1. That the railroad company's employees negligently allowed the doors of the baggage car to remain open while the train was running, and that it negligently caused or permitted the ice to fall therefrom.

2. That the company, its agents and servants negligently loaded the ice in the car "without securely fastening it therein to prevent it from falling therefrom."

3. That the railroad company "negligently failed to exercise ordinary and reasonable care to make reasonable inspection of the load thereon to determine whether or not same was reasonably safe there for transportation."

4. That the train was negligently operated at a high rate of speed over the track along which appellee and other employees were working.

Appellant's answer was a general denial and plea of contributory negligence.

The lower court, in its instructions, submitted to the jury as grounds for recovery only the alleged negligent

failure of appellant to load the ice properly and to make proper inspection as to the manner of such loading.

There was little, if any, conflict in the testimony. The troop train in question carried thirteen cars, consisting of (beginning from the rear) five Pullmans, two baggage cars used for kitchen cars, five more Pullmans and a baggage car next to the locomotive. Two officers and 365 enlisted men were on the train.

Ben Peevy testified for appellee that he was working in the gang with appellee about two and one-half miles east of Alma; that appellee was injured by ice that was pushed out of the wide door of a car in the train; that another member of his crew had been injured by ice coming from a train.

B. C. Burkett testified for appellee that he was the agent of appellant at Van Buren; that when a train filled with soldiers is carried between Little Rock and Van Buren it has the railroad's crew, consisting of engineer, fireman, conductor and flagman; that troop sleepers are owned by the government, Pullman cars are owned by the Pullman Company and the coaches are owned by the railroad company, and the equipment is owned by the government; that the movement of the train is under the control of the train crew; that the train itself is in charge of the troop or train commander.

Charles Patillo testified for appellee that he was working with appellee when he was struck by the ice; that he did not know who opened the door or who pushed the ice out; that some other ice came from the train a short distance back.

Appellee testified that he thought "it might be an empty troop train . . ."; that he "couldn't see anybody"; that the doors of the baggage car were open; that the ice came from an open door; that during the period he had worked on the track he saw things thrown from a train an average of once a week; that he didn't see this piece of ice until it hit his knee, but assumed it came out of the baggage car; that he did see the door

open when he looked up, but didn't know how long it had been open or who opened it.

H. H. Conger, chief clerk to assistant superintendent of appellant, testified for appellee that in the movement of troop trains the crew has nothing to do with the kitchen car; that the government equips it with any devices it wants to keep the soldiers from falling out; that what is within the car belongs to the government and the crew is only responsible for the safe operation of the train from one terminal to another; that the train commander is in charge; that at the time the kitchen car is ordered and placed at a point of origin the government will equip it with ice which belongs to the government; that if ice is needed the train commander will wire ahead and it is placed in the door and paid for by the commander; that the government takes charge of the car, loads it, puts ice in and the railroad company has nothing to do with loading or the manner in which it is loaded; that the train commander supervises the loading and the railroad company makes no inspection as to whether it is done in the proper manner, but leaves it all up to the government; that the train commander has probably had railroad experience; that this particular train originated at Ft. Bragg, North Carolina, from where it was carried to Memphis by the Frisco and there delivered to appellant, to be transported to Camp Gruber, Oklahoma.

Sam Manager testified for appellee that he was on the other (north) side of the track from appellee when appellee was injured; that as the train passed they threw out a lot of garbage on the south side and threw out pieces of ice; that he doesn't know who threw this stuff off.

H. M. Cook, a witness for appellant, testified that he was conductor on the train in question; that there were 365 men and two officers aboard the train; that there was a train commander who "is absolutely in command"; that the only time witness is in the kitchen cars is when there is an accident and he then notifies the military guards that he has to go through; that is the only time he

is permitted in the kitchen cars and this applies to the other trainmen on all military trains; that he knew nothing about the ice hitting anyone until he was subpoenaed to court; that the train commander is in charge of the kitchen car, the cooking and supplies, that witness has nothing to do with it; that when he took charge of the train he did not go into the cars and inspect the load, or the personnel, or the baggage or the contents of the car; that no member of the crew made such inspection; "we are not allowed to go through there unless something happens . . . that is up to the train commander."

Other members of the train crew gave testimony similar to that of Cook.

Railroad companies have been held liable for injuries to licensees or invitees caused by objects falling, or being thrown, from moving trains in these three classes of cases:

1. Where the injury is caused by an object being thrown from the train. In cases of this kind the liability is based on the negligent act of some employee done in the scope of his employment or done habitually with the knowledge of the company. *Fletcher* v. *Baltimore & Potomac Railroad Company,* 168 U. S. 135, 18 S. Ct. 35, 42 L. Ed. 411; *St. Louis, Iron Mountain & Southern Railroad Company* v. *Lavendusky,* 87 Ark. 540, 113 S. W. 204; *Maysville & B. S. R. Co.* v. *Willis,* 31 Ky. L. Rep. 1249, 104 S. W. 1016; *Louisville & Nashville Railroad Company* v. *Eaden,* 122 Ky. 818, 93 S. W. 7, 6 L. R. A., N. S. 581; *Louisville & Nashville Railroad Company* v. *Petrey,* 167 Ky. 223, 180 S. W. 370.

2. The "mailbag cases," in which railroad companies have been held responsible for the action of government mail clerks in throwing mailbags from a moving train thereby injuring persons lawfully on the premises of the railroad company, where it is shown that the careless practice of throwing the mailbags from moving trains has been habitually carried on with the knowledge of the railroad company. The liability of the railroad

company in such cases is not based on the theory of *respondeat superior,* but the carrier has been held answerable in these cases for negligently permitting a dangerous practice. *Huddleston* v. *St. Louis, Iron Mountain & Southern Railway Company,* 90 Ark. 378, 119 S. W. 280; *Missouri Pacific Railroad Company* v. *Angus,* 188 Ark. 300, 65 S. W. 2d 543; *Missouri Pacific Railroad Company* v. *Newton,* 205 Ark. 353, 168 S. W. 2d 812.

3. In cases where injury occurred by objects falling from trains, wherein liability was predicated on negligence of the railroad company in loading the car. *Gulf C. & S. F. Ry. Co.* v. *Wood* (Tex. Civ. App), 63 S. W. 164; *Croll* v. *A. T. & S. F. Ry. Co.,* 57 Kan. 548, 46 Pac. 972.

In the case at bar there was no proof that any employee of the railroad company pushed or threw the ice from the train, nor was there any proof that soldiers on troop trains, with the knowledge of the company, habitually threw ice or other objects from such trains. Therefore, no liability against the company, under the rule of *respondeat superior,* or under the dangerous practice theory, was shown by the evidence. So the lower court properly refused to permit the jury to find against the company on account of the negligence of anyone in pushing or throwing the ice from the car.

Now there was no evidence to show that the railroad company had anything to do with loading the ice which caused the injury, or as to the manner in which the ice was loaded. But, assuming that it did load the ice improperly or that it negligently failed to make inspection as to the manner of loading, there was no testimony whatever upon which to base a finding that improper loading was the cause of the ice falling from the train. So far as the testimony shows, this piece of ice may have been purposely or accidentally pushed from the train by some of the military personnel thereon. As a matter of fact, the testimony of appellee and his witnesses strongly indicated that someone in the car did push or throw the ice from the train.

Juries may make reasonable deductions from proved facts, but they may not base their findings on conjecture or speculation.

Judge BUTLER, in the case of *Magnolia Petroleum Company* v. *Bell,* 186 Ark. 723, 55 S. W. 2d 782, said: "It is well settled that the verdict of the jury based on mere conjecture or speculation . . . will not be permitted to stand."

In the case of *St. Louis-San Francisco Railway Company* v. *Smith,* 179 Ark. 1015, 19 S. W. 2d 1102, it is said: "Juries are not permitted to base verdicts on mere conjecture or speculation. There must be substantial testimony of essential facts, or facts which would justify a reasonable inference of such essential facts, on which to base a verdict, before it will be permitted to stand. *St. Louis, Iron Mountain & Southern Railway Company* v. *Smith,* 117 Ark. 655, 174 S. W. 547; *St. Louis, Iron Mountain & Southern Railway Company* v. *Belcher,* 117 Ark. 638, 175 S. W. 418; *Texas Co.* v. *Jones,* 174 Ark. 905, 298 S. W. 343."

It was not shown positively by the testimony whether this ice fell or was pushed from the train, nor was there proof to show who, if anyone, threw or pushed the ice, or permitted it to fall from the train. There was an entire absence of proof as to what caused the ice to come from the train. Under these circumstances the jury could not properly find that any negligent failure of the railroad company to load this ice properly or to inspect it after loading proximately caused appellee's injury.

The doctrine of *res ipsa loquitur* cannot be invoked in this case to supply the absent proof of negligence because it is necessary, before that doctrine may be applied, that the machinery or object causing the injury be shown to have been under the sole control of the one against whom liability is asserted. "It is essential to the application of the doctrine of *res ipsa loquitur* that it appear that the instrumentality which produced the injury complained of was at the time of the injury under the management or control of the defendant or his agents and servants.

. . . The doctrine does not apply where the agency causing the accident was not under the sole and exclusive control of the person sought to be charged with the injury." 38 Am. Jur. 996; *Southwestern Telegraph & Telephone Co.* v. *Bruce,* 89 Ark. 581, 117 S. W. 564; *Arkansas Power & Light Company* v. *Jackson,* 166 Ark. 633, 267 S. W. 359; *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244. In the case at bar, the evidence showed that the train and its passengers were under the control of an army officer, and that members of the train crew were not allowed to enter the baggage car, from which the ice came, without obtaining permission from the soldiers.

The lower court erred in not granting appellant's motion for an instructed verdict in favor of appellant.

The judgment of the lower court is reversed and, the case having been fully developed, it is dismissed.

SMITH *v.* SMITH.

4-7777 191 S. W. 2d 956

Opinion delivered January 7, 1946.

Ras Priest, for appellant.

Judson N. Hout, for appellee.

HOLT, J. W. B. Smith died intestate January 16, 1944. At the time of his death, he was approximately 87 years of age, his eyesight was defective, his hearing impaired, and he was unable to write his name. He had been married a number of times and ten children, or their surviving children, survived him. One of the appellees, Notra Hudgens, was the youngest child and the only child of her mother. The other three appellees composed the next youngest set of children. The appellants were born of earlier marriages. W. B. Smith had owned 240 acres of farm land prior to his death, and appellees lived on this land. The youngest daughter, one of the appellees, lived with her father for about ten years after she was married and cared for him until his death.

February 18, 1942, about two years prior to his death, W. B. Smith executed two deeds to 160 acres of his land to appellees, Willie Smith and Steve Smith, 80 acres to each. The deed to appellee Willie Smith recited a consideration of $3,000 "to him paid," and the deed to appellee Steve Smith $2,500 "to him paid." April 2, 1942, W. B. Smith conveyed 40 acres to appellee, Cora Smith Lacy, for "$5 and other good and valuable considerations" and another 40 acres to Notra Lee Hudgens for "$5 and other good and valuable considerations."

November 18, 1944, appellants filed this suit and alleged that W. B. Smith, at the time he executed the four deeds, *supra,* was mentally incompetent and that the instruments were procured by the appellees through fraud and undue influence on their father. They asked that the deeds be declared void and canceled. In the alternative, they further alleged that the consideration of $5,500 recited in the deeds to Willie Smith and Steve Smith was never paid and prayed recovery of this amount from appellant, John L. Smith, administrator of W. B. Smith's estate, in the event the said deeds were held valid.

Appellees answered with a general denial. Upon a trial, the trial court found the evidence insufficient to warrant cancellation of the deeds and dismissed that part of the complaint. On the second branch of the case, the court found that the consideration for the deeds of W. B. Smith to Willie Smith and Steve Smith was $2,000, of which amount $800 had been paid and that the administrator should recover the balance due, $1,200. Appellants have appealed from both parts of the decree and appellees have cross-appealed from that part of the decree holding Willie and Steve Smith liable to the administrator for $1,200.

I.

It is a well settled rule of law that a man may dispose of his property as he may desire, in the absence of a showing of lack of mental capacity, or of fraud or undue influence practiced upon him. Here, appellants earnestly contend that W. B. Smith was mentally incompetent and unduly influenced at the time the deeds in question were executed by him. The burden was on appellants. The mental capacity of a grantor to make a deed is presumed. This is purely a question of fact. In *Braswell* v. *Brandon,* 208 Ark. 174, 185 S. W. 2d 271, this court said: "Since the sanity and mental capacity of a grantor to make a deed is presumed, the burden is upon those who allege that he did not have sufficient mental capacity to make the deed." *Beaty* v. *Swift,* 123 Ark. 166, 184 S. W. 442.

We try the cause *de novo* here and unless we can say that the findings and decree of the trial court are

against the preponderance of the testimony, we must affirm. After a careful review of all the testimony, we have reached the conclusion that it supports the findings and decree on both branches of the case.

Appellee, Notra Smith Hudgens, testified that her father died almost two years after he executed the deeds in question and that she was present at their execution; that her father had a very good mind; that he would show them where to plant cotton, corn and other crops and would insist that his orders be followed; that he knew what he was doing when he signed the deeds and that she had never seen him when he did not look like he had as good a mind as anybody.

Jeff Smith, one of the appellants, testified that his father's health was bad and that his daughter waited on him like a baby. Upon being asked by appellants' attorney, "How about his mind?" witness said, "Well, now, friend, that is hard to say. I'm not going to say about his mind." He further testified that he did not know whether his father knew what he was doing when he went to the lawyer's office to execute the deeds in question.

Dr. S. Justus testified that he had known W. B. Smith for about 36 years and had been his family physician for the last 15 years. When being asked about his mental condition, the doctor said he was about like any other man in his dotage. "Q. Was there anything from your examination or observation of him that would lead you to believe that he was not a man of sound judgment? A. I do not recall anything. Q. Would you say, doctor, that in the spring of 1942, W. B. Smith would know what he was doing in connection with business transactions? A. That was two years prior to his death? Q. Yes. A. I wouldn't know anything to the contrary. Q. Well, is it your opinion as a physician and his physician would you say that he didn't know what he was doing or have knowledge of any transaction that he might make then? A. No, according to my observation he would know the things we were talking about and there wasn't anything wrong with his mental condition in that respect."

Mrs. Ida Luther testified: "Q. Well, in the spring of 1942, you wouldn't say that he didn't know what he was doing when he did anything, would you? A. Well, not exactly. But I don't believe my father was right or he wouldn't have had the deeds made like they were. Q. That is the only thing you are basing it on, his making the deeds? A. Well, that is one. And another one is he didn't know who I was until I came in and I told him." Leonard Luther, husband of Ida, testified: "Q. In the spring of 1942, would you tell this court here that W. B. Smith didn't know what he was doing? A. I don't think he realized all that he was doing enough to transact his business." John Smith (the administrator) testified: "Q. Do you think that in the spring of 1942 that your father, W. B. Smith, was not competent to transact business at all? A. I wouldn't say that he wasn't." He further testified: "He told me one time up there that he had sold the boys 80 acres of land apiece—that was about 1942, somewhere along there," and quoting from the testimony of Mrs. Betty Roberts: "Q. Well, in the spring of 1942, you wouldn't say that he didn't know what he was doing when he did anything, would you? . . . A. Well, not exactly. But I don't believe my father was right or he wouldn't have had the deeds made like they were. Q. That is the only thing you're basing it on, his making these deeds? A. Yes, sir."

There was evidence of lapse of memory on the part of W. B. Smith, that he entrusted his bank account to two of the appellees, permitting them to draw on it, to sign his name to checks, and that he was liberal and indulgent with them, but we fail to find any evidence of fraud or undue influence exerted on the part of any of the appellees, and we think the effect of all the testimony tends to show that he possessed sufficient intelligence to transact business and fully understand the consequence of his acts. As above indicated, he had the right to prefer some of his children over the others.

The principles of law applicable to facts such as we have here have been many times stated by this court. Assuming that the trust relationship existing between W. B. Smith and appellees placed the burden on appellees to

show that the deeds to them were the free and voluntary act of a competent person, nevertheless we hold that appellees have satisfied this burden.

In *Beaty* v. *Swift, supra,* this court held: (Headnote.) "An ignorant and illiterate person may acquire property and may convey it, provided he knows what he is doing and appreciates and understands the transaction in which he is engaging, and although a grantor is very ignorant, and there is evidence tending to show mental incapacity to make a deed, such deed will be held valid, where the evidence shows that he knew what he was doing and the purpose thereof."

In *Atwood* v. *Ballard,* 172 Ark. 176, 287 S. W. 1001, this court said: "If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting his own interest in dealing with another is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him."

II.

On the second branch of the case, as already noted, we think the preponderance of the testimony supports the trial court's finding that the intended and real consideration in the two deeds to Steve and Willie Smith was $2,000, and that they are still due the estate a balance of $1,200.

In addition to the testimony of Steve and Willie Smith to the effect that $2,000 was to be the consideration, we attach much weight to the testimony of Mr. J. N. Hout, Sr., on this point. He was a disinterested witness and unrelated to any of the parties. He testified that he was the farm loan agent of the Metropolitan Life Insur-

ance Company, and that Willie and Steve Smith, together with their father, W. B. Smith, came to him the latter part of 1941 and inquired what amount of money they could borrow on the two 80-acre tracts of land in question here, which W. B. Smith deeded to them February 18, 1942, and (quoting from appellants' brief) "I told them it would be in the neighborhood of $2,500. They said that would hardly be what money they would need. Mr. W. B. Smith stated at that particular time that he was selling the land to the boys, Willie and Steve Smith, and that they owed him a balance of $2,000 on the farm and he asked me if I would draw some deeds for them. I told him, no, that I didn't want to, and referred them to my son, J. N. Hout, Jr., at Newport. But they did make an application that day for $2,600, specifying that they owed W. B. Smith $2,000. Q. Did W. B. Smith tell you that they owed him a balance of $2,000 on the land? A. He did."

The evidence further discloses that this loan for approximately $2,600 was procured and that Mr. Hout's son, an attorney, prepared the deeds here involved to Willie and Steve Smith from their father, W. B. Smith. When the proceeds were received from the insurance company, Steve and Willie Smith deposited $800 in their father's bank account in part payment on the $2,000. The testimony of Steve and Willie Smith that they paid the balance due of $1,200 to their father in cash is so unreasonable in the circumstances as to carry little, if any, force. They were unable to produce any evidence of this payment to their father and were uncertain as to the time or place. They could give no explanation of their failure to deposit this $1,200 at the same time they deposited the $800 and they made no attempt to explain just why it was necessary to turn over to their father this large sum of money.

Finding no error, the decree is affirmed on both direct and cross-appeal.

ROBINS and MILLWEE, JJ., dissent.

GREER *v.* PARKER.

4-7782 191 S. W. 2d 584

Opinion delivered January 7, 1946.

Daggett & Daggett, for appellant.

Hal B. Mixon, for appellee.

MILLWEE, J. This is a suit by appellant, Anna C. Greer, for specific performance of a contract of sale of 120 acres of land situated in Lee county, Arkansas, made December 7, 1944, between appellant and appellee, A. C. Parker. In the contract of sale, appellee agreed to pay

$3,600 on delivery of a valid warranty deed conveying a merchantable title. In his answer appellee admitted execution of the contract of sale and tender of a deed, but alleged in defense that the deed tendered by appellant did not convey a merchantable title. The cause was submitted to the trial court on an agreed statement of facts, and a decree was rendered dismissing the complaint for want of equity.

T. A. Cathey died August 15, 1911, leaving two children, Anna C. Gardner (now Greer, appellant herein) and Mary Rainey, as his only descendants. The last will and testament of T. A. Cathey, which was probated August 26, 1911, designated appellant as executrix and trustee of the testator's property, and contained a provision necessary for a determination of the issue raised by the appeal, as follows:

"In other words, I will and direct that after the payment of my debts and expense of administration, my estate may be divided equally between my two daughters, Mrs. Anna C. Gardner and Mrs. Mary Rainey. However, I desire that Mrs. Gardner's portion shall pass to her absolutely, while as to Mrs. Rainey's portion, she will simply receive the income or interest thereon during her life, and at her death said portion or interest will go to her children or their descendants, as above set out."

According to the agreed statement of facts, appellant duly settled the estate of T. A. Cathey and fully accounted to Mary Rainey for all property devised to her under the will. Mary C. Rainey is a widow 66 years of age and the possibility of issue is extinct. She has two children, Anna R. Ivens, 45 years of age, and Ellen R. Vincent, 37 years of age. On January 8, 1926, in order to repay appellant for funds advanced to Mary Rainey and children in excess of the amount due from the estate of T. A. Cathey, they, Mary Rainey, Ellen R. Vincent, and Anna R. Ivens conveyed to appellant by warranty deed all their interest in the land involved herein.

The sole question presented by the appeal is whether the children of Mary C. Rainey took a vested, or contingent remainder under the terms of the will of T. A.

Cathey. If the remainder is vested, then their interest passed to appellant under the warranty deed of January 8, 1926, and the deed tendered by the latter to appellee conveyed a merchantable title.

Many cases involving the subject of contingent and vested remainders have reached this court. In the case of *McKinney* v. *Dillard & Coffin Co.,* 170 Ark. 1181, 283 S. W. 16, this court had under consideration the following language of a will: "I give to my daughter, Mary V. McKinney, during her natural life, the following described tracts: . . . and at her death I give and devise the same lands to her children in equal portions, and if at the time of Mary V. McKinney's death any of her children be dead leaving children, then such child or children is to have the same interest in said lands that said parents would have had if alive."

In considering the language of the will in that case this court said: "Appellants contend for a reversal of the decree upon the ground that, under the will, they took a contingent remainder in the real estate, which was not subject to partition, and for that reason the court was without jurisdiction to render a decree dividing the land in kind. In other words, they collaterally attacked the decree of partition as being void. The correctness of their attack must depend upon the construction placed upon the provision of the will quoted above. The law favors the vesting of estates as early as possible. *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *McCarroll* v. *Falls,* 129 Ark. 295, 195 S. W. 387. In applying this doctrine, where a life estate was given to parents and to their children after their death, share and share alike, it was ruled by this court that the remainder vested as soon as the child was born and before the life tenant died. *Jenkins* v. *Packingtown Realty Company,* 167 Ark. 602, 268 S. W. 620. Also in the case of *Black* v. *Bailey,* 142 Ark. 201, 218 S. W. 218, this court ruled that the testator did not intend to create a contingent remainder in the appellants in that case in the lands he devised to them under a provision similar to the provision in the will in the instant case. The provision of the will in the Black case, *supra,* is as follows:

" 'Provided, that if any of my children should die before the expiration of the above trust, hereinbefore created, leaving issue, said issue shall only take the share that should go to my children if living.'

"This court said the language quoted was a mere declaration of the law of descent and distribution and not an expression of an intention to create a remainder interest in the grandchildren. We think the instant case is ruled by the Jenkins and Black cases, *supra,* and that the remainder estate vested in fee simple in Mrs. McKinney's children, subject to her life estate. . . ."

In the case of *Jenkins* v. *Packingtown Realty Co., supra,* the will provided: "I will and devise the east half of my said plantation to my son, James Hayes Jenkins, and his wife, Josephine, to hold, use and occupy and enjoy for and during the term of their natural lives, for the support and education of their children, and, after their death, to be equally divided between their children, share and share alike." There, this court said: "We think that the language used by the testator presents a case of a devise in remainder to a class of persons, whether in being at the time or not, and that the remainder vested immediately upon the coming into being of any one of that class. In other words, we think that the case is one which falls within the rule announced by the Supreme Court of the United States in *Doe* v. *Considine,* 6 Wall. (U. S.) 458, 18 L. Ed. 869, as follows:

" 'A devises to B for life, remainder to his children, but, if he dies without leaving children, remainder over, both the remainders are contingent; but, if B afterwards marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and, if the child dies in the lifetime of the parents, the vested estate in remainder descends to his heirs.' "

The case of *Landers* v. *Peoples Building & Loan Ass'n,* 190 Ark. 1072, 81 S. W. 2d 917, involved the con-

struction of the following language in a deed: "The above property . . . I hereby give, convey, and deliver to my said daughter during her life, and her children, Leola Wooten Millette and Meredith Millette, now born, and to others that may be born unto her, share and share alike, equally and undivided, after the death of my said daughter in fee simple forever." In construing this provision in the deed, this court said: "In the instant case the deed was made to Willie Millette and her children. It expressly gave her a life estate. The children named in the deed took a vested remainder, that is, the living children. Where a conveyance is made to persons that are living and to others thereafter born, the persons living take a vested interest. . . .

"The children of Willie Millette living at the time the conveyances were made took a vested interest, which would open up and let in other children that were born thereafter. The record does not show how old these children were, but the deed was made many years ago, and the parties have agreed that Willie Millette is past the age when she could give birth to a child. . . .

" 'Vested remainders, even at common law, may be conveyed by deed. Also a deed of trust will pass a vested remainder. Though subject to be divested by the exercise of a power of appointment, a vested remainder is an alienable interest. Upon the death of a testator who has devised a life estate to one, with limitation over to another in fee, the deed in which both the life tenant and remainderman join will pass the entire estate in fee to the grantee.' 3 Thompson on Real Property, p. 220."

At the time of T. A. Cathey's death in 1911, his daughter, Mary Rainey, had two living children. Under the principles announced in the above cases, Mary Rainey became seized of a life estate in the land devised with a vested remainder over to her two children. The interest of the children, Anna R. Ivens and Ellen R. Vincent, would open up and any afterborn children of Mary Rainey would share with them in the remainder interest. Mary Rainey is a widow and has had no other children. She is 66 years of age and it is agreed by the parties

that the possibility of issue is extinct. According to the rule laid down in *Jenkins* v. *Packingtown Realty Co., supra,* any subsequent devolution of the title of the daughters of Mary Rainey is governed by the law of descent and distribution, and not by the will, and they having joined their mother in the conveyance to appellant, no estate remains in them to descend to their heirs. The interest of Mary Rainey and her children, therefore, passed to appellant under the warranty deed of January 8, 1926, and the deed tendered to appellee by appellant conveys a merchantable title.

Appellee, in support of his contention that the remainder is contingent, relies upon the cases of *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S. W. 2d 491; *National Bank of Commerce* v. *Ritter,* 181 Ark. 439, 26 S. W. 2d 113; and *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994. We have given careful consideration to the language of the instruments under consideration in these cases and the factual situations involved. In *National Bank of Commerce* v. *Ritter, supra,* this court recognized the rule laid down in the Jenkins case and said: "Counsel for appellant rely upon the case of *Jenkins* v. *Packingtown Realty Co.,* 167 Ark. 602, 268 S. W. 620. In that case there was a devise to a son and wife for their lives, with remainder to their children. There was a contingent remainder in the after-born children of the devisees which became vested upon the coming into being of a child of such union."

In *Deener* v. *Watkins, supra,* this court in distinguishing the case from that of *Landers* v. *Peoples Building & Loan Ass'n, supra,* said: "The distinguishing feature between the conveyance in the Landers case and that in the case at bar is that in the former there were *in esse* fixed and determinate persons in whom a present interest in the estate is fixed, namely, Leola Wooten Millette and Meredith Millette."

Having reached the conclusion that the language of the will involved in the case at bar falls within the principles announced in the cases of *Jenkins* v. *Packingtown*

Realty Co., McKinney v. *Dillard & Coffin Co.,* and *Landers* v. *Peoples Building & Loan Association, supra,* it follows that the chancellor erred in dismissing the complaint of appellant. The decree is accordingly reversed, and the cause remanded with directions to enter a decree for appellant for specific performance of the contract of sale.

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

4-7776 191 S. W. 2d 587

Opinion delivered January 7, 1946.

[redacted]

Henry Donham and *Leffel Gentry,* for appellant.

Tom W. Campbell and *Pace, Davis & Pace,* for appellee.

GRIFFIN SMITH, Chief Justice. Missouri Pacific has appealed from a judgment in favor of E. J. Zolliecoffer for $15,000. Suit was brought under authority of Federal Employers' Liability Act.

Appellant insists (a) that there should have been a directed verdict for the defendant; (b) that George Henry's testimony was erroneously admitted; (c) that the 1936 complaint filed in Zolliecoffer's behalf in a personal injury suit should have been admitted—inasmuch as he then procured judgment for $8,000 to compensate a leg injury;—and, (d) $15,000 is excessive because the jury did not diminish damages in proportion to the plaintiff's contributory negligence. Other grounds were set out in the motion for a new trial, but are not argued.

Zolliecoffer, a resident of Alix, and a former coal miner, went to the City of Van Buren May 2, 1944, and applied to the railroad company for employment as brakeman. Thereafter he made "student" trips to ascertain what his duties were and how they should be performed. May 7th he was directed to Little Rock for assignment. The Company's records show that he responded May 8th and claimed to be ill. He reported for duty May 15th and made certain runs. In returning from Van Buren May 20th, Zolliecoffer reached the tracked area near what is called the viaduct adjoining Locust Street in North Little Rock where two mainlines and

four side- or "hold" tracks form part of the terminal facilities. Numerous switches are required in routing traffic. Because of the frequent use of this property the Company maintains groups of employes to look after it. Workmen were required to take out old ties and put in new ones, assist carmen in clearing derailments, help in loading and unloading track materials, pick up scraps of machinery, remove cinders from roadbeds and contiguous places, and perform other duties.

During May, 1944, slightly more than seventeen hundred man-hours were thus employed, ranging from a low of eight hours May 21, 28, and 30, to a high of 85 May 13 —the average being approximately fifty-four and three-quarters. It is not denied that appellee's duties required him to alight from the train while it was slowly moving.

Appellee's testimony is that about 5:30 the afternoon of May 20th he stepped from the caboose for the purpose of "taking care of the northbound switch," and in doing so stumbled in heavy cinders, clinkers, or firebrick fragments and sustained injuries to both legs. Another trainman testified that while he did not see Zolliecoffer fall, he saw him lying on the ground.

(a) The first question relates to the Company's duty in respect of the premises. There was testimony that Missouri Pacific has 180 miles of tracks in Greater Little Rock. No law imposes upon the Company the obligation to keep this vast area free of cinders, clinkers, firebrick, or scrap iron, to such an extent that an employe may, with complete safety, leave a moving train. What *is,* or what is *not,* appropriate care at a particular place and in stated circumstances, depends upon what the individual may reasonably expect and rely upon. In the case at bar appellee contends he had a right to assume that the impeding substances would not be strewn in such manner as to create a physical hazard. This measure of care, as applied to the premises where injury occurred, is strengthened by appellant's witnesses, several of whom testified that they were directed to watch for foreign matters and to remove them promptly. There

was also evidence from which the jury could draw the inference that the clinkers had been on the ground several hours. But, irrespective of extraordinary lapse of time between deposit and accident, the physical matter was seemingly left by a locomotive, and the act of negligence (if we assume, as the Company undertook to prove, that cleaning crews were at work) was not that of a stranger. In this respect the case is unlike *Missouri Pacific Railroad Company* v. *Ford,* 203 Ark. 212, 156 S. W. 2d 207, where there was no suggestion that the stick which caused Ford to fall had been left on the railroad platform by Company servants. See *Kroger Grocery & Baking Co.* v. *Kennedy,* 199 Ark. 914, 136 S. W. 2d 470, where it was said that the plaintiff must show *either* that the object was negligently left by an employe, or that it remained there a sufficient length of time to charge the master with knowledge of its presence. (Compare *The Scott-Burr Stores Corporation* v. *Foster,* 197 Ark. 232, 122 S. W. 2d 165, cited by appellant).

(b) While ordinarily a witness will not be permitted to testify regarding previous condition of premises—whether they were clean or obstructed—unless it be shown that no material changes occurred after the accident happened and before the witness made his observations—in the instant case Henry was with Zolliecoffer within an hour of the time the latter claims he was injured, and the two went to where the fall was caused. No effort was made to show, other than by speculation, that the debris was left by an engine operating over the tracks after Zolliecoffer's misfortune occurred. It is only suggested that there *might* have been intervening activity—not that there *was.* In the circumstances we think the objection was properly overruled.

(c) Appellant insists it was prejudiced through refusal of the trial court to admit in evidence a certified copy of a complaint filed in Ozark Circuit Court in 1936, in consequence of which judgment in Zolliecoffer's favor was for $8,000. Of this sum he says he received $2,700 in compromise. The action was against Valley Gas Company. Zolliecoffer charged that he fell and broke a leg

because an iron pipe had been negligently misplaced. In the complaint there was the broad allegation that "bones, flesh, muscles, tendons, ligaments, and nerves in and about plaintiff's left leg, ankle, foot and knee were broken, split, fractured, lacerated, injured, . . ." etc. Physicians called by each side testified that at the present time appellee is injured in both knees, but the left is more seriously impaired. One surgeon, however, testified that in his opinion the injuries now complained of could not relate back to the 1936 transaction; the trauma was of comparatively recent origin. There is also substantial testimony going to the proposition that the damage is permanent. Walking is difficult and unsafe; a fall may be expected at any time.

Appellant comments on what this Court said in *Taylor* v. *Evans,* 102 Ark. 640, 145 S. W. 564. Argument is that the decision was erroneous and that it was not supported by the cases cited: *Gibson* v. *Herriott,* 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17, and *Valley Planting Company* v. *Wise,* 93 Ark. 1, 123 S. W. 768, 26 L. R. A., N. S. 403. Chief Justice McCulloch, who wrote the Taylor-Evans opinion, and other members of the Court (with the exception of Mr. Justice Kirby who dissented) no doubt thought that the law had been correctly declared, and we adhere to the decision. The Gibson-Herriott, and the Valley Planting Co.-Wise, cases were mentioned in support of the Court's holding that "It was competent, for the purpose of proving an admission on the part of the plaintiff, and also for the purpose of impeaching him, to read the complaint in evidence, or to prove by him, on cross-examination, that he had made allegations in the original complaint inconsistent with his present contention."

In the suit at bar Zolliecoffer was interrogated respecting his former allegations, his injuries, and their duration. He had neither signed nor verified the complaint; and he testified that the specific allegations were entirely those of his attorneys. He had only told them he sustained an injured leg—"a broken leg," as he other-

wise expressed it—and he insisted there was no thought on his part of claiming permanent injury.

The rule stated in American Jurisprudence, v. 20, Sec. 634, p. 537, is that while allegations affecting the same subject-matter may be introduced for the purpose of testing credibility, yet, in a court proceeding, a party who does not verify, authorize, or adopt a pleading, may not have the allegations thereof admitted against him, even though he makes use of the record in a subsequent proceeding. See *Griffin Grocery Co.* v. *Thaxton,* 178 Ark. 736, 11 S. W. 2d 473; *Berry* v. *French,* 200 Ark. 401, 139 S. W. 2d 381.

On rebuttal Zolliecoffer introduced witnesses who testified that they had worked with him in coal mines under extremely difficult conditions for protracted periods since 1936, and that he was not impaired by reason of the leg injury.

(d) Finally, it is argued that the judgment is excessive because the jury did not consider appellee's contributory negligence. There are at least two answers: First, it is not shown that, as a matter of law, Zolliecoffer was negligent. He assumed (and the Company in effect through its witnesses testified) that the general policy was to keep the grounds clean and free from dangerous substances in the area involved. A second answer is that the fact-finders were instructed not to return a verdict for the plaintiff "unless you find from a preponderance of the evidence that Zolliecoffer was not guilty of contributory negligence."

Affirmed.

GRAVES *v.* FRENCH.

4-7797 191 S. W. 2d 590

Opinion delivered January 14, 1946.

Claude E. Love and *Sam Goodkin,* for appellant.

L. B. Smead, for appellee.

HOLT, J. This litigation involves the care and custody of a child, Billy James Graves, now seven years of age. Appellants are the grandparents and appellee the mother. May 7, 1942, appellee obtained a decree of divorce from the child's father, R. L. Graves, Jr., and about 13 days later she married W. H. French. The decree awarded appellee custody of the child. The child's father, however, sought a modification of the divorce decree affecting the care and custody of the child, and on June 30, 1942, the court modified the decree and awarded the care and custody of Billy James Graves to his father, R. L. Graves, Jr. Appellee appealed from this decree of modi-

fication, but this court on March 8, 1943, affirmed the action of the lower court, (*French* v. *Graves,* 205 Ark. 409, 168 S. W. 2d 1108).

November 20, 1942, Bob Graves, the father, was inducted into the military service of the United States and was sent overseas. Thereafter, on June 1, 1944, the father, Bob, was killed in action and on February 8, 1945, appellee, Ola Graves French, the mother of the child, brought the present suit to obtain its care and custoday, and on July 2, 1945, the trial court awarded its care and custody to her with the provision that appellants, the child's grandparents, who have had the care and custody of Billy James practically all of the time since he was six months old, should have him in their home for at least a day and night each month, and with the further privilege to "visit said child at all reasonable times." This appeal followed.

On the threshold here, we are confronted with the former decree, *supra,* affecting the care and custody of this child. In that decree, its care and custody as noted above were awarded to the father, then living, who left the child in the care and custody of his father and mother, appellants here, where it had been with appellee's consent since it was about six months old. According to our long established rule, this latter decree awarding the care and custody of this child to its father should not be disturbed unless there have been such changed conditions, subsequent to that decree that would warrant the change, and then only for the best interest of the child. "A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree, . . . and then only for the welfare of the child." *Phelps* v. *Phelps, ante,* p. 44, 189 S. W. 2d 617.

As we view the record, the only material change in conditions since the decree of this court in *French* v. *Graves, supra,* is the death of the child's father. Otherwise, the material facts and conditions are, in effect, the same on this appeal as in the former, except that here appellants have had the continued care and custody of

this little boy for almost three additional years since the former decree.

Reference is made to the former case for statement of the facts. We think it unnecessary to repeat them here.

Cases of this character are always difficult of solution. No hard and fast rule can be laid down and each case must be governed largely on its own particular facts, at all times bearing in mind that of prime importance and first consideration is the well-being of the child. There are certain general and well established rules, however, many times announced by this court, to guide us. One of our latest cases is that of *Tucker* v. *Tucker,* 207 Ark. 359, 180 S. W. 2d 571. There we said: "We recognize the general rule that ordinarily the parent of the child is its natural guardian and is entitled to its care and custody; however, this is not always true. There are exceptions. Of prime concern and the controlling factor is the best interest of the child. The rule is laid down in *Johnston* v. *Lowery,* 181 Ark. 284, at page 287, 25 S. W. 2d 436 at p. 437, by this court in the following language: 'The law recognizes the preferential rights of parents to their children over relatives and strangers, and where not detrimental to the welfare of the children, they are paramount, and will be respected, unless special circumstances demand that such rights be ignored. *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. 2d 513; *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726. The courts will not always, however, award the custody of an infant to the father, but, in the exercise of sound discretion, will look into the peculiar circumstances of the case, and act as the welfare of the child appears to require considering primarily three things: (1) Respect for parental affection, (2) Interest of humanity generally, (3) The infant's own best interest.' "

As we have indicated, except for the death of this child's father, the facts and circumstances that existed when the decree, *supra,* was rendered have, we think, remained unchanged. Was, therefore, the death of the father a sufficient change in conditions to warrant the decree transferring the child's care and custody to the

mother, appellee? We do not think so. Appellants, the grandparents, still have their same home and have continued to care for this child by giving him educational and religious opportunities as before that decree. The same love and affection for the child with three additional years of cultivation, on the part of appellants, continues. While it is conceded that the appellee, mother, and the stepfather, French, are both of good character and able to care for the child, the nature of the stepfather's business, that of an engineer, requires frequent moves from place to place which obviously would disturb the child's schooling and environment. The trial court made the following findings in the decree: "There is no doubt whatever in the court's mind that these grandparents are of the finest type of citizenship. This child could be in no better hands."

This record discloses that the father of this child had lodged its custody with its grandparents, appellants, and the underlying factor in the former decree awarding the care and custody to the father was the fact that appellants in reality had its care and custody and that it was for the best interest of the child that it remain with its grandparents, appellants. Though the decree did not so recite, such was its effect.

The contest was then, and is, between the grandparents, appellants, and the mother, and we think, on this record the grandparents should prevail. In *Verser* v. *Ford, et al.,* 37 Ark. 27, this court said: "This is a contest for the custody and nurture of an infant girl of tender age, whose mother died at her birth, and who, from the first two or three days of her existence, has been cared for and kept by the grandparents. The father now demands the child again, having since married, and being in circumstances to provide and care for it. . . . The father has shown himself to be a moral man, with the means of discharging his parental obligation. Certainly, under the circumstances, if he had been in possession of the child, no chancellor could have found warrant in equity for taking her away to be placed under the grandmother's care. But it cannot be ignored that the case does not present that attitude. The child was placed

where she is by the father's assent, and has so remained. By his assent ties have been woven between the grandmother and granddaughter, which he is under strong obligation to respect, and which he ought not wantonly and suddenly to tear asunder."

So here, the mother was the first to part with this child's custody, and we think the principles of law announced in the above case apply with peculiar emphasis here.

Appellee has stood by far too long and permitted the ties of love, affection and attachment of these grandparents for this child to become too strong to be cast aside at this late date. Therefore, the decree will be reversed and the cause remanded with directions to the trial court to award the custody of the child to appellants, its grandparents, with the right of the mother to visit it at all proper times. It is so ordered.

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

4-7763 191 S. W. 2d 592

Opinion delivered January 14, 1946.

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

Kenneth C. Coffelt, W. A. Waddell and *Eugene Coffelt,* for appellee.

ROBINS, J. Ervin Yandell was killed instantly early in the afternoon of August 21, 1944, by collision of southbound passenger train of appellants with the truck in which Yandell was riding, at a public crossing a short distance north of Benton, Arkansas. In suit brought by his widow, appellee, Elsie Yandell, for the benefit of herself and Yandell's three minor children, a jury returned verdict in favor of appellees for $40;000. To reverse judgment entered on the verdict, this appeal is prosecuted.

Appellees alleged in their complaint that the death of Yandell was caused by the negligence of the railroad company in failing to give the signals for the crossing as required by law and in operating the train around a sharp curve (alleged by them to be only 300 feet from the crossing) at an excessive speed. The answer was a general denial and plea of contributory negligence.

There was a double track at the site of this accident, the east track being used for north-bound traffic and the west track for south-bound traffic; and there was a spur track almost parallel with and about 50 feet west of the west track. The crossing was for a paved highway leading from Benton to Bauxite, and it was equipped with an electric warning signal. This signal consisted of two metal posts, one north of the highway and immediately east of the north-bound track, the other south of the highway and immediately west of the spur track, on each of which was mounted an electric bell and "blinker" light which operated automatically when a train was near the crossing. The evidence showed that these signals were operating when Yandell drove on the crossing, but there was testimony that they could have been caused to operate at this time by a north-bound freight train which passed over the crossing immediately before Yandell drove on the crossing. The passenger train was traveling at a speed of about sixty miles an hour. Yandell was twenty-five years old and was earning approximately $175 per month.

While other grounds for reversal of the judgment of the lower court are asserted, these are chiefly relied upon by appellants:

I. That the evidence did not justify a finding that the collision was caused by negligence on the part of the railroad company.

II. That the evidence showed that the collision was caused by the negligence of Yandell; or, in any event, that the negligence of Yandell in driving upon the track when he did was greater than that of appellant company or its servants in charge of the passenger train which struck Yandell's truck.

III. That the verdict was excessive.

I.

In determining whether or not the evidence adduced was sufficient to authorize the lower court to submit to the jury the question of negligence on the part of the operators of the passenger train we must give to the evidence the strongest probative force in favor of appellees that it will reasonably bear. *St. Louis-San Francisco Railway Company* v. *Whitfield,* 155 Ark. 560, 245 S. W. 323; *Wells* v. *Bentley,* 87 Ark. 625, 113 S. W. 939.

The testimony, on this phase of the case, introduced by appellees may be summarized as follows:

A photographer introduced in evidence photographs of the track, taken with his camera placed, for some of the pictures, at the approximate location of Yandell's truck immediately before it went on the track where it was struck. One of them showed a south-bound train photographed as it came in view from around the curve to the north of the crossing. The photographer testified that from his position at the crossing he could see an approaching train for a distance of about one hundred yards.

Ben H. Cox testified that he had lived for eighteen years within two hundred feet of the crossing; that there was a sharp curve north of the crossing and that from the highway where the spur track crosses it one could see a train coming from the north about four hundred feet; that there was an embankment along the track north from the crossing; that from a point about ten feet west of the rails of the south-bound track one could see about six or seven hundred feet up the track; that the automatic crossing signals continued to operate after a train had passed over the crossing and had gone one hundred and fifty feet beyond it.

Duke Ussery testified that he saw the accident from a short distance west of the crossing; that he saw the freight train going north as Yandell drove up to the crossing and stopped; that when the caboose cleared the crossing Yandell started up, a whistle sounded and the col-

lision occurred; that it was a clear day; that he had used this crossing many times and one could see up to the bend in the track from where Yandell stopped; that he did not hear any bell ring, but heard the whistle blow about twice; that when the engine ran out of the bend the whistle blew and was then blown again and the collision occurred.

Paul Drennan testified that he witnessed the accident from a point about 300 feet southeast of the crossing; that about the time the caboose of the freight train passed the crossing he heard the whistle sound; that at this time Yandell was starting toward the crossing; that he did not hear the bell on the passenger train or pay any attention to it; that the passenger train ran about 600 or 700 yards beyond the crossing before it stopped.

Collie White testified he was about one block's distance from the crossing when the collision occurred; that he did not hear any bell ringing on the train, but heard the whistle blow just before the train struck the car.

Witnesses on behalf of appellants contradicted appellees' witnesses on material features of the case, and the credibility of some of appellees' witnesses is attacked by appellants, but the credence to be given to all these witnesses was a matter solely to be determined by the trial jury. *Farmers' Club Company* v. *Emerson Mercantile Company,* 153 Ark. 614, 241 S. W. 372; *Home Life & Accident Company* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648; *Laflin* v. *Brooks,* 180 Ark. 1167, 21 S. W. 2d 169; *St. Louis-San Francisco Railway Company* v. *Burford,* 180 Ark. 562, 22 S. W. 2d 378; *Gaster* v. *Hicks,* 181 Ark. 299, 25 S. W. 2d 760; *St. Louis-San Francisco Railway Company* v. *Bishop,* 182 Ark. 763, 33 S. W. 2d 383; *Missouri Pacific Railroad Company* v. *Rodden,* 187 Ark. 321, 59 S. W. 2d 599; *Greenlee* v. *Rolfe,* 187 Ark. 1162, 60 S. W. 2d 568; *Browne* v. *Dugan,* 189 Ark. 551, 74 S. W. 2d 640; *Metropolitan Life Insurance Company* v. *Pope,* 193 Ark. 139, 97 S. W. 2d 915.

By § 11135 of Pope's Digest, it is required that when a locomotive is approaching a public road crossing the bell must be rung or the whistle sounded continuously

from a point at least thirteen hundred and twenty feet distant from the crossing until the crossing has been passed.

When we give to testimony on behalf of appellees the force and credence that we must under our rules accord to it, it cannot be said that there was no substantial testimony to show that those in charge of the locomotive on the passenger train failed to sound the whistle or ring the bell constantly for a distance of at least thirteen hundred and twenty feet north from the crossing where the collision occurred.

II.

The proof showed that when Yandell approached the railroad tracks at the crossing the automatic "blinker" signals and bells were operating and, therefore, under the provisions of § 6742 of Pope's Digest, it became Yandell's duty to stop his truck and not to proceed until he could do so safely. The evidence shows that he did stop his truck and wait until after the caboose of the north-bound freight train had passed over the crossing. There was evidence introduced by appellees to show that these automatic signal devices continued to work after a train passed over them and until the train had proceeded a distance of one hundred and fifty feet beyond the crossing, and it is urged by appellees, and was no doubt found by the jury, that Yandell, after waiting for the freight train to pass over the crossing, concluded that the continued operation of the automatic signals was caused by the departing freight train rather than a train approaching the crossing.

However, the fact that the jury, by its verdict, fixed liability on the railroad company, but at the same time returned a verdict in favor of the engineer in charge of the passenger locomotive, strongly indicates that the jury found, as it should have found, that Yandell was guilty of negligence in driving his truck upon the crossing in the face of the warning given by the automatic signals.

The statute authorizing consideration of comparative negligence in a case of this kind (§ 11153 of Pope's Digest) applies only to a suit against a railroad company

and not against an individual. In an action against an individual responsible for an injury of this kind, the doctrine of law in force before enactment of this statute, under which a traveler, injured by collision at a crossing, who was guilty of any contributory negligence causing or contributing to his injury, was precluded from recovering still applies; so that it is apparent that, since the jury by its verdict exonerated the engineer, but imposed liability upon the railroad company, it must have found that Yandell was guilty of negligence in driving upon the crossing. But, since the jury was instructed as to the provisions of the statute (§ 11153, Pope's Digest) on the effect of comparative negligence in an action of this nature, the jury must have found that the negligence of the railroad company was greater than that of Yandell. Whether, in a case like this, negligence of the injured person is greater or less than that of the railroad company is ordinarily a question for the jury. *Chicago, Rock Island & Pacific Railway Company* v. *French,* 181 Ark. 777, 27 S. W. 2d 1021. We cannot say that there is no foundation in the evidence for the appraisement of the negligence of the respective parties which was made by the jury in this case.

III.

Section 11153 of Pope's Digest, referred to above, is as follows: "In all suits against railroads, for personal injury or death, caused by the running of trains in this state, contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of less degree than the negligence of the officers, agents or employees of the railroad causing the damage complained of; provided, that where such contributory negligence is shown on the part of the person injured or killed, the amount of recovery shall be diminished in proportion to such contributory negligence."

This section has been amended by Act No. 140 of the General Assembly of Arkansas, approved March 2, 1945, but the effect of the amendment is only to include within the operation of the provisions of the previous lawsuits for damage to property, the application of the

original act having been limited to suits in which recovery for bodily injury or death was sought.

As we have pointed out above, the jury should have found and did no doubt find that Yandell was guilty of negligence in driving his truck upon the track while the warning lights were flashing and the alarm bells were sounding. Hence it was the duty of the jury to diminish the amount of the damages in proportion to this negligence; and the amount of the verdict indicates that this was not done.

We conclude that, under the circumstances of this case, any judgment for appellees in excess of $15,000 would be excessive.

We have examined other assignments of error raised by appellants and do not find any of them sufficient to require reversal herein.

If, therefore, within fifteen days from this date remittitur for all of the judgment in excess of $15,000 shall be filed by appellees, the judgment of the lower court, as so reduced, will be affirmed, otherwise the cause will be reversed and remanded for a new trial.

GANT *v.* GANT.

4-7791 191 S. W. 2d 596

Opinion delivered January 14, 1946.

Geo. W. Johnson, for appellant.

Roy Gean, for appellee.

McFaddin, J. The only question on this appeal is whether the chancery court was correct in awarding appellee $150 to reimburse her for amounts expended by her for clothing, nursing, and medical treatment of the afflicted child of the appellant and appellee.

Lola Gant and Paul Gant were married in 1924. They had one child, a boy, Richard Gant, mentally subnormal, and now about sixteen years of age. On September 17, 1943, Lola Gant obtained a decree of divorce in the Sebastian chancery court on the ground of cruelty and indignities; and, in the decree, there was incorporated an agreement between the parties concerning the custody and support of the child, which agreement recited, *inter alia:*

"It is agreed that the custody of the child shall be vested one-half time in the husband and one-half time in the wife, and the husband will pay to the wife, for the care and upkeep of said minor child while in her care, the sum of $20 per month. . . . The husband will also provide, at his own expense, all clothing and medical treatment and service which the child may required."

On June 7, 1945, Paul Gant filed his motion for modification of the former decree, seeking to secure full-time custody of the child, and to be relieved of all future payments of $20 per month to Lola Gant for the care and upkeep of the child. On June 12, 1945, Lola Gant responded to the said motion. (1) She waived all right to custody of the child except from 1:00 p.m. Sunday until 9:00 a.m. Monday of each week. (2) Mrs. Gant did not seek any money for future care and upkeep of the child, but she did seek reimbursement for previous expenditures

in these two respects: (a) she claimed that she should be allowed $121.46 to reimburse her for that amount expended for "clothing and medical service, which she had furnished said child while in her custody"; and (b) she claimed that the $20 per month provided in the decree of September 7, 1943, had been wholly inadequate for the care and upkeep of the child, and that she had been obliged to obtain a nurse or attendant, and that $240 should be allowed her as reimbursement for additional expenses incurred by her in care and upkeep of the child during the period from September 7, 1943, until June 12, 1945. Mrs. Gant admitted that Paul Gant had paid the $20 per month provided in the decree, but claimed that she had expended $121.46 for clothing and medical services, and $240 for the service of an attendant, and that she was entitled to the additional allowance of this $361.46.

After an exhaustive and patient hearing, the chancery court entered a decree allowing Mrs. Lola Gant $150, which may be separated as $121.46 for clothing and medical services, and $28.54 for additional care and upkeep. From this allowance, Paul Gant has appealed. We reach these conclusions:

I. *Mrs. Lola Gant is Entitled to Be Reimbursed for the $121.46 that She Expended for Clothes and Medical Services for the Child.* By the terms of the original decree of September 7, 1943, Paul Gant was "to provide at his own expense all clothes and medical treatment and services which the child may require." The evidence supports the decree of the chancery court to the effect that Mrs. Lola Gant expended $121.46 for clothes, drugs and medical treatment, and she is entitled to be reimbursed to this amount, because by the decree of September 7, 1943, Paul Gant was under the duty to pay these items, in addition to the $20 per month for care and upkeep. The clothing and medical items were placed in a separate category from the $20 per month for care and upkeep. If authorities are needed to sustain the statement that the father is under the duty to supply clothing and medical services for his child, and is liable for the cost thereof, even in the absence of the provisions of a divorce decree, then see

Holt v. *Holt,* 42 Ark. 495; *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012; *McWilliams* v. *Kinney,* 180 Ark. 836, 22 S. W. 2d 1003; *Bradas* v. *Downing,* 202 Ark. 90, 150 S. W. 2d 27; *McCall* v. *McCall,* 205 Ark. 1123, 172 S. W. 2d 677.

II. *Mrs. Lola Gant Cannot Recover the $28.54 Allowed for Additional Expense of Care and Upkeep.* The chancery court allowed Mrs. Gant a total of $150. Of this amount, $121.46 was for clothing and medical services as previously explained. The remaining $28.54 was for care and upkeep, in addition to the $20 per month allowed her by the decree of September 7, 1943, and paid by Paul Gant. We do not doubt that Mrs. Gant expended more than $20 per month allowed by the decree; but she should have secured a court order for increased allowance before incurring increased expenses. The law does not permit an award for maintenance to be increased retrospectively. See *Adair* v. *Superior Court,* 44 Arizona 139, 33 Pac. 2d 995, 94 A. L. R. 328; and the Annotation in 94 A. L. R. 331; and see, also, 27 C. J. S., § 322, p. 1237 and p. 1239, and cases there cited.

It follows that the decree of the chancery court, allowing Mrs. Lola Gant $150, is modified so as to make the allowance $121.46; and as so modified the decree is affirmed, and all costs of both courts are adjudged against the appellant.

NORTH AMERICAN ACCIDENT INSURANCE COMPANY *v.* BRANSCUM.

4-7794 191 S. W. 2d 597

Opinion delivered January 14, 1946.

Buzbee, Harrison & Wright, for appellant.

Chas. X. Williams and *Paul X. Williams,* for appellee.

MILLWEE, J. This is a suit on an accident insurance policy. Appellee sought recovery of $600 in disability and hospital benefits alleged to be due him as the result of an accidental injury sustained on August 16, 1944,

while returning to Booneville, Arkansas, from California on a Rock Island passenger train. Appellant prosecutes this appeal from a verdict and judgment for $300 in favor of appellee.

Section 3 of the policy provides for indemnity payments of $25 per week, not exceeding ten consecutive weeks, in case of accidental injury resulting in total disability of the insured. Section 4 provides for double the amount payable under section 3, where the injury is sustained by insured while riding as a fare-paying passenger in a railroad passenger car, and material damage is caused to such conveyance by reason of the accident. In addition to such weekly indemnity, section 6 of the policy provides for payment of hospital benefits at the rate of $25 per week, not exceeding four consecutive weeks, where confinement in a reputable hospital results from injury causing "immediate total disability and confinement in such hospital."

It is conceded by appellant that there was substantial evidence to go to the jury on the question whether appellee was injured by an accident causing material damage to a railroad passenger car. It is, however, earnestly insisted that there is no testimony of total disability suffered by appellee within the terms of the policy, and this presents the difficult question in the case. In determining that question, we are required to give the evidence tending to establish such disability its highest probative value. Appellee and his physician, Dr. O. Q. Ewing, were the only witnesses in the case.

Appellee is an insurance salesman and testified that he was injured by a sudden jerk of a crowded train near Booneville, Arkansas, while returning to that city from a trip to California. He was standing in the aisle of the passenger car near a group of marines when a sudden jerk of the train caused him to be thrown violently against the edge of a seat. The glass of the car door was broken when one of the marines was thrown against it. Appellee received injuries to his ribs, coccyx and testicles. The day following his injury, appellee went to his physician who taped his side and gave him medicine to relieve pain.

He continued to make trips to the doctor and received shots for the continued pain. When his condition grew progressively worse, he went to a hospital at Searcy and was "in and out" of the hospital from October 4, 1944, until December 19, 1944. He was confined in the hospital from December 16 until December 19, as a result of his injuries. At the time of the trial on April 16, 1945, he was still suffering from his injuries.

The insurance company which employed appellee continued his salary payments of $25 per week, but the greater part of his income was from commissions on policies sold. He had worked a part of the time since his injuries, but had lost $700 or $800 in commissions by reason thereof, and the amount of his commissions did not compare with those earned in the early part of 1944. Riding in a car all day caused him to suffer great pain. In the proof of loss which was introduced in evidence, appellee stated he was totally disabled from August 16, 1944, until October 29, 1944, during which time he gave no attention to the duties pertaining to his business and had not recovered when the statement was made.

Dr. O. Q. Ewing testified that he treated appellee for his injuries in August and September, 1944, and that appellee was still suffering from the injury to his left testicle at the time of the trial. It was his opinion that appellee was unable to work on account of his injuries at the time appellee came to him for treatment, but he thought appellee might be able to do light work at the time of the trial. Appellee had sustained injuries to his coccyx and testicles, and apparently had some "cracked" ribs. Dr. Ewing did not have an X-ray and recommended that appellee go to a hospital for a check of his injuries. In a "statement of attending physicians" furnished appellant, Dr. Ewing stated that appellee was totally disabled from August 16, 1944, until October 29, 1944, and was still disabled at the time the statement was made.

Appellant contends that appellee is not entitled to recover any weekly indemnity because he was not immediately, continuously and wholly disabled and prevented from performing every duty pertaining to any and every

kind of business, labor or occupation as provided in section 3 of the policy. Like most of the policies involved in cases which have reached this court on the question, the definition of the term "total disability" contained in the policy under consideration is such that a literal construction thereof would require a state of absolute helplessness before a claimant could be held to come within its terms. However, the decisions of this court are in accord with the general rule as it is stated in 29 Am. Jur. 872: "The rule prevailing in most jurisdictions is that the 'total disability' contemplated by a sickness or accident insurance policy, or the disability clause of a life insurance policy, does not mean, as its literal construction would require, a state of absolute helplessness, but contemplates rather such a disability as renders the insured unable to perform all the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner."

This rule has been repeatedly approved by this court and is in line with the general trend of authority in most of the states. See Annotations, 24 A. L. R. 203, 37 A. L. R. 151, 41 A. L. R. 1376, 51 A. L. R. 1048, 79 A. L. R. 857 and 98 A. L. R. 789. In the case of *Aetna Life Insurance Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310, Chief Justice HART, speaking for this court, said: "Total disability is generally regarded as a relative matter which depends largely upon the occupation and employment in which the party insured is engaged. This court has held that provisions in insurance policies for indemnity in case the insured is totally disabled from prosecuting his business do not require that he shall be absolutely helpless, but such a disability is meant which renders him unable to perform all the substantial and material acts of his business or the execution of them in the usual and customary way. *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A., N. S., 635, 21 Ann. Cas. 1029; *Brotherhood of Locomotive Firemen & Enginemen* v. *Aday,* 97 Ark. 425, 134 S. W. 928, 34 L. R. A., N. S. 126; and *Aetna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335."

Some of the more recent decisions which have reiterated the rule are *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. 2d 600; *Mutual Benefit Health and Accident Ass'n* v. *Bird,* 185 Ark. 445, 47 S. W. 2d 812; *Travelers' Protective Association of America* v. *Stephens,* 185 Ark. 660, 49 S. W. 2d 364; *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. 2d 407; *Mutual Life Insurance Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. 2d 433; *Missouri State Life Ins. Co.* v. *Brown,* 188 Ark. 1136, 69 S. W. 2d 1075; *Equitable Life Assurance Society* v. *Bagley,* 188 Ark. 1009, 69 S. W. 2d 394; *Missouri State Life Ins. Co.* v. *Case,* 189 Ark. 223, 71 S. W. 2d 199; *Mutual Life Ins. Co. of N. Y.* v. *Dowle,* 189 Ark. 296, 71 S. W. 2d 691; *Metropolitan Life Ins. Co.* v. *Weathersby,* 190 Ark. 1050, 82 S. W. 2d 527; *Pacific Mutual Life Ins. Co.* v. *Riffel,* 202 Ark. 94, 149 S. W. 2d 57; *New York Life Insurance Company* v. *Dandridge,* 204 Ark. 1078, 166 S. W. 2d 1030.

Appellant relies upon the case of *Brotherhood of Railroad Trainmen* v. *Drake,* 204 Ark. 964, 165 S. W. 2d 947, and says a clause similar to the one involved in the instant case was strictly construed. In that case the facts were that the insured failed to give notice of his disability within the time prescribed by the policy. Insured was a railroad conductor and continued to perform all his duties and make his regular runs for a period of 18 days following his alleged injury. It was held that he was not disabled within the meaning of the policy and the court said: "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."

We think the evidence was sufficient to warrant a submission of the question to the jury whether appellee was totally disabled for a period which the amount of the verdict reflects could not have exceeded six weeks. It is true, appellee continued to draw a salary, but the bulk of his earnings came from commissions which, according to the testimony, were materially reduced because of his inability to perform the substantial and material acts of of his occupation. In the case of *Mutual Life Insurance Co.* v. *Marsh, supra,* the insured was a traveling salesman

and became wholly disabled by his injuries to pursue his occupation. It was held that he was totally disabled although he was subsequently elected circuit clerk from which office he received a substantial income, where the evidence reflected that he was unable to perform the substantial duties of the office in the usual and customary way and his earnings were thereby reduced.

It is also insisted by appellant that the question of hospital indemnity should not have been submitted to the jury because appellee did not suffer an injury which caused "immediate total disability and confinement in such hospital" as provided in the policy. It is now argued that confinement in the hospital must immediately follow the injury before a recovery could be had under the language of section 6. Appellant's specific objection to the court's instruction on this issue was that, "there is no proof that the injury caused immediate total disability or that he was confined in such hospital, but on the contrary the proof is that plaintiff was not confined in any hospital." It would appear, therefore, that appellant's objection at the trial was that there was no evidence of confinement in a hospital, and not that such confinement was too remote, as it is now contended. It is well settled that all doubtful or ambiguous provisions of an insurance contract are to be resolved against the insurer and in favor of the insured. We think a reasonable construction of the provision is that total disability must immediately follow the injury, while hospital indemnity may be allowed where confinement is essential and follows in a natural sequence as a result of the injuries sustained. The instruction given on the issue of hospital indemnity was in the language of the policy, and no error resulted from the submission of this issue to the jury in the absence of an objection on the point now urged.

The judgment is affirmed.

SIRMON *v.* ROBERTS.

4-7800 191 S. W. 2d 824

Opinion delivered January 14, 1946.

[redacted]

Boyd Tackett, for appellant.

Geo. E. Steel, for appellee.

GRIFFIN SMITH, Chief Justice. The motion for mandamus, denied below, is based upon Act 319 of 1941, as amended by Act 136 of 1943.

Athens School District No. 10 of Howard County employed Mrs. Farris Sirmon to teach the term ending February 23, 1945. Approximately three weeks before expiration of the 1944-'45 period for which Mrs. Sirmon had been expressly retained, the District contracted with Mrs. Travis Strasner for the succeeding term. T. W. Roberts, Ben Mullen, and J. Y. Harris, as directors, were made defendants in the action brought by Mrs. Sirmon August 2, 1945. It was alleged that the District had arbitrarily refused to make written renewal of Mrs. Sirmon's contract. The applicable statute is copied in the margin.[1]

[1] Every contract of employment hereafter made between a teacher and a board of school directors shall be renewed in writing on the same terms and for the same salary, unless increased or decreased under the provisions of the law, for the school year next succeeding the date of termination fixed therein; unless within ten days after the date of the termination of said school term, the teacher shall be notified by the school board in writing delivered in person or mailed to him or her at last and usual known address by registered mail that such contract will not be renewed for such succeeding year, or unless the teacher

We think the case turns on answer to the question, Did Mrs. Sirmon sustain her allegation that the contract made in 1944 had not been superseded?

Appellant's attorney, in objecting to certain testimony, stated the issues to be: (a) whether [timely] written notice was given Mrs. Sirmon that her services would not be required; (b) whether Mrs. Sirmon gave written notice of her resignation, and (c) whether she was reëmployed by another contract.

It is agreed that written notice was not given by either side. The Court, in effect, found that Mrs. Sirmon either consented to abrogation of the contract or in fact resigned. The District employs but one teacher, and funds are available for one only.

While there is considerable incompetent testimony in the record, evidence properly admitted shows that the directors, as a board, met from time to time with some present and others absent; and that these meetings were often informal. But the issues here raised do not relate to the manner in which board meetings were held. When we determine whether the Court erred in its conclusion that Mrs. Sirmon did not have a right to require manual execution and delivery of a renewal contract, other matters become secondary.

A majority of the directors testified that Mrs. Sirmon had stated that if the board did not want her to teach during the ensuing term she did not want to do so, and that she expected to go to Washington, D. C., and remain there. She did go to Washington, but returned.

Mullen was emphatic in his assertion that Mrs. Sirmon wanted him to discuss with other members of the board the suggestion that an extra month be taught in the Spring of 1945. After Mullen had talked with associate members Mrs. Sirmon returned; and (quoting Mullen): "We agreed to let her finish that month—it wasn't quite out—and hire a new teacher. Question: Did you

within ten days after close of school shall deliver or mail by registered mail to such school board his or her written resignation as such teacher, or unless such contract is superseded by another contract between the parties. . . ." Act 136 of 1943, § 4 (b).

tell her that? A. She came up to my house and wanted to know what I had done about it. I told her we agreed to let her finish out that [extra] month and we were going to hire a new teacher. Q. What did she say? A. She said, 'All right, hire a new teacher; but I am going to quit. I will never teach another school in Athens: I am going to Washington.' "

One obvious purpose of the statute requiring written notice was elimination of uncertainty and possible controversy regarding the future status of a teacher and a school. The General Assembly did not intend to cast upon a teacher the burden of proving by ordinary methods that notice had been given. Upon the other hand, the District was afforded the same accommodation. But, while conduct amounting to waiver should be carefully inspected and all evidence bearing upon the subject ought to be impartially scrutinized, there is nothing to prevent a competent person from agreeing to forego designated rights; and this is true whether such rights are conferred by law or by contract. See Bowers on The Law of Waiver, p. 19; Corpus Juris, v. 67, pages 290-291. A definition of "waiver" found in the Corpus Juris citation is ". . . the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right, or the intentional doing of an act inconsistent with claiming it. Thus, 'waiver' occurs where one in possession of a right, whether conferred by law or contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it."

Chief Justice Cornish of the Supreme Court of Maine (*Kallock* v. *Elward,* 118 Me. 346, 108 Atl. 256, 8 A. L. R. 750) said that "A statute cannot stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice."

The distinction between waiver and estoppel is discussed by Mr. Justice WOOD in his opinion on rehearing in *Sovereign Camp, Woodmen of the World, v. Newsom*, 142 Ark. 132, at pages 156-7-8, 219 S. W. 759, 14 A. L. R. 903.

Although there is some difference between testimony given by Mrs. Sirmon and members of the board, disparity in effect is but slight. Mrs. Sirmon was asked (in connection with transactions that occurred just before the school term ended): "Didn't you tell Mr. Mullen at that time that it was your understanding that another teacher would be used, and you didn't want the school and wouldn't have it? A. I said, 'If the school board doesn't want me, I don't want it.' "

On redirect examination Mrs. Sirmon was asked whether she had told Mullen she didn't want the school. Her reply was: 'The only thing I told Mr. Mullen was that if Parker and the board didn't want me, I didn't want the place." On cross-examination the question was asked: "Mrs. Sirmon, isn't it a fact you told the children *who* was going to teach this year?. A. They asked me a time or two who was going to teach, but I didn't know."

Mrs. Sirmon at least knew she had not given notice in writing, and that the board had not. Her conversations, then, must have had reference to the position she had taken when talking with Mullen: that is, if the board didn't want her she didn't want the school. If she had intended to claim the rights now contended for under the 1944-'45 contract, Mrs. Sirmon would have known who would teach the school. She was familiar with the law on the subject of employment and fully understood that the old agreement was automatically continued unless timely notice were given; hence, any reasonable construction of what she said to Mullen, and what she authorized him to say to other board members, is that if her services were not wanted she was willing to yield any rights that might attach. This amounted to a waiver of notice and terminated the relationship.

Appellee urges that mandamus was not an appropriate remedy, inasmuch as the contract, unless waived,

continued in effect as a matter of law, and its terms were known to all of the parties and copies of the contract were available to them. Conceding that in the absence of estoppel or waiver the contract continued, it is not necessary here to pass upon the form of action other than to say that the Court had jurisdiction of the parties and subject-matter, and had before it all necessary proof to decide whether Mrs. Sirmon waived her rights; and it was not error to dispose of the case by entering an order denying the writ.

Affirmed.

Mr. Justice MILLWEE did not participate in the consideration or determination of this case.

STERLIN *v.* EVERETT.

4-7795 191 S. W. 2d 949

Opinion delivered January 14, 1946.

Opie Rogers, for appellant.

W. F. Reeves, for appellee.

SMITH, J. Mrs. Emma Sterlin Tuel died intestate June 2, 1944. Her heirs at law surviving her were a son, named Cratus Sterlin, and a 14-year-old granddaughter, named Adele Everett, the only child of a deceased daughter. By a second marriage she became Mrs. Tuel, but she was a widow at the time of her death. The witnesses re-

fer to her as Mrs. Sterlin, and we refer to her by that name. A few months before Mrs. Sterlin's death there was placed of record a deed from her to her son, Cratus, in which she apparently conveyed to her son 100 acres of a 385-acre tract of land, which she at one time owned, and certain lots in the town of Elba. The date of this deed is mutilated. It was apparently first dated April, 1935, but the date 1935 was marked out, and the date 1941 inserted. It recited a consideration of $2,000 in hand paid by Cratus to his mother. The acknowledgment which purports to have been taken by T. M. Williams, a justice of the peace, has the same mutilation of dates. This deed was filed for record April 14, 1944, and was duly recorded.

The father of Adele, as her next friend, filed this suit to cancel this deed, it being alleged that Mrs. Sterlin had never executed the deed and that it was forgery. The relief prayed was granted and the deed was canceled, and from that decree is this appeal. In this decree it was ordered that an administrator be appointed with directions to assemble, administer upon and distribute the personal property of Mrs. Sterlin, and no one complains of that order.

There was much testimony to the effect that Mrs. Sterlin referred to this deed on numerous occasions as a "bogus deed," and that she denied ever having executed it, and she said that Cratus told her he would destroy it. This testimony was all hearsay evidence, and must be disregarded for that reason. *Strickland* v. *Strickland,* 103 Ark. 183, 146 S. W. 501.

There was competent testimony, however, which casts grave doubt as to the authenticity of the deed. A justice of the peace testified that about the time of the date of this deed Cratus asked him if he would take the acknowledgment of a deed without requiring the grantor to appear before him, and the witness declined to do so.

The deposition of T. M. Williams, another justice of the peace, who made the certificate of acknowledgment, was taken and his testimony leaves much to be desired. He was interrogated in regard to the 1941 deed as fol-

lows: "Q. Do you remember when the defendant, Cratus Sterlin, brought you a deed purporting to have been signed by his mother conveying to him certain land and lots in Elba? A. Yes. Q. Was his mother present at the time? A. No. Q. State whether or not he wanted you to certify and sign the acknowledgment to that deed. A. Yes. Q. Please state as well as you can remember what he said to you about it. A. Well, the best I remember Cratus said that he wanted to go down there and make a deed. I told him I was busy. And I believe in a day or two he brought the deed out there. He came by and I made it, but I didn't acknowledge it that day and he said something about he would get his mother to sign the deed and that I could acknowledge it, and I did. Q. Did you see his mother sign that deed at any time? A. No. Q. Did she ever appear before you and acknowledge that she had signed that deed? A. No. Q. So far as you know, if she ever signed you do not know it? A. No. Q. Did you ever say anything to her about it afterwards? A. No, I never did say anything to her about it."

On the cross-examination the witness was asked only this one question: "Q. The deed you mention was in 1942, was it? A. Yes. No, I think it was in 1941."

The witness was recalled for further direct examination by appellee's attorney, and was asked: "Q. Was this the only deed you ever made and certified the acknowledgment to for them? A. No. Q. Was it the only deed you ever made at his request for his mother to sign for him? A. Yes. The only one he ever requested without his mother being present. Q. This was a deed, as I understand you, that purported to convey to Cratus Sterlin certain lands and lots in Elba including her home? A. Yes."

Why the witness was not asked by counsel for either party about the other deed from Mrs. Sterlin, the acknowledgment of which he had taken, does not appear.

The *prima facie* effect of this testimony is that the deed was a forgery, and the court so found, although there was other testimony to the effect that Mrs. Sterlin did in fact sign the deed and deliver it, although she did

not acknowledge it. If she signed the deed and delivered it the deed was valid between the parties, although it was not acknowledged. *Floyd* v. *Ricks,* 14 Ark. 286, 58 Am. Dec. 374; *Jackson* v. *Allen,* 30 Ark. 110; *McKneely* v. *Terry,* 61 Ark. 527, 33 S. W. 953; *Dawkins* v. *Petteys,* 121 Ark. 498, 181 S. W. 901.

If Mrs. Sterlin signed the deed she probably delivered it as Cratus had it in his possession. The deed had attached to it two documentary stamps of $1 each, and two for 10 cents each.

Cratus did not deny the testimony of the two justices of the peace, that he had asked them to take his mother's acknowledgment without the appearance of his mother, but he offered an explanation which, while it is unusual, is not improbable and which we think the testimony shows to be true. It was to the following effect.

His mother became an invalid and sold him all of her real estate for the sum of $2,000, and gave him a deed reciting its payment, although it was not paid in cash at the time. Payment, however, was secured by a mortgage given by Cratus to his mother, covering considerable live stock, farming implements and other personal property. This consideration of $2,000 was evidenced by four notes for $500 each, payable in one, two, three and four years, respectively. A significant fact is that the deed to Cratus from his mother and the mortgage from him to her bear the same date—April 1, 1935—and both instruments were acknowledged before T. M. Williams, as justice of the peace. These may have been the other instruments referred to by the witness in the deposition from which we have quoted. Cratus further testified that notwithstanding the execution and delivery of the deed to him from his mother, it was agreed that she should retain possession of the land and, in consideration of that possession, he should have the right to pasture the land, a right which he testified was to offset the interest on the notes.

This mortgage from Cratus to his mother was filed for record January 21, 1939, and was duly recorded. Indorsed upon the margin of the record where the mortgage is recorded are four small payments, which are also in-

dorsed upon the mortgage itself. The indorsement on the record was attested by the clerk and recorder under date of August 2, 1939, although none of the payments were made that day. The clerk in office now, and at that time, testified that he was familiar with Mrs. Sterlin's signature and that the indorsement was her genuine signature, and that the signature to the indorsement on the mortgage was the same as that to the deed.

Cratus was asked by appellee's counsel if this mortgage had not been given to protect him against a contingent liability which he had incurred by reason of having indorsed certain notes as surety, and he denied that he had. There is no intimation that this was true, save only the fact that he was asked the question, and he denied having executed the mortgage for that purpose, his testimony being that he gave the mortgage to secure the payment of the purchase price of the land.

Cratus explained that the deed was not placed of record as Mrs. Sterlin did not want appellee's father to know that she had executed the deed. It is certain that on the same day on which Cratus testified the deed from his mother was delivered to him, he gave her a mortgage for the exact amount of the consideration of the deed, and we think it equally certain that the deed was the consideration for the mortgage.

The chirography and orthography employed shows that to some extent these parties were illiterate and wholly inexperienced in the formalities of conveyancing. Cratus testified that his mother sold 285 acres of the 385-acre tract, for the consideration of $500, after having given him a deed to all the land. The land sold was cut-over land and was of small value, while the 100 acres remaining was partly cultivated and constituted the homestead. Cratus further testified that it was agreed that his mother execute a deed for the 285-acre tract, and that she did so, and that the $500 paid for the 285 acres was credited upon his debt to his mother, and that this left him owning the 100-acre homestead, and the town lots, and that the purpose of the deed dated April 1, 1935, which the court canceled as a forgery, was to evidence

his title to the land that remained after the sale of the 285 acres.

The originals of all these instruments above referred to are in the record, and we have compared them with the receipts signed by Mrs. Sterlin, of which more will be presently said, and we are convinced that Mrs. Sterlin signed both deeds to Cratus herein referred to.

But we are not at all convinced that Cratus has paid all the $2,000 recited as the consideration in each of the deeds to him, and in the mortgage from him. The court below did not consider or pass upon this question. The suit was brought to cancel the 1941 deed as a forgery and that relief was granted, but for reasons herein stated that decree will be reversed and the cause will be remanded for the purpose of determining whether Cratus has paid th entire purchase price for the land, and if not, what balance remains unpaid. Unquestionably he is entitled to certain credits, one of these being the $500 received for the 285-acre tract of land.

Cratus offered in evidence one of the receipts above referred to, which reads as follows:

"PAID ON PLACE

Pade on place Sept. 8, 1936	$ 50.00
Pade on place Dec. the 10, 1939	500.00
Pade on place	2,411.50"

This writing has on its back the indorsement of Mrs. Sterlin. Cratus probably made one or both of the first of these payments, but at the bottom of the instrument which we have copied appears the notation in the same handwriting. "Pade on place $2,411.50," which Cratus testified completed the payments. Now it is certain that he never at any one time paid that amount and he does not contend that he did. He may have paid that amount altogether, but this we do not decide.

As has been said, administration on the estate of Mrs. Sterlin has been ordered to collect and distribute the personal property. Any part of the purchase price of the land remaining unpaid should be collected by the

administrator, and he may be made a party to this litigation upon the remand of the cause for that purpose. Our conclusion is that Cratus did purchase the land and has the title thereto, but he should be required to pay any balance of unpaid purchase money, and when that balance, if any, has been ascertained a lien therefor should be declared upon the land.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REYNOLDS *v.* BAKER.

4-7790 191 S. W. 2d 959

Opinion delivered January 21, 1946.

John L. Sullivan, for appellant.

Buzbee, Harrison & Wright, for appellee.

MILLWEE, J. There are three school districts in Pulaski county: (1) Little Rock Special School District, which embraces all of metropolitan Little Rock and several small areas contiguous to the city, hereinafter referred to as Little Rock District; (2) North Little Rock Special School District, which embraces all the territory in the limits of the City of North Little Rock and several small adjoining areas, hereinafter referred to as North Little Rock District, and; (3) Pulaski County Special School District, which includes all of Pulaski county not included in either of the aforementioned districts, thus making it a rural district, hereinafter referred to as Pulaski County District.

Appellants are patrons of Sylvan Hills School which is a part of Pulaski County District and is located near the city of North Little Rock. They instituted proceedings to annex the Sylvan Hills School area to North Little Rock District under the provisions of Act 387 of 1939, as amended by Act 327 of 1941. Petitions were filed with North Little Rock District requesting its consent to the annexation proposal. This consent was granted by resolution of the Board of Directors of North Little Rock District. Identical petitions were filed with the Pulaski County District requesting its consent to the detachment of the Sylvan Hills School area from the rural district and annexation to North Little Rock District. The Board

of Directors of Pulaski County District refused to give its consent to the proposal. Petitions were then filed by appellants with the Pulaski County Board of Education requesting the annexation. The County Board of Education declined to act upon the proposal because the petitioners had failed to obtain the consent of the directors of Pulaski County District. Appellants then brought this suit against Pulaski County District and the County Board of Education.

The complaint alleged in detail the superior physical and academic advantages of the North Little Rock Schools over the Sylvan Hills Schools. It was further alleged that the action of the directors of Pulaski County District in refusing to consent to the annexation proposal was arbitrary and contrary to the best interests of the children and patrons of the Sylvan Hills Community. It was prayed that the Chancery Court issue an order requiring the Board of Directors of Pulaski County District to pass a resolution authorizing the annexation.

In the answer, the directors of Pulaski County District admitted their refusal to approve the proposed annexation and alleged that appellants were without lawful right to maintain the suit in the absence of such consent by the Pulaski County District. Their reason for refusing to consent to the proposal is set out in the answer as follows: "The Directors are willing that Pulaski County Special School District be consolidated with and taken over by the only other two school districts in Pulaski county, Little Rock Special School District and North Little Rock Special School District, but they oppose the annexation of choice areas by the other two districts to the great detriment of the inhabitants of the territory which remains. The Directors state that the substantial improvements and educational standards gained since the formation of Pulaski County Special School District will be substantially impaired or destroyed by the piecemeal transfer of financially strong areas of the district to the other districts. Pulaski County Special School District was brought into being by the necessity of providing better education for the children of areas with low land

values, through the equalizing effect of unified action with areas of higher land values. The annexation of desirable territory of the type of Sylvan Hills would amount to an emasculation of the Pulaski County Special School District."

On the date set for hearing of the cause, appellant's solicitor stated that he had a number of witnesses to testify to the conditions existing at Sylvan Hills School and the advantages that would accrue to the pupils thereof as a result of the proposed annexation; and that the action of the Pulaski County District Board in its refusal to pass a resolution consenting to annex amounted to an arbitrary abuse of discretion. The court refused to hear such proof and treated the answer of Pulaski County District as a demurrer which was sustained on the ground that Chancery Court had no judicial right to review the action of Pulaski County District, and that the lack of written consent of the district, as required by § 1 of Act 387 of 1939, as amended by Act 327 of 1941, was fatal to appellant's asserted cause of action. This appeal follows.

The contention of appellants is set out in the following statement in their brief: "We contend that by the action of the Chancellor in refusing the appellants opportunity to present testimony and introduce evidence in the premises, he was unable to pass upon the only question involved in this case—whether the members of the Pulaski County Special School District (Rural) acted arbitrarily and abused their discretion, in failing to pass a resolution for the annexation of the Sylvan Hills School and area to the North Little Rock Special School District."

Section 1 of Act 387 of 1939, as amended by § 11 of Act 327 of 1941, provides that the several county boards of education "shall have the power to change the boundary lines between school districts upon the written consent and request by a resolution adopted by the Board of Directors of each district affected by the proposed change, and with the written consent and request of a majority of the electors in the territory seeking to be annexed as shown by the petition." The language of the

statute is plain and unambiguous. By the express terms of the act the written consent and request of, (1) Pulaski County District, (2) North Little Rock District, and (3) a majority of the electors in the Sylvan Hills School area, are conditions precedent to the power of the County Board of Education to detach the Sylvan Hills area from the Pulaski County District and attach it to the North Little Rock District. It is conceded that the written consent and request of the Pulaski County District to the annexation proposal has not been secured. On the contrary, the district has refused to give its consent.

The effect of the Act is to make the consent of the Pulaski County District a prerequisite to the jurisdiction of the County Board of Education. The consent being absent, the power to act is lacking. " 'Consent' as recognized by the law cannot be the subject of compulsion, but implies an agreement to that which, but for the consent, could not exist, and which the party consenting has a right to forbid, and supposes a physical power to act, a moral power of acting, and a serious, determined and free use of these powers." Words and Phrases, Permanent Ed. Vol. 8, page 628; *State, ex. rel. United Rys. Co. of St. Louis* v. *Public Service Commission of Missouri,* 270 Mo. 429, 192 S. W. 958. Consent is given when we yield that which we have a right to withhold. Under the statute, the directors of the Pulaski County District had the right to withhold their approval of the annexation proposal and, having exercised that right, are not subject to judicial coercion.

Appellants cite such cases as *Rural Special District No. 21* v. *Common School District No. 87,* 183 Ark. 329, 35 S. W. 2d 587, and *Perry* v. *Gill,* 184 Ark. 1099, 44 S. W. 2d 1084, where it is held that county boards of education are vested by law with a sound discretion in determination of matters pertaining to formation and consolidation of school districts, which is subject to review only where it appears that the orders of the board are arbitrary or unreasonable. These, and similar cases, involve the review of affirmative actions of the county board of education where the board has acquired jurisdiction. By

the terms of the statute under which appellants elected to proceed, the County Board of Education is without jurisdiction to act unless the consent of the Pulaski County District to the annexation proposal is secured.

It may be pointed out that other avenues of procedure for annexation were open to appellants. By § 11481, Pope's Digest, as amended by Act 327 of 1941, annexation may be effected by the County Board of Education upon a petition signed by a majority of the qualified electors in each district affected. Or, appellants might have proceeded under § 11482, Pope's Digest, as amended by Act 327 of 1941, which provides that the County Board of Education may submit the question to a vote as provided in § 11477, Pope's Digest, upon petition of 10% of the qualified electors in the territory affected. Appellants elected to proceed under Act 387 of 1939, as amended. Since the consent of the Pulaski County District is a prerequisite to jurisdiction of the County Board of Education, and since it is conceded in the pleadings that such consent is affirmatively lacking in the case at bar, the chancellor correctly dismissed the complaint of appellants.

The decree is, therefore, affirmed.

WHEELER *v.* WENDLETON.

4-7806 191 S. W. 2d 952

Opinion delivered January 21, 1946.

Ross Mathis, for appellant.

John D. Eldridge, Jr., for appellee.

ROBINS, J. This suit was begun by appellee, who alleged in his complaint that he was the owner of a forty acre tract in Woodruff county, Arkansas, which, though taxes for that year had been paid, had been erroneously forfeited to the state for nonpayment of taxes of 1927, and had been conveyed by the state to W. S. Hunt, and that Hunt, after agreeing in writing to surrender the land to Mrs. Maud Richardson through whom appellee claims title, conveyed same to appellant. Appellee prayed for cancellation of these conveyances and for quieting of his title.

Appellant denied that appellee had any title to the land. She admitted that the written agreement to surrender the land had been executed by Hunt, her grantor, with her knowledge, but alleged that the consideration therefor was the promise on the part of appellee's predecessor in title to pay Hunt and appellant all sums expended for taxes and for clearing part of the land, which promise she averred had never been performed. By an amendment to her answer appellant pleaded as additional defenses the two-year statute of limitations (§ 8925 of Pope's Digest) and the seven-year statute of limitations (§ 8918 of Pope's Digest), alleging that from the date of Hunt's donation certificate, February 7, 1931, Hunt and appellant had been in adverse possession.

The lower court found that the donation deed executed to W. S. Hunt was void because the taxes for nonpayment of which the land had been forfeited to the state

had, in reality, been paid, canceled this donation deed and also the deed of W. S. Hunt to appellant, quieted title in appellee, found that the rental value of the land more than offset the value of improvements made and taxes paid by appellant and her grantor, and rendered judgment in favor of appellee against appellant for $60 for rent for 1945. Appellant has appealed from this decree.

This land was originally owned by Mrs. Maud Richardson, who mortgaged it to Bennie Forrester. When Forrester brought foreclosure proceedings against Mrs. Richardson, she procured her son, the appellee, to purchase the land from Forrester, who bid it in at the commissioner's sale held pursuant to the foreclosure decree. Forrester transferred his certificate of purchase to appellee, to whom the commissioner executed his deed on January 10, 1938.

Two days after Hunt, who was the father of appellant, obtained his deed from the state he executed the following instrument:

"To Mrs. Maud Richardson,

"This is to certify that I am vacating your land described as the NE¼ of the NW¼ of section 22, Twp. 5 R. 1 in Caney Township, Woodruff county, Arkansas, and turning it back to your possession, as I realize it is rightfully yours, and was certified to the state through an error in the tax books of Woodruff county, Arkansas.

"W. S. Hunt (his x mark)

"Witness Anna Wheeler

"Subscribed and sworn to before me this the 10 day of Feb. 1934."

Appellant, who actually signed her father's name to this writing, and in her testimony admitted the execution of this writing, said that it was signed by her for her father in consideration of Mrs. Richardson's promise to re-imburse Hunt for his expenditures on the land, but that nothing had ever been paid thereon.

It is not necessary for us to decide whether Hunt's title under his donation deed was good, because after he had received his deed from the state he executed the writing, apparently based on a valid consideration, which writing, though crude in form and not acknowledged, was sufficient to evidence an agreement on the part of Hunt to release and quitclaim his interest in the land to Mrs. Richardson.

The fact that the consideration for this agreement was not paid would not revest the title in Hunt, but would only give him a right to enforce collection of the amount due him for his improvements and taxes. 16 Am. Jur., p. 476. The rule is that in the absence of a provision in the contract that time of payment of purchase money is of the essence of the agreement, failure to pay the purchase price does not operate as a rescission of the contract to sell. *Smith* v. *Berkau,* 123 Ark. 90; 184 S. W. 429; *Feibelman* v. *Hill,* 141 Ark. 297, 216 S. W. 702; *Bothe* v. *Noack,* 149 Ark. 297, 232 S. W. 606.

With the title of Hunt under his donation deed eliminated, as it must be in view of his written agreement, the only defense left to appellant was her plea of adverse possession for seven years. The proof showed that neither appellee nor Mrs. Richardson had, from the time Hunt executed the agreement to surrender the land, ever been in actual occupancy of the land, but there was testimony from which the lower court could have found that the possession of appellant was not so adverse or continuous for such a length of time as to ripen into title; nor was there any testimony to show that after Hunt had executed the above relinquishment he or his daughter, the appellant, ever brought home to appellee any notice that either of them was holding adversely to appellee. The lower court also found that the rental value of the land was more than sufficient to repay appellant and her grantor for improvements and taxes, thereby discharging the obligation assumed by Mrs. Richardson when Hunt agreed to surrender the land to her. We cannot say that these findings of the lower court are

against the weight of the testimony. Therefore, under our long established rule, we may not disturb them. *Greer* v. *Fontaine,* 71 Ark. 605, 77 S. W. 56; *Hinkle* v. *Broadwater,* 73 Ark. 489, 84 S. W. 510; *Arnold* v. *McBride,* 78 Ark. 275, 93 S. W. 989; *Taylor* v. *Rudy,* 99 Ark. 128, 137 S. W. 574; *Midyett* v. *Kerby,* 129 Ark. 301, 195 S. W. 674; *Haydon* v. *Haydon,* 203 Ark. 1147, 158 S. W. 2d 689; *Bush* v. *Bourland,* 206 Ark. 275, 174 S. W. 2d 936; *Ellis* v. *Blankenship,* 207 Ark. 739, 182 S. W. 2d 756.

Accordingly the decree of the lower court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* KEETON, ADMINISTRATRIX.

4-7432 191 S. W. 2d 954

Opinion delivered January 21, 1946.

Thos. B. Pryor, Thos. Harper and *Harrell Harper,* for appellant.

Partain, Agee & Partain, for appellee.

MCHANEY, J. On the original appeal of this case to this court, we reversed the judgment and dismissed the

action, for the reason that the evidence, in our opinion, was insufficient to support the verdict and judgment. See same styled case, 207 Ark. 793, 183 S. W. 2d 505, opinion delivered October 23, 1944.

On *certiorari* to the Supreme Court of the United States, our judgment was reversed in a per curiam opinion on November 5, 1945, in this language: "On examination of all the evidence considered in this case by the Supreme Court of the State of Arkansas, we are of the opinion that the question of respondent's negligence should have been submitted to the jury. The judgment will be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

What that court meant by the above opinion was that the evidence "considered" by this court was sufficient to sustain the verdict of the jury and it should have been permitted to stand, because the "question of respondent's negligence" was submitted to the jury in the trial in the circuit court.

In our original opinion we called attention to the fact that appellee, as administratrix of her husband's estate, was permitted to testify, over appellant's objections and exceptions, to a statement made to her by her husband shortly before his death, as a dying declaration. The statement is there quoted. We did not there consider the competency or admissibility of this dying declaration, for we there said: "Nor do we think the dying declaration sufficient to make out a case of negligence for the jury, conceding without so holding that it was competent and does not offend against the statute, § 5154 of Pope's Digest." Counsel for appellant in their brief in the original hearing strongly urged that said dying declaration so testified to by appellee, the administratrix, was incompetent under said § 5154 which provides that, "in actions by or against administrators, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any statements of the intestate, unless called to testify thereto by the opposite party." This is § 2 of the Schedule to the Con-

stitution and provides that it may be amended or repealed by the General Assembly.

We do not think § 5201, the dying declaration statute, repeals or amends in any way § 5154. There is no express repeal and repeals by implication are not favored. We think both statutes may be permitted to stand and both serve very useful purposes.

We have sustained § 5201. In *Mo. Pac. R. R. Co.* v. *Haigler, Admrx.*, 203 Ark. 804, 158 S. W. 2d 703, we held the declaration of Haigler admissible, as such, but there the testimony was given by some one other than the administratrix.

We have concluded that the testimony of the appellee as to the dying declaration was competent in so far as her action to recover for loss of contributions was concerned, but incompetent under § 5154, in so far as her action to recover for conscious pain and suffering for the benefit of the estate is concerned. Her official capacity as administratrix was a mere means of bringing the action for contributions. All of such recovery, if any, was for her individual benefit and the estate of the decedent had no interest in such recovery. As said in *Adams* v. *Shell,* 182 Ark. 959, 33 S. W. 2d 1107, "The damages (for the benefit of the widow and next of kin) are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund when recovered is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin; and the suit is wholly for their benefit. The administrator is a formal party to the maintenance of the action, and becomes a mere trustee for those entitled under the statute to the amount recovered."

But not so, as to her action to recover for the benefit of the estate of her deceased husband. She was acting there as the personal representative of the deceased and only the personal representative may bring the action for damages for pain and suffering. *Webb* v. *Waters,* 154 Ark. 547, 243 S. W. 846. In such a case her testimony as to

statements made to her by her deceased husband runs counter to the express provisions of said § 5154. It was error, therefore, to permit her to give in evidence the dying declaration of her husband on the action for pain and suffering. Without it there is no substantial evidence to support the verdict for $10,000. If appellee will, within 15 judicial days enter a remittitur for this amount, the judgment for $20,000 will be affirmed, otherwise the judgment will be reversed and the cause remanded for a new trial. Other errors of the trial court urged in the original brief and on this hearing have been considered and found to be without substantial merit.

PROGRESSIVE LIFE INSURANCE COMPANY *v.* DOOLEY.

4-7803 192 S. W. 2d 128

Opinion delivered January 21, 1946.

Rehearing denied February 18, 1946.

E. M. Arnold, for appellant.

O. A. Featherston, for appellee.

GRIFFIN SMITH, Chief Justice. Two policies of insurance—each for $500—were written on the life of James P. Dooley October 19, 1928. The Company denied liability because, as it contended, false answers were made to material questions when the applications were written, and these answers, under terms of the policy, were declared to be warranties. Premiums paid during the period involved amounted to $258.56. This sum was tendered and refused.

The Company issues non-medical policies: that is, it requires soliciting agents to ask the questions printed on the application form, and relies upon truthfulness of such statements and other information contained in the application in exercising the discretion to accept or reject the risk. In the case at bar D. J. Pate represented the Company. He had at one time lived in the town of Glenwood, where the Dooleys also resided.

Each policy was payable to Josie Dooley, the insured's sister, who testified regarding circumstances attending issuance and her brother's health. The assured died while an inmate of the State Hospital.

While it is admitted that for some time prior to his death James suffered from epileptic attacks and other nervous disorders, appellee seeks affirmance on the ground that the record discloses substantial testimony establishing sound health when the contracts were made. That would be true if excerpts could be taken from the evidence and considered alone: that is, if these statements could be accepted at full value, irrespective of preceding or succeeding sentences. For instance, one sister testified that in respect of health James "was just nervous, that is all I know; it didn't interfere with his general

health." Another sister testified that when the applications were made "James was in perfect health"; and a brother-in-law expressed this belief.

But the uncontradicted testimony is that James was afflicted most of his life, if not from birth. Dr. N. T. Hollis, clinical director for State Hospital, gave to the court essential facts from official records. The patient was admitted May 2, 1943, suffering from "psychosis with mental deficiency plus epileptic deterioration. . . . The boy had apparently been deficient all his life and has suffered with convulsive seizures upon the basic deficiency. . . . In addition to my personal observations and examination I base my findings upon an opinion formed from talking to the patient and his relatives. . . . His sister, Mrs. Roy Watkins, filled in our so-called 'anamnesis,' in which she stated that he was around a year in teething, three years in walking, and three years in talking, and that at the age of thirty-three he began having convulsive seizures; that he began going to school at the age of twelve."

Importance attaches to the testimony of Dr. W. B. Gould, local physician, who had known James for more than twenty years. Question: "During that time, what was his physical condition?" Answer: "Not good! He was of a nervous type. Very seldom was I called to see him—just a few times; still, I knew his condition was not good." Q. "Were his right hand and arm drawn and useless?" A. "He had some trouble with it. He had a peculiar twitching or turning of his hand. He was never engaged in any business that I knew of."

Appellee testified that while James did not talk "plain," his enunciation was such that the family could understand what was intended to be said. James had nervous spells, "but they didn't affect his mind." Question: "His hands were 'drawn' throughout his life?" A. "Yes, sir."

When asked whether the agent, Pate, "knew of James' affliction as well as you did," the witness replied, "he just lived in the same town."

There was testimony by another witness that although he (the witness) had resided in Glenwood for many years and had heard that such a person as James Dooley existed, he had never seen him.

Admitted facts are that the insured's mother desired that the policies be written, and she answered for her son when questions were asked. Appellee unequivocally stated that the agent asked all of the questions, that her mother gave the answers, and that the answers were written just as they were made. When asked whether Pate said anything regarding the certainty of procuring the insurance, appellee replied, "He said he would write it up and send it off and the Company would answer it. . . . [My mother] wanted a policy for him."

There is testimony by appellee that "[both my mother and Pate] knew the condition of the boy at the time"; yet, when asked whether Pate and Mrs. Dooley discussed the matter, appellee replied, "He didn't say much about the policy, [but] wrote it up and sent it off. In ten days it came in."

When answers (made by witnesses by whose testimony it was sought to show that James was an insurable risk when the policies were written) are weighed in their relation to other questions asked and answers given by the particular witness, the conclusion is inescapable that James was never normal, and that he was physically impaired when the insurance was written. Still, this would not defeat recovery if the agent, acting within the actual or apparent scope of his authority, knew of the conditions. Such knowledge would be imputed to the Company, resulting in a waiver, or estoppel, regardless of the fact that the answers, under express terms of the policies, are declared to be warranties and not mere representations.

It was said in *Southern National Life Insurance Company* v. *Heggie,* 206 Ark. 196, 174 S. W. 2d 831, that when an insurance company issues a policy with full knowledge of all the facts, such conduct is tantamount to

an assertion that the policy is valid at the time of delivery, and is a waiver of the known ground of invalidity. In the same case it was held that where the applicant's answers were incorrectly written on the application and fraud was later alleged, the insurance company would not be permitted to say that it relied on the answers as written when as a matter of fact its agent, acting within the scope of his authority, received other information. In the absence of collusion between applicant and agent, the latter's actual knowledge will be imputed to the company and substituted for the answers fraudulently written insofar as validity of the policy in that aspect is concerned.

The controlling question is disposed of when we determine whether there was substantial testimony showing that Pate knew of the insured's condition.

There is a suggestion—possibly nothing more—in the cross-examination of appellee that the so-called physical "condition" was discussed. Pate and Mrs. Dooley were seemingly uncertain whether policies would be written in response to the applications. Question: "Both of them knew the condition of the boy at the time?" A. "Yes, sir." Q. "And they discussed it?" A. "[Pate] didn't say much about the policy."

When asked whether James was present when the applications were written, one witness replied, "He saw him." Pate stated in the application that he did not see James, but approved the risk.

In circumstances such as we are dealing with an insurance company would ordinarily be put on inquiry when the application is signed by one other than the person it is proposed shall be insured; nor does it seem that premiums may be collected for sixteen years and no point of incontestibility be reached. On the other hand no one has a vested right in the fruits of false warranties. Testimony not met by substantial evidence is:

(a) James was nervous and irrational from birth. An arm was affected, he was slow in learning to talk and

walk, and his hearing was definitely impaired. At the age of twelve he was placed in the Arkansas School for the Deaf. He did not have "continuous" use of his arms. Prior to attending the State institution he had not gone to school, but thereafter he attended classes at Murfreesboro for four years, "and went some in Pike City"; and yet, at seventeen or eighteen years of age he had not "gone over" the fourth or fifth grades, in spite of the fact that his mother gave private lessons at home.

(b) Mrs. Roy Watkins (a sister), when asked if James was afflicted from birth, replied: "I don't know, but it was a crossup of nerves." This same witness testified that James' hands were not affected, "but they twitched."

(c) Pate *may* have seen James, but it does not affirmatively appear that he talked with him, or was with him long enough to acquire the basis for an opinion. There is nothing to show that Pate's act, in recommending the applicant, was predicated upon anything but answers given by Mrs. Dooley. Pate was later discharged, but not on account of the Dooley transaction.

(d) Dr. Gould, the family physician, would not testify that James was normal. There is no showing that after issuance of the policies the Company had information regarding the physical impairments complained of.

In *Progressive Life Insurance Company* v. *Preston,* 194 Ark. 84, 105 S. W. 2d 549, Mr. Justice BUTLER discussed the legal effect of warranties such as those involved in the instant appeal. It is not necessary to repeat the rule. One of the questions asked Mrs. Dooley was: "[Has James] any deformity or disability, such as spinal curvature, lameness, loss of limb, impairment of speech, loss of sight or hearing." The answer was "No." Appellee concedes that this question was asked and that her mother answered it on behalf of the applicant. Many other questions affecting the risk were propounded, but the issue so raised may be disposed of by merely calling attention to what Mr. Justice BUTLER said in the Preston case.

No question is raised regarding the amount tendered, representing premium refunds as such. Our view is that the plaintiff did not contradict by substantial proof the essential matters here discussed. It follows that a directed verdict should have been given for the defendant, with an order on the registrar to pay plaintiff the refunds.

SAMUELS *v.* ROBINS.

4-7866 192 S. W. 2d 109

Opinion delivered January 21, 1946.

Rehearing denied February 18, 1946.

G. P. Casey, John P. Vesey and *Graves & Graves,* for appellant.

Harry C. Robinson, Weisenberger & Pilkinton and *John W. Atkinson,* for appellee.

HOLT, J. The material facts in this case appear not to be in dispute. September 29, 1945, Monroe Samuels and 1601 other persons, who claimed to be qualified electors of Hempstead county and to be more than 15% of the qualified electors as shown on the poll tax records of said county, filed petition in the county court of said county, praying that an election be called in Hempstead county to determine whether license should be granted for the manufacture or sale, or the bartering, loaning or giving away of intoxicating liquors within said county, all alleged to be in accordance with the provisions of Initiated Act No. 1, adopted November 3, 1942 (Acts 1943, p. 998), and effective January 1, 1943.

October 8, 1945, there was a hearing before the county court to determine the sufficiency of the petition, *supra,* and the court found that more than 15% of the qualified electors of said county, as shown on the poll tax records, had signed the petition, that it was sufficient, and called an election to be held on November 6, 1945, in accordance with the prayer of the petition and the act, *supra.*

Appellees appeared and opposed the petition, excepting to the findings and judgment of the county court, and in apt time and by proper procedure appealed to the Hempstead circuit court.

At the beginning of the trial in the circuit court, it was stipulated that there were 4,980 poll tax payers in the county for the year 1943 as shown on the list of poll tax

payers filed in the county clerk's office, that there were 1,602 names signed on the petition, and that there were 2,500 persons over the age of 21 years from Hempstead county in the armed forces of the United States, on the date the petition was filed.

Appellants contended below, and now contend on this appeal, that in determining the sufficiency of their petition, the 2,500 persons in the armed forces should not be counted and that to do so would be contrary to the provisions of the act, *supra,* which required that their petition be signed by 15% of the qualified electors of said county "as shown on the poll tax records of the county," which would be 15% of 4,980, or 747. Appellees, on the other hand, contended below, and argued here, that those in the armed forces, *supra,* under the provisions of said act, must be added to the poll tax payers' list of 4980, *supra,* making a total of 7,480, 15% of which would be 1,122.

The circuit court found that under the act, *supra,* the number of qualified electors signing the petition in question must be a number equalling 15% of 7,480, or 1,122, which is 15% of the poll tax payers of the county for the year 1943, according to the official list in the county clerk's office, and in addition 15% of all persons from Hempstead county over the age of 21 years who were in the armed forces of the United States on September 29, 1945, when the petition was filed. In other words, (quoting from the judgment) "That before the petitioners (appellants) can prevail and before the election can be called under the petition, the number of qualified electors signing the petition must be not less than 15% of the number on the poll tax list and the number in the armed services of the United States from Hempstead county, which would be 15% of 7,480, which would be 1,122, and that only 1,056 qualified electors having signed the petition, the petition is insufficient."

The judgment and order of the county court was set aside and appellants' petition dismissed. This appeal followed.

The primary question presented, and which we think is decisive of this case, is: What was the criterion fixed in Act No. 1, *supra,* to determine the number of qualified electors that must sign the petition in question to authorize the calling of the election? Is the official poll tax list in the clerk's office the criterion or is the criterion the number "as shown on the poll tax records of the county" added to the number of persons over the age of 21 years from Hempstead county who were in the armed forces of the United States on the date the petition was filed, September 29, 1945?

Section 1 of said act provides: "When fifteen per cent (15%) of the qualified electors, as shown on the poll tax records of the county shall petition the County Court of any county within this State, praying that an election be held in a designated county, township, municipality, ward or precinct, to determine whether or not license shall be granted for the manufacture or sale, or the bartering, loaning or giving away of intoxicating liquor within the designated territory, the County Court, within ten (10) days thereafter, (the County Court shall be open at all times for the purposes of this Act) shall give a public hearing to determine the sufficiency of the petition; and if it be found that fifteen per cent (15%) of the persons who have paid their poll taxes for the year, making them qualified voters at the time the petition is filed, (or qualified electors in case the qualifications for electors should be changed by Constitutional Amendment) have signed said petition, said County Court shall order a special election to be held in such county, township, municipality, ward or precinct, to be affected thereby, for the sole and only purpose of voting on the question presented by the petition."

Amendment 36 to the Constitution of Arkansas, adopted November 7, 1944, provides: "Any citizen of Arkansas, while serving in the armed forces of the United States, may vote in any election, without having paid a poll tax, if otherwise qualified to vote in any such election."

It will be observed that the first sentence of § 1 of the act above contains two clauses separated by a semicolon, the first clause in plain and certain language fixes the criterion in determining the number of qualified electors that must sign the petition in order to call an election to be 15% "of the qualified electors as shown on the poll tax records of the county." That number here is conceded to be 4,980. Does the language in the second clause change this criterion? We do not think it does.

One of the requirements for voting, as applied to all citizens, at the time Act No. 1, *supra,* became the law, was the payment of a poll tax, and the official poll tax list was fixed as the criterion by the law making body. Amendment 36, *supra,* relieved all citizens while serving in the armed services of the United States of the requirement of paying a poll tax in order to vote in any election. This amendment in no way affects the provisions of said act as to the number of signers on the petition necessary to call the election. The poll tax requirement is still applicable to all other citizens, and we hold that the official poll tax list is the criterion as fixed in said act, to determine the qualified electors who must sign the petition in question. This act does not deprive those in the armed forces of voting in the local option election here. Such was the effect of our holding in the recent case of *Shay* v. *Welch, ante,* p. 519, 191 S. W. 2d 253. We there held: (Headnote 1) "Electors who may be absent from home and in the armed services of the United States are not deprived from voting in a local option election by Initiated Act No. 1 of 1942; it is the war that rendered their absence from home necessary and not the Initiated Act."

The Legislature, or the people, by right of initiative as here, could make the official poll tax list the criterion for determining the number of qualified electors who must sign the petition for calling the election.

We have heretofore upheld this principle of law in election contests. In *Vance, et al.,* v. *Austell, et al., Futrell, et al.,* v. *Austell, et al.,* 45 Ark. 400, this court said: "Section 1165 of Mansfield's Digest, which provides that, for the purpose of ascertaining the number of quali-

fied voters of any county, and the lawful majority necessary to authorize the change or removal of any county seat, the county court shall be governed by the number of persons liable to pay a poll tax as returned upon the assessor's books, is not in conflict with the Constitution of the State, and all doubts as to the power of the Legislature to establish the rule prescribed in said section are to be resolved in favor of the statute. . . . And it has prescribed the minimum vote necessary to effect a removal, viz: a majority of those participating in the election. . . . The assessment list had been delivered in the clerk's office, on the first Monday of June, as required by § 5672, Mansf. Dig. And being so returned, it was a finality for all purposes connected with a county seat election. Ib., 1156. It matters not that there were other persons in the county who were liable to assessment for a per capita tax and whose names were afterwards added by the assessor; nor that some of the persons included in the list were not, in fact, legal voters. The statute has adopted the list for convenience as a criterion to determine the result, under the notion that it would show approximately the number of voters living in the county. It would destroy the certainty and the value of such a criterion to allow the courts, in the event of a contest, to inquire into the completeness of the list, or to enter upon an investigation into the qualifications of electors who did not offer to vote." This case was approved and reaffirmed in *Velvin* v. *Kent,* 198 Ark. 267, 128 S. W. 2d 686.

This act, *supra,* might have fixed instead of 15%, 20% or 50% of the poll tax list, as the criterion, or in fact some other criterion than the official poll tax list.

Hempstead county who had paid a poll tax for the year 1943, according to the official poll tax list filed by the collector in the office of the county clerk, and 15% of this number is 747, it was only necessary for the petition to contain the names of 747 qualified electors of the county. It is further conceded that the petition contained 1,602 names. In effect, appellees challenged 615 names on the

petition which left 987 signers on the petition who were unchallenged, or 240 more than the required 747. As noted above, the trial court found that the petition was signed by 1,056 qualified electors of the county.

For the error indicated, the judgment is reversed and the cause remanded with directions to proceed in a manner consistent with this opinion.

McFaddin, J., not participating.

Searcy Wholesale Grocer Company *v.* Baltz.

4-7801 192 S. W. 2d 111

Opinion delivered January 21, 1946.

Rehearing denied February 18, 1946.

Harrell Simpson, Kaneaster Hodges and *Harry Neelly,* for appellant.

Schoonover & Steimel, for appellee.

McHaney, J. An action for damages for personal injuries and for damages to his automobile was brought in the Randolph circuit court by appellee who is a citizen and resident of said county, against appellant and certain individuals. As to appellant he alleged that it was engaged in the wholesale grocery business in Searcy, White county, Arkansas, "and whether a corporation or a partnership this plaintiff is not advised," but that the individuals named are directors, trustees, managers or partners of appellant.

Appellee's automobile collided with a truck and trailer owned and operated by appellant in its business near Searcy in White county, and negligence of the driver of said truck was alleged in that he crowded into a one-way bridge on U. S. Highway 67 and then applied his brakes in a careless manner, causing the trailer to come over to appellee's side of said highway immediately in front of him, resulting in the damages sued for. Since there was an instructed verdict for the individual defendants and no appeal by appellee as to them they pass out of further consideration.

Appellant's first plea was a motion to make the complaint more definite and certain by alleging whether appellant is a corporation or a partnership. It recites that appellant appeared only for the purpose of the motion. The court overruled the motion. It then filed a motion to strike from the complaint that portion asking for damages to the automobile under the terms of Act No. 317 of 1941. This motion was overruled.

The answer preserved appellant's exceptions to the overruling of said motions and was a general denial and a plea of appellee's negligence which caused the wreck.

Trial resulted in a verdict and judgment for appellee for $100 for personal injuries and $500 for property damage, or a total of $600. This appeal followed.

To reverse this judgment appellant contends that the court erred first, in overruling the motion to make more definite and certain; second, in overruling the motion to strike; third, in permitting testimony regarding damages to the car, and instructing thereon; and, fourth, in refusing to direct a verdict for it.

1. Whether appellant is a corporation or a partnership was immaterial to appellee. If liable to him at all it would be the same liability in either capacity. Its identity was a matter definitely within its own knowledge and we see no reason in requiring appellee to allege the corporate existence of appellant, a fact peculiarly within its knowledge. Certainly there could have been no prejudice to appellant in this respect. Even had its corporate existence been alleged, appellee would not have been required to prove it, unless in its verified answer appellant had expressly asserted that it was not a corporation. Section 2132 of Pope's Digest. See, also, § 1458 of the Digest, providing that "no variance between the allegations in the pleading and the proof is to be deemed to be material, unless it has actually misled the adverse party to his prejudice—."

As we said in *Central Supply Co.* v. *Wren,* 198 Ark. 1090, 133 S. W. 2d 632, "Here there can be and is, no question, as to the intention to sue the Ritz Theater, whose correct name is Ritz Theater, Inc. Service upon its agent designated for that purpose is conclusive evidence of that fact, and it was, in our opinion, error to dismiss the complaint." The service of summons upon appellant was had, as shown by the sheriff, "by delivering a copy and stating the substance to E. N. Rand, for the Wholesale Grocer Company, a corporation." In an early case, *Odd Fellows Building Association* v. *Hogan,* 28 Ark. 261, cited with approval in the Central Supply Co. case, *supra,* it was held unnecessary for Hogan to allege in his complaint the corporate capacity of the Odd Fellows Association, further than by a statement of the corporate name, and that "The name of the company implies its corporate existence. It is impliedly averred by the name, that the company was a corporation." So,

here, the name of appellant implies its corporate existence.

2. We here treat the second and third grounds together as they both relate to the jurisdiction of the court to try the issue as to property damage.

We agree with appellee that the filing of the motion by appellant to make the complaint more definite and certain amounted to a general entry of appearance by it to the cause of action for property damage, even though the motion recited that it appeared only for the purpose of the motion. That motion did not question in any way the jurisdiction of the court. It sought the aid of the court to require appellee to amend the complaint as to whether it was a corporation or a partnership, and impliedly conceded the jurisdiction for all other purposes. Act 317 of 1941 provides the venue of actions for damages to personal property by wrongful or negligent act and places it in the county where the accident occurred or where a *bona fide* defendant resides, "or in any county where personal service may be had upon him."

In *Chapman & Dewey Lumber Co.* v. *Bryan,* 183 Ark. 119, 35 S. W. 2d 80, we said: "It is familiar law that one may submit to a jurisdiction which could not otherwise be acquired, and that one does submit, who, without questioning the jurisdiction, enters an appearance, and it has been many times decided by this court that any action on the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to general appearance." See, also, *Mut. Ben. H. & A. Ass'n* v. *Moore,* 196 Ark. 667, 119 S. W. 2d 499.

We think the cases cited by appellant, such as *Met. Life Ins. Co.* v. *Baker,* 197 Ark. 61, 122 S. W. 2d 951, are not in point. In that case a motion to quash the summons was filed and the movant appeared specially for that purpose, to question the jurisdiction, and it was held no general appearance was had. We hold that appellant entered its general appearance and that the court acquired jurisdiction of the person by such motion, it already having jurisdiction of the subject matter.

3. It is finally insisted that there is no substantial evidence to support the verdict and that a directed verdict should have been given. We cannot agree. We think the evidence made a question of fact for the jury. Appellee testified to one state of facts as to how the accident occurred, which were disputed by the driver of the truck and his helper. We think no useful purpose could be served by detailing the evidence. It is sufficient to say that the evidence, as to who was to blame for the collision that occurred, is in dispute and that there is substantial evidence to support the verdict, and the judgment based thereon must be and is affirmed.

BEVIS *v.* STATE.

4399 192 S. W. 2d 113

Opinion delivered January 21, 1946.

Rehearing denied February 18, 1946.

Giles Dearing, for appellant.

Guy E. Williams, Attorney General and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

SMITH, J. On his trial upon an information charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing one Charlie Osborne, appellant was found guilty of voluntary manslaughter, and given a sentence of five years in the penitentiary, from which judgment is this appeal.

The Attorney General has moved to dismiss the appeal upon the ground that no final judgment was rendered. The transcript copies the recital appearing at page 55 of the circuit court record, reading as follows:

"September 6, 1945—Verdict of guilty of Voluntary Manslaughter. Punishment fixed at five years. Judgment pronounced.

"Jury's Verdict: 'We, the jury, find the defendant, Frank Bevis, guilty of the crime of voluntary manslaughter, in manner and form as charged in the information and fix his punishment at imprisonment in the State Penitentiary for a period of 5 years.

W. R. Cook, Foreman'."

Following this, the transcript sets out *in extenso* the motion for a new trial, and on the next page following appears this recital:

"September 7, 1945—Motion for new trial filed. Overruled. Defts. exceptions noted. Appeal prayed and granted. Dft. given 55 days for Bill of Exceptions. Bail Bond at $5,000."

Apparently the clerk of the court copied the orders appearing on the docket of the trial judge without directing, as a part of the judgment, that the defendant be transported to and confined in the penitentiary for the period of time stated in the verdict of the jury. If the clerk has that practice, it is to be severely condemned, and should not be tolerated by the trial judge. The statute contemplates that when the motion for a new trial has been overruled, if one has been filed, and in other cases where no motion for a new trial has been filed, the court shall render judgment upon the verdict of conviction, and a record of the proceeding should, of course, be made. Section 4069, Pope's Digest. It is this judgment which authorizes and directs the sheriff to perform the judgment of the court by transporting the prisoner to the penitentiary for confinement, or for execution, as the sentence pronounced by the court may have directed.

Was there a judgment from which an appeal will lie? Upon the authority of the case of *Durben* v. *Montgomery,* 144 Ark. 153, 221 S. W. 855, which was decided by a divided court, we hold there was. The facts in that case are very similar to those of the instant case. The opinion in that case states that an order was entered upon the records of the court reciting that the jury had returned a verdict in favor of the plaintiff for $450. It was further recited that a motion for a new trial had

been filed, and overruled, and that the defendant had prayed and been granted an appeal. It was not recited that the plaintiff have judgment upon this verdict, nor that process should issue for its enforcement. Upon these facts it was there held:

"The entry in the present case recites the return of the verdict, the acceptance of it by the court and the order overruling the motion for new trial, and the formal entry of judgment would follow as a necessary consequence of the verdict, and the overruling of the motion, the omission to recite a formal judgment being a mere clerical error. The entry, taken as a whole, shows that the cause was finally ended in the circuit court, and an appeal granted to this court after the judgment overruling the motion for a new trial.

"We are of the opinion therefore that the entry shows by fair and necessary inference that judgment was rendered and the entry is sufficient to give this court jurisdiction of the cause. The clerk therefore will be directed to file the transcript as of date on which it was presented to him, which was within six months of the rendition of the judgment, and to issue summons thereon as prescribed by statute."

Here it is certain that appellant was convicted of a felony and given a sentence of five years in the penitentiary, and his motion for a new trial overruled. We, therefore, hold that an appeal lies from the order reciting these facts. If it were required, formal sentence might even yet be pronounced, in which event an appeal would then lie, but we think there is a judgment from which the appeal lies.

It is assigned as error that the court, over appellant's objection, permitted witnesses to testify about a game of dice, called craps, on a Sunday, in which deceased and appellant were participants. This *prima facie* was error, as it is not permissible to prove the commission or a violation of the law other than that charged in the indictment or information. But this testimony was necessary to explain the trouble which eventuated in the death of Osborne.

Joe Young was the first witness called for the state, and on his cross-examination he was asked: "What started it (the trouble)?" and he answered, "Getting drunk and gambling." Testimony shows that deceased suspected and had accused appellant of stealing $700 from him, and that appellant had possession of a billfold containing a picture of deceased's baby, and threats of great violence were shown to have been made by deceased, if appellant did not return the billfold and the picture of the baby. These threats could not be explained or understood unless the occasion for making them was shown. Indeed the first testimony as to the drinking and gambling was brought out by appellant's counsel.

Appellant's wife, called as a witness on his behalf, testified that deceased called at her husband's place of business on the day before the shooting, and stated that appellant had gotten his money and that he would rather kill him than do anything else, but that this would not get him his money, but that he would get even with him by tomorrow afternoon at 6 o'clock. On the cross-examination of the witness, she was asked if she remembered the Sunday afternoon when her husband, the appellant, and others had gotten drunk and engaged in a dice game in deceased's store. Objection being made to the question, counsel of the state asked the witness, "Do you remember the Sunday that it is alleged that your husband stole $700 from Charlie Osborne," and the witness answered that she did. This testimony tends to explain the subsequent conduct of the parties and no error was committed in its admission.

Appellant testified that he knew deceased had accused him of stealing his money, and of having his billfold and baby's picture, and that deceased had set 6 p. m. of the day following deceased's visit to appellant's place of business as the time limit for restitution, with threats of great violence if his demand was not complied with. It was clearly established that these threats of great personal harm were made, and were communicated to appellant. The testimony shows also that deceased was a man of turbulent disposition and given to the practice

of carrying a pistol. Appellant testified that he was scared of deceased, and believed he would execute his threats, as he did not have deceased's billfold, and had not stolen the money and could not, therefore, make the restitution demanded.

Appellant testified that he sought to avoid deceased and that he remained in his store, in the rear of which he and his wife lived, until after 6 p. m., the expiration of the time limit given by deceased, and that at about 8 p. m. he walked out in the street in front of his place of business, and that when he saw deceased approaching he turned to return to his store, when deceased accosted him, and made a motion which he thought was the beginning of an attempt to draw his pistol, and that he drew his own pistol and commenced firing.

This testimony, if true, constituted a case of self defense, but it is sharply disputed, and the court gave elaborate and clear instructions as to the law of self defense. It was testified that when deceased saw appellant he said he would go over and speak to appellant, and it is denied that he made any demonstration of any kind, but that on the contrary, appellant drew his pistol and began firing when he was spoken to, that deceased started to run and ran across the street, when appellant continued to shoot at him. The undertaker who prepared deceased's body for burial testified that he found two wounds, a small hole in the back and a larger one in the front of deceased's body, near the collar bone. Deceased was unarmed at the time.

This recital of the testimony disposes of the contention that the evidence is insufficient to support the verdict; as in our opinion it would have sustained a conviction for an even higher degree of homicide.

It is assigned as error that the court erred in giving Instruction No. ....., over the objection of appellant on the subject of threats made, and the purpose for which that testimony may be considered. If this assignment is sufficient to identify the instruction it may be disposed of by saying that no objection was made or exception saved

to the instruction at the time it was given, and the objection now made to it will not be considered. *Pixley* v. *State,* 203 Ark. 42, 155 S. W. 2d, 710.

Over appellant's objection and exception, the court permitted the prosecuting attorney to ask appellant if he had not shot his first wife. A similar question was held proper in the case of *Gaines* v. *State,* 208 Ark. 293, 186 S. W. 2d 154. The testimony could of course be considered for the purpose only of affecting the credibility of the witness. He answered that he had not, and that answer concluded the inquiry. Had he answered that he had, he should have been permitted to explain, without elaboration, the circumstances, as for instance that the shooting was accidental, or to explain briefly the circumstances showing lack of criminality, and as the matter was collateral, his answer could not have been shown to be false. *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684. No attempt was made to do so.

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

HOBBS-WESTERN COMPANY *v.* CRAIG.

4-7792 192 S. W. 2d 116

Opinion delivered January 21, 1946.

Rehearing denied February 18, 1946.

Bridges, Bridges, Young & Gregory and *Buzbee, Harrison & Wright,* for appellant.

J. H. Lookadoo and *McMillan & McMillan,* for appellee.

McFaddin, J. Appellants, Hobbs-Western Co. and its insurance carrier, seek to have set aside an award of the Workmen's Compensation Commission in favor of appellees, the widow and children of John Craig, deceased workman. Appellants contend that John Craig was an employee of Steve Lea, rather than Hobbs-Western Co., and that Steve Lea was not a subcontractor of Hobbs-Western Co. within the purview of § 6 of the

Workmen's Compensation Law of Arkansas (Act No. 319 of 1939).

The Commission found that Steve Lea was a subcontractor of Hobbs-Western Co. within § 6 of the Workmen's Compensation Law. We are asked by the appellants to hold "that there was not sufficient competent evidence in the record to warrant the making of the award" or "that the facts found by the Commission do not support the award." These are grounds 4 and 3 in § 25(b) of the Act, and together necessitate (1) an examination of the evidence before the Commission to see if there was sufficient competent evidence in the record to justify the findings, and (2) a study of the facts found by the Commission to see if they support the award.

In examining to see if there is sufficient evidence in the record to justify the finding of the Commission, we have repeatedly announced that the finding of the Commission on the facts is entitled to the force and effect of a jury verdict, and that we review the evidence in the light most favorable to the appellee. *Fordyce Lumber Co.* v. *Shelton,* 206 Ark. 1134, 179 S. W. 2d 464, and cases there cited. See, also, West's Arkansas Digest, "Workmen's Compensation," § 1939 and § 1964. On the contention that the facts found by the Commission do not support the award, the position of the appellants is about the same as though they were moving for a judgment *non obstante veredicto,* in which situation every intendment of the general verdict is construed against the movant. *Iowa City State Bank* v. *Biggadike,* 131 Ark. 514, 199 S. W. 539; *Kansas City So. Ry. Co.* v. *Leinen,* 144 Ark. 454, 223 S. W. 1; West's Arkansas Digest, "Trial," § 359.

The opinion and award of the Commission is eight typewritten pages in length, and review in detail the testimony of each witness. We summarize the findings of the Commission, and the evidence as follows:

(1) The Hobbs-Western Co., a corporation, (hereinafter referred to as "Hobbs-Western") is engaged in the business of producing and selling cross ties to various railroad companies. Hobbs-Western was under a con-

tract with the Chicago, Rock Island & Pacific Railway Company and its trustee in bankruptcy (all hereinafter referred to as "Rock Island"), which contract, *inter alia*, obligated Hobbs-Western: "to produce cross ties on the line of the railway company," and "the quantity of such cross ties to be furnished shall be for the railway's entire requirements for the period of contract." In other words, Hobbs-Western was to produce for Rock Island all the cross ties that it needed during the period of the contract.

(2) Before the war emergency, Hobbs-Western had purchased most of its ties from individual farmers; but, due to the shortage of agricultural labor, not enough cross ties were produced by farmers to supply Hobbs-Western's requirements, so—to meet that situation and to secure enough cross ties to fulfill its contract with Rock Island—Hobbs-Western undertook the financing of some eight or ten individually operated tie mills in Dallas county, Arkansas; and each such mill manufactured cross ties and delivered them to the tie yard of Hobbs-Western at Sparkman, Arkansas, where the ties were accepted by Rock Island. Steve Lea was one of the individuals so financed by Hobbs-Western.

(3) On September 18, 1943, Hobbs-Western obtained a tie mill and one truck for Steve Lea at a total cost of $2,575, and took his note due on demand for this entire amount, and secured the note by a mortgage on the tie mill and truck. Steve Lea did not invest a penny of his own money in the tie mill and truck. About the same time Hobbs-Western purchased from Charles Petty, for $900 cash, all the timber on 120 acres of land, and took the timber deed in the name of Hobbs-Western. Then Hobbs-Western made an oral contract with Steve Lea, whereby he would locate the said mortgaged tie mill on the Petty land and manufacture the Petty timber into cross ties, and use the mortgaged truck in hauling the ties to the Hobbs-Western tie yard at Sparkman, Arkansas. Lea recruited the laborers to manufacture the ties and to deliver the same to the Sparkman tie yard, but did not carry any workmen's compensation insurance, or in any other way comply with the Workmen's Compensation Law.

(4) Steve Lea was paid by Hobbs-Western at an average price of 80c per tie for each tie he delivered; but from the 80c Hobbs-Western was to retain:

(a) 10c per tie until the $2,575 note was paid in full; and also

(b) 12c per tie until Hobbs-Western had received therefrom the $900 it had paid for the Petty timber, and then 6c per tie on all other ties thereafter produced from the Petty timber. At the time that John Craig was injured Hobbs-Western was retaining 22c from the average price of 80c of each tie (since the $900 had not been received by Hobbs-Western). From the remaining 58c, Steve Lea paid the laborers who worked in the tie mill and on the truck.

(5) One of these laborers was John Craig, who received an injury on September 25, 1943, arising out of and in the course of his said employment; and John Craig died on September 30, 1943, as a direct result of said injury. It is clear that Steve Lea had no financial means and that Hobbs-Western had control over his operations and financed him for the purpose of Hobbs-Western obtaining the cross ties. The following appears in the cross-examination of the representative of Hobbs-Western:

"Q. If he (Steve Lea) had gone out on the Charles Petty tract and cut all the trees into lumber, and sold it to the Camden Furniture Co., or to anyone else, what would you have done about it?

"A. As long as he owed me money, I wouldn't let him do it.

. . .

"Q. You are not in the finance business—you are interested in turning out cross ties, aren't you?

"A. That's right."

The facts which we have just reviewed are facts which not only appear in the record, but which were also found by the Commission; and the question now becomes: Do these facts justify the award? We hold that they do.

Before discussing the law, we dispose of two contentions made by appellants:

(1) We regard as unimportant the contention that Steve Lea received as his own the slabs and extra pieces of wood (called "tie sidings"), remaining after a tree had been manufactured into cross ties. There is no finding that this residue amounted to any appreciable item, or that any disposition was ever made of any such residue from the Petty tract.

(2) The appellants argue that Steve Lea was not obligated to deliver *all* the ties to Hobbs-Western, and could have sold ties to others, or manufactured the trees into lumber rather than cross ties. We consider this argument as unimportant, because Hobbs-Western's representative, as quoted above, stated that Hobbs-Western would not have allowed Lea to manufacture the Petty timber into lumber, rather than cross ties. Hobbs-Western had the right to exercise control over Steve Lea in the manufacture of the Petty timber into cross ties.

We come now to the law. Section 6 of the Arkansas Workmen's Compensation Law reads in part:

"A contractor in the performance of whose contract one or more persons are employed, either by himself or by a subcontractor, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such employment, unless the subcontractor primarily liable therefor has secured compensation for such employee so injured as provided in this Act."

The Arkansas Workmen's Compensation Law was not taken in whole from the statutory law of any particular state, and we therefore have no previous adjudications of such other state as binding on us in our construction of the Act. We are thus free to give the Arkansas law an interpretation consistent with the liberal spirit of the Act. In only two other cases has this court commented on this § 6, and those cases are not pertinent to

the issue here. They are *Thomas Bros. Lbr. Co.* v. *Hill,* 204 Ark. 976, 166 S. W. 2d 3, and *Magnolia Petroleum Co.* v. *Griych,* 206 Ark. 352, 176 S. W. 2d 435. So far as our investigation has disclosed, § 6 of the Arkansas act is similar to, but not identical with the corresponding provisions in the law of any other state.

In *Schneider on Workmen's Compensation,* permanent edition, Text Volume II, page 176, in commenting on the subcontractor provisions in the Workmen's Compensation Laws of the various states, this is stated:

"The apparent legislative purpose of constituting the principal contractor a statutory employer is to prevent evasion of the act; to protect the employees of subcontractors who are not financially responsible; to induce all employers to carry insurance; or to make the principal contractor a guarantor of the personal injury obligations of the sub-contractor. However, to constitute a principal contractor the statutory employer of the employees of the sub-contractor, there must be some contractual relationship between the two, so that if there is merely a contract of purchase or some other relation besides that of principal and contractor, there will be no liability."

In 58 A. L. R. 872 there is an annotation, "Construction and effect of specific provisions of workmen's compensation acts in relation to employees of independent contractors or subcontractors," and it is there stated:

"It would seem that the chief purpose of provisions of this type is to protect the employees of subcontractors who are not financially responsible, and to prevent employers from relieving themselves of liability by doing through independent contractors what they would otherwise do through direct employees."

This annotation is supplemented in 105 A. L. R. 581. In 71 C. J. 483, *et seq.,* there is an extended discussion of the subcontractor provision, and on page 485 the text reads:

"The purpose of provisions of the character under consideration is not for the protection of subcontractors;

they were enacted for the purpose of giving employees of the contractor a remedy against the principal, the object being to afford full protection to workmen by preventing the possibility of defeating the compensation act by hiring irresponsible contractors or subcontractors to carry on a part of the employer's work."

We have given these quotations so that it might be readily apparent that we are construing § 6 of our Act in accordance with the general statement of purposes of the subcontractor section.

But appellants most seriously insist that the facts, as herein stated, do not support the conclusion that Steve Lea was a subcontractor of Hobbs-Western within the intendment of § 6 of the Arkansas Workmen's Compensation Act; and in support of their position appellants cite the following cases: *Harris* v. *Southern Kraft Co., et al.* (La. App.), 183 So. 65; *Anthony* v. *Natalbany Lumber Co.* (La. App.), 187 So. 288; *Perkinson, et al.,* v. *Thomas,* 158 Va. 699, 164 S. E. 561; *Madison Entertainment Corp., et al.,* v. *Kleinheinz, et al.,* 211 Wis. 459, 248 N. W. 415; *City of Hudson* v. *Industrial Commission, et al.,* 241 Wis. 476, 6 N. W. 2d 217; *Employers' Mutual Liability Ins. Co., et al.,* v. *Industrial Commission, et al.,* 224 Wis. 527, 272 N. W. 481; *Williams* v. *George, et al.,* (La. App.), 15 So. 2d 823; *Eley* v. *Benedict,* 113 Ind. App. 202, 46 N. E. 2d 492. Of course, the value of any case from another jurisdiction depends, not only upon the identity of the statute involved as compared with our statute, but also on the similarity of the essential facts in the case cited as compared with the facts in the case here under consideration. For purposes of this opinion, we may disregard the dissimilarity of statutes, and consider only the dissimilarity of facts:

(1) *Harris* v. *Southern Kraft Corp., supra,* was decided by the Louisiana Court of Appeals in 1938. Harris received injuries while working as a woodcutter for Stotts who was engaged in cutting and hauling pulp wood which was sold by him to Southern Kraft Corp. On the theory that Stotts was a subcontractor of Southern Kraft Corp.,

Harris sought an award against Southern Kraft Corp. under the subcontractor section of the Louisiana Workmen's Compensation Law. The Louisiana Court of Appeals stated the facts:

"Stotts has been engaged for eleven years in cutting, hauling and marketing pulp wood. As a rule he buys the timber from land owners and hires men to cut it into required lengths and stack it. He hires other men to haul it to the nearest railroad points at which it is loaded into cars and shipped to the purchaser. He pays for the stumpage, for the cutting, hauling and loading. For these purposes he hired and fired whom he pleased. The wood was not engaged or contracted to any one until loaded on cars destined for the plant.

"The arrangement between this company and Stotts appears to be as follows: The company purchased his wood as it was needed and as he was able to deliver it to them in cars. He was not obligated to sell the wood to it, nor was it obligated to buy any quantity of wood from him, excepting such as was covered by specific orders to him. . . . The Company exercised no control or supervision whatever over the cutting, hauling or loading of the wood. On each Wednesday a check would be mailed to Stotts to pay for wood received during the previous week ending on Saturday. He was paid $3.50 per cord for all wood accepted at Bastrop. This price was subject to change at any time, dependent upon the company's will. The *modus operandi* between these defendants, reflected from the foregoing statement of facts, clearly negatives a contractual relationship between them. It does prove a relationship of buyer and seller. To such relationship, the workmen's compensation law, Act No. 20 of 1914, cannot be made to apply. If this were not true, it may readily be seen, commerce and business dealings would be seriously interfered with and hampered. A merchant in Shreveport, after placing an order for goods with a manufacturer in New Orleans, would become responsible for compensation due a workman of the manufacturer injured while manufacturing the goods ordered."

On these facts, the Louisiana Court of Appeals denied an award against Southern Kraft Corporation.

We are in full agreement with such a conclusion. If the facts here were the same as in *Harris* v. *Southern Kraft Corp.*, we would easily reach a conclusion of no liability on the part of Hobbs-Western. But, here, there are these distinguishing facts, the counterparts of which are not found in *Harris* v. *Southern Kraft Corp.*: (a) Hobbs-Western entirely financed all of the operations of Steve Lea, for the purpose of obtaining cross ties to fulfill a particular contract of Hobbs-Western. (b) Hobbs-Western held a demand note and mortgage on the entire plant and equipment of Steve Lea. (c) Hobbs-Western could and would have prevented Lea from manufacturing the timber into lumber for sale to others. (d) Hobbs-Western purchased the timber and took the title in its own name, and was to participate to the extent of 6c per cross tie on all the proceeds from the timber after the initial cost had been repaid. Some of these facts standing alone might not be sufficient differentiation from the case of Southern Kraft Corp., but when all concur, then the relationship between Hobbs-Western and Steve Lea in the case at bar is entirely different from the relationship of Southern Kraft Corp. and Stotts in the cited case; and this difference is so great that we cannot say that the award of the Arkansas Workmen's Compensation Commission is erroneous.

(2) In *Anthony* v. *Natalbany Lumber Co., supra,* Cass Anthony was injured while working at a lumber mill operated by Steve Anthony. Cass Anthony sought recovery from Natalbany Lumber Co. on the theory that Steve Anthony was a subcontractor of the Natalbany Lumber Co.; but the Louisiana Court of Appeals detailed the course of dealings between Steve Anthony and the lumber company, and held that Steve Anthony was a seller and not a subcontractor. What we said about *Harris* v. *Southern Kraft Corp.* applies with equal force and differentiation to this case.

(3) Likewise, a review of the facts in *Perkinson* v. *Thomas, supra,* shows facts similar to *Harris* v. *South-*

ern Kraft Corp., and does not contain facts such as shown in the case at bar.

(4) In *Madison Entertainment Corp.* v. *Kleinheinz, supra,* the injured person (appellee) was a professional baseball player on the team known as the "Madison Blues," and received injury while leaving the dressing rooms on the field leased and under the control of the Madison Entertainment Corp. Kleinheinz was employed by Lenahan, who was the sole owner and operator of the ball team; but Kleinheinz sought recovery from the Madison Entertainment Corp., on the theory that Lenahan was a subcontractor of the corporation under the Wisconsin Workmen's Compensation Act. The Supreme Court of Wisconsin, in denying the applicability of the subcontractor provision of the Wisconsin law, said:

"If the contract between Lenahan and the entertainment corporation was for services promotive of the ordinary and usual business of the corporation, and which would otherwise be performed through direct employees of the corporation, the conclusion would be that section 102.06 was operative and the corporation liable for injuries to employees of Lenahan. That such is not the situation is quite clear under the evidence. The Madison Entertainment Corporation was not organized to give entertainments through and by its employees. Its business was the promotion of entertainments in order to exploit the facilities of the baseball field. Its position was analogous to that of the owner of a theater who gives guaranties to traveling shows in order to promote the profitable operation of the plant constituting the theater. Its business was the furnishing of facilities for giving entertainments, rather than the giving of them through its own efforts. Hence the corporation was not attempting to discharge its business through independent contractors and thus avoid the necessity of doing business through direct employees. Section 102.06 is not applicable."

(5) *Employers' Mutual Liability Ins. Co.* v. *Industrial Commission* is another Wisconsin case, and involves the logging and lumber business. Thomison, an employee

of Peterson received injury arising out of and in the course of his employment. On the theory that Peterson was a subcontractor of the Gagen Lumber Co., Thomison sought an award against the lumber company. The facts showed that Peterson was a farmer, and at various times sold logs to Gagen Lumber Co. The company had loaned Peterson money with which to purchase land and equipment, but Peterson owned all his trucks and his logging equipment, and sold to others. There was no evidence that Gagen Lumber Co. financed the entire operations of Peterson, or held a demand note and mortgage on his entire property, or could have prevented him from manufacturing logs into lumber, and selling to others, or that Gagen had taken title to the timber to be manufactured and was to participate in the profits from the timber. The presence of these facts in the case at bar distinguishes it from the cited case. If we had in the case at bar only the set of facts as presented in the cited case, we might readily reach, in this case, the same conclusion as reached by the Wisconsin court in the cited case. But here we have an entirely different set of facts.

A further review of cases cited by the appellant would only serve to lengthen this opinion. Hobbs-Western was under contract to the Rock Island to provide cross ties. From its manner of doing business in the case at bar, we conclude that Hobbs-Western adopted the works and servants of Steve Lea as its own instrumentality in its effort to fulfill its contract with the Rock Island just as effectively as if Hobbs-Western had directly subcontracted a portion of its said contract to Steve Lea by means of the most deliberate and solemn subcontract. In this situation, when Hobbs-Western failed to require Steve Lea to comply with the Workmen's Compensation Law, then Hobbs-Western thereby placed itself under the liability provided in § 6 of the Act. In accordance with these views, we affirm the case.

SHOOP *v.* STATE.

4397 192 S. W. 2d 122

Opinion delivered January 28, 1946.

Howell & Howell, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

ROBINS, J. Noah Shoop has appealed from judgments in four cases wherein he was found guilty of selling intoxicating liquors in a county in which the sale of such liquors was prohibited under the provisions of Initiated Act No. 1, adopted November 3, 1942 (Acts 1943, p. 998). He was fined $500 for each offense. The trial court ordered that the defendant be confined in the Crawford county jail until the obligations were discharged. Two days later, and at the same term, a new judgment was entered, directing that Shoop ". . . be confined in the state penitentiary at hard labor until such time as the fine(s) and cost(s) be paid at the rate of $2 per day."

Reversal is sought, first, on the ground that evidence was insufficient. The record discloses testimony by James F. Dubberly, Sr., that he had repeatedly purchased liquor from Shoop; and, while he was not specific as to all dates, he did state positively that at least four separate purchases had been made from the defendant since the county by referendum banned the sale of intoxicants. Dubberly's credibility was for the jury and its finding that the sales were made will not be disturbed. Argument by appellant's counsel that there was no proof the sales, if in fact they were made, were consummated in "dry" territory, is answered by our familiar holding that trial courts may take judicial notice of local laws where the circumstances are such that knowledge will be presumed. *Skiles* v. *State,* 150 Ark. 300, 234 S. W. 721; *Crumbley* v. *Guthrie,* 207 Ark. 875, 183 S. W. 2d 47.

The second contention is that the municipal court for the city of Van Buren, where information was originally filed by the prosecuting attorney, was without jurisdiction because of limitations imposed by Art. 7, § 43, of the Constitution. It is there provided that corporation (or municipal) courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, "and the General Assembly may invest such of them as it may deem expedient with jurisdiction of any criminal offenses not punishable by death or imprisonment in the penitentiary, with or without indictment, as may be provided by law. . . ."

Although on appeal to circuit court the charges against Shoop were consolidated, the jury was instructed that he was being tried for four separate offenses and that each one was a "first offense." Section 3 of Initiated Act No. 1 of 1942 (Acts 1943, p. 998, effective January 1, 1943) contains the provision that "It shall be unlawful for any person . . . to sell . . . liquor . . . in any county . . . in which the . . . sale . . . shall be prohibited. . . . Any person (who shall so sell any such liquor) . . . in any territory which has been made dry . . . shall, upon first conviction, be deemed guilty of a misdemeanor and shall be fined not less than $100 nor more than $1,000; for a second conviction, shall be fined not less than $200, nor more than $2,000; and for any subsequent conviction, shall be guilty of a felony and shall be sentenced to not less than one year nor more than five years in the state penitentiary. If any person so convicted be punished by a fine only, if such fine be not paid immediately, he shall be confined in the state penitentiary at hard labor until such fine and costs be paid at the rate of $2 per day."

Appellant's argument is that, although the offense with which he was charged is denominated in the statute as a misdemeanor, the part of the statute that authorizes confinement in the penitentiary on default of payment of fine controls and makes the offense a felony, and that, if the offense was a felony then, since the prosecution was begun in the municipal court which, under the con-

stitution, is invested with jurisdiction to try only misdemeanor cases, the circuit court on appeal would likewise be without jurisdiction.

On behalf of the state it is urged that the offense charged was only a misdemeanor and the fact that the law provided for confinement in the penitentiary until the fine was discharged at the rate of $2 per day did not change the grade of the offense from that of misdemeanor to that of felony.

This act declares that violation thereof (except in case of a third conviction) shall constitute a misdemeanor, punishable by a specified fine; but in the last sentence it is provided that, upon failure of the accused to pay the fine, he shall be confined in the penitentiary until the fine shall have been discharged at the rate of $2 per day.

By §§ 2922 and 2923, Pope's Digest, it is provided that offenses punishable by imprisonment in the penitentiary are felonies and that other offenses (which are those punishable by fine and/or jail sentences) are misdemeanors.

While there is authority for holding that the imprisonment authorized in event of non-payment of a fine is not a part of the punishment, but rather a means of enforcing collection of the fine, we conclude that whenever the ultimate effect of conviction of an offense may, in any case, be incarceration in the penitentiary such offense must be deemed to be a felony. "The maximum penalty that may be imposed or the things authorized to be done are the controlling characteristics in determining whether an offense is a felony or a misdemeanor." 22 C. J. S. 57.

Viewing the act in the light of this conclusion, there is an irreconcilable conflict in its provisions, because, in the first sentence of the paragraph dealing with punishment of violations, it is stated that first and second violations shall be misdemeanors, and in the final sentence of this paragraph it is provided that, if these violators (convicted of what has been declared to be a misde-

meanor) do not pay their fines, they are to be confined at hard labor in the penitentiary—a punishment reserved under the law for those found guilty of felonies.

In his work "On the Interpretation of Statutes" Sir Peter Benson Maxwell said: "Where the language of a statute, in its ordinary meaning . . . leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether . . . under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning." Chap. IX, § 1, p. 198.

"It may be that two provisions are irreconcilable; if so, the one which expresses the intent of the law-makers should control." Section 166, p. 263, Crawford, "Statutory Construction."

While under the charge laid against appellant he was accused only of a misdemeanor, yet, under a literal construction of the act, if appellant is unable to pay the fines against him, aggregating $2,000, he must be confined in the penitentiary at hard labor for 1,000 days. There is no provision in the law for any distinction between prisoners received at the penitentiary—they are all presumably felons, and are treated as such by those in charge of the prison. Now by some refined process of reasoning it might be established that appellant, should he be put in the penitentiary for nonpayment of his fine, would not be a felon, and that there is a difference between one committed to the institution on conviction of felony and one sent there to discharge a fine by hard labor, it is doubtful if this distinction would be comprehended by the public generally, and certainly it would be difficult for a misdemeanant undergoing penal servitude along

with felons to appreciate this differentiation, however logical it might be in theory.

Treating the offense as a misdemeanor, as it is denominated by the act, justices of the peace have jurisdiction of trials therefor. So, if the act should be literally construed and enforced, a justice of the peace, on nonpayment of fine assessed by him for violation of the act, would be authorized to issue his *mittimus* committing the offender to the penitentiary—and this in the face of the constitutional provision limiting jurisdiction of the justices of the peace (except in examining proceedings) to misdemeanor cases. We cannot conceive that it was the intention of the framers of our constitutional or statutory law that a justice of the peace should, in any circumstances, have the power to commit offenders to the state penitentiary.

In interpreting a statute the guiding principle must always be the ascertainment of the intention of the lawmakers. The framers of this law declared that violation thereof should be a misdemeanor, and we conclude that this explicit declaration should control and nullify the last clause under which punishment reserved for felons might be imposed on persons already defined to be misdemeanants.

Next contention of appellant is that by the provisions of § 9903 of Pope's Digest the circuit court could not put appellant on trial until ten days after the date of the filing of the transcript of the municipal court. The statute does not expressly so limit the power of the circuit court. This section is as follows: "All appeals from municipal courts must be taken and the transcripts of appeal lodged in the office of the clerk of the circuit court within thirty days after judgment is rendered, and not thereafter. The circuit court shall advance on its docket such causes on appeal and the same shall stand for trial *de novo* in the circuit court ten days after being docketed."

We have uniformly held that the granting or refusing of a motion for continuance is largely within the discretion of the trial court and that the ruling thereon of

the trial court will not be disturbed in the absence of a showing that the discretion was abused. *Thompson* v. *State,* 26 Ark. 323; *Edmonds* v. *State,* 34 Ark. 720; *Shipley* v. *State,* 50 Ark. 49, 6 S. W. 226; *Jackson* v. *State,* 54 Ark. 243, 15 S. W. 607; *Harper* v. *State,* 79 Ark. 594, 96 S. W. 1003; *Walker* v. *State,* 91 Ark. 497, 121 S. W. 925; *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527; *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93; *French* v. *State,* 205 Ark. 386, 168 S. W. 829; *Pate* v. *State,* 206 Ark. 693, 177 S. W. 2d 933. A somewhat similar question was involved in the case of *Griffin* v. *State* (Ala.), 50 So. 962, in which it was held that a statute providing that the criminal docket should be taken up by the circuit court on Monday of the second week of court did not prevent a circuit court, in the exercise of its discretion, from setting a criminal case for trial during the first week.

We do not find anything in the record tending to show that the ruling of the lower court as to appellant's motion for a continuance was arbitrary or that any prejudice to appellant flowed therefrom.

The judgment of conviction in all four cases is affirmed, but modified so as to provide that collection of the fines may be enforced only by methods provided by law for collection of fines in misdemeanor cases.

GRIFFIN SMITH, Chief Justice, and Mr. Justice McFADDIN dissent as to modification.

McFADDIN, J. (dissenting). My dissent is from the modification. I hold that the circuit court judgment should be affirmed in all respects. Initiated Act No. 1 of 1942 was voted by the people at the general election; the Act provides that the first and second violations constitute misdemeanors and result in a fine. All of the appellant's violations in the case at bar were "first offenses," because he had not been convicted of any previous violations at the time he was tried and convicted in the case here. So, under the Act, the appellant was fined. Section 3 of the Initiated Act provides "if any person so convicted be punished by a fine only, if such fine be not paid immediately, he shall be confined in the state penitentiary at hard labor until such fine and costs

be paid at the rate of $2 per day." The majority opinion says that this act contains an "irreconcilable conflict in its provisions"; and then the majority proceeds to substitute *confinement in the county jail* in lieu of *confinement in the state penitentiary.* I insist that the statute should be enforced as written.

In the attempt to demonstrate an "irreconcilable conflict," the majority reasoning is in successive steps about as follows: (1) the commitment to jail or penitentiary is a part of the punishment; (2) the commitment to the penitentiary makes the offense a felony, (3) first violations of the liquor act are misdemeanors; so (4) there can be no commitment to the penitentiary in default of payment of the fine. On these successive steps of reasoning, the majority is striking out of the statute the mandatory language directing the commitment to the penitentiary, and substituting in lieu thereof the majority-made legislation to the effect that the appellant should be committed to the county jail.

There are several answers to the majority's reasoning; one being, (a) that the distinction between felony and misdemeanor is of statutory origin only, and that the people by this initiated act could have changed the distinction between felony and misdemeanor; another being, (b) that the majority fails to give any effect to the holding of this court in *Burrell* v. *State,* 203 Ark. 1124, 160 S. W. 2d 218.

But rather than press either of these points, I prefer to go to the first step of reasoning advanced by the majority; that is, that the commitment is a part of the punishment. When I destroy that point, then all the other steps of reasoning in the majority opinion must necessarily fail. I contend (1) that the fine was the punishment; (2) the commitment was merely a means of collecting the fine; (3) the commitment is no part of the punishment.

This court, leading text-writers, and all the courts of last resort of the other states (so far as I have been able to ascertain) hold that the means of collecting a fine is

not a part of the punishment. The commitment, whether to the county jail or to the penitentiary, is not the punishment, but merely a means of collecting it. I cite and quote from some of these:

(1) Mr. Justice RIDDICK, in *ex parte* Brady, 70 Ark. 376, 68 S. W. 34, speaking for this court in 1902, said:

"It will be seen from these and other statutes that the imprisonment which follows the failure to pay the fine assessed by the court is not now a form of punishment substituted for the fine, but is a means adopted to compel the payment of the fine."

(2) In 15 Am. Juris. 184, in discussing "Commitment as a Part of Punishment," the rule is stated:

"Committing a prisoner to jail until a fine is paid is no part of the punishment. The penalty, or the punishment adjudged, is the fine, and the custody adjudged is the mode of executing the sentence, that is, of enforcing the payment of the fine. This is in accordance with the common law."

(3) In 25 C. J. 1157, in discussing imprisonment to collect a fine, the rule is stated:

"A direction in a sentence imposing a fine that defendant stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court. If he refuses to pay, he is not sentenced to a term in prison; the duration of his imprisonment is in his own control; by payment of the fine he can at any time secure his release. The sentence is not, therefore, open to the objection that the magistrate rendering it has no jurisdiction of offenses which are punishable by imprisonment."

(4) Likewise, in 36 C. J. S. 788, the rule is stated:

"Imprisonment of defendant until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court. If he refuses to pay, he is not sentenced to a term in prison; the duration of his imprisonment is in his own

control; by payment of the fine he can at any time secure his release. . . . The sentence is not, therefore, open to the objection that the magistrate rendering it has no jurisdiction of offenses which are punishable by imprisonment."

(5) In 16 C. J. 1367, in discussing imprisonment for failure to pay a fine, the rule is stated:

"When a fine is imposed as a punishment, according to the weight of authority, it is within the common-law power of the court to direct that defendant stand committed until it is paid. In some jurisdictions, however, imprisonment in default of payment of fine is illegal, unless the court is authorized expressly by the legislature to impose it. The practice and authority for directing that one ordered to pay a fine stand committed until it is paid is now commonly authorized by statute. This is a proper means for the collection of a fine, and is not regarded as a part of the punishment. It is not, therefore, open to the objection that the magistrate has no jurisdiction of offenses which are punishable by imprisonment."

(6) In 127 A. L. R. 1286, there is an annotation on the subject, "Character as Felony or Misdemeanor of Offense for Which a Fine is Provided as Affected by Provision for Imprisonment Until Fine is Satisfied." That annotation is immediately following the reported case of *McKinney* v. *Hamilton,* 127 A. L. R. 1283, wherein the New York Court of Appeals reversed a holding of the Appellate Division. The opinion of the highest New York court was in accord with this dissent, and reversed the Appellate Division which had reached a conclusion similar to that reached by the majority in the case at bar.

(7) The courts of last resort in all the other states, so far as my search has disclosed, have reached the conclusion that the commitment is no part of the fine. Some of the cases so holding are: *In re* Newton, 39 Nebr. 757, 58 N. W. 436; *State* v. *Baxter,* 41 Kans. 516, 21 Pac. 650; *In re* MacDonald, 4 Wyo. 150, 33 Pac. 18; *Ex parte* Garrison, 193 Calif. 37, 223 Pac. 64; *Ex parte* Peacock, 25

Fla. 478, 6 So. 473. In 12 A. S. R. 202, immediately following the reported case of *Ex parte* Bryant, 24 Fla. 278, 4 So. 854, there is a splendid annotation on "Right to Imprison until Fine is Paid," which gives the English common-law cases on this point. In *Ex parte* Converse, 45 Nev. 93, 198 Pac. 229, the Supreme Court of Nevada, after quoting from 16 C. J. 1367 to the effect that the commitment is only a means for collecting the fine, and is not regarded as a part of the punishment, said:

"Of the courts which have had occasion to speak on this question, a great majority have reached the same conclusion that we have; the last to fall in line being that of Idaho. *State* v. *Goodrich,* 196 Pac. 1043. See, also, *ex parte* Londos, 54 Mont. 418, 170 Pac. 1045; *State* v. *Peterson,* 38 Minn. 143, 36 N. W. 443; *Ex parte* Dockery, 38 Tex. Cr. R. 293, 42 S. W. 599; *Irvin* v. *State,* 52 Fla. 51, 41 So. 785, 10 Ann. Cas. 1003; Bishop, New Crim. Proc., § 1301; *In re* Newton, 39 Neb. 757, 58 N. W. 436; *In re* Beall, 26 Ohio St. 195; *State* v. *Merry,* 20 N. D. 337, 127 N. W. 83."

I forego a citation of all the other cases on this point; but I trust I have listed enough authorities to establish that the commitment is not a part of the punishment. The appellant herein was fined for violating Initiated Act No. 1 of 1942. He made bail pending appeal. He could pay the fine, and be free. In default of paying the fine, I hold that he should be committed to the penitentiary just as the act clearly directs. I hold to this opinion, since the commitment is not a part of the punishment, but is merely a means of collecting it. The people, in adopting Initiated Act No. 1 of 1942, had a perfect right to provide that upon failure to pay the fine, the convicted person could be imprisoned in the state penitentiary. I submit that the action of the majority in modifying this statute is against the holdings in all the other states. From the modifying of the judgment of the circuit court, I respectfully dissent; and I am authorized to state that the Chief Justice joins in this dissent.

CARTER OIL COMPANY *v.* WEIL.

4-7798 192 S. W. 2d 215

Opinion delivered January 28, 1946.

Hearing denied February 25, 1946.

Smith & Sanderson, Arnold & Arnold and *Gaughan, McClellan & Gaughan,* for appellant.

Barney & Quinn and *Shaver, Stewart & Jones,* for appellee.

SMITH, J. On December 9, 1921, the Four States Lumber Company, a corporation, hereinafter referred to as the Company, was the owner of the 40-acre tract of land which is the subject of this litigation. The officers of the Company were: Leo Krouse, president; I. J. Kosminsky, secretary; Allen Winham, Jr., assistant secretary; and Fred Offenhauser was a stockholder and one of the directors. All of these persons except Winham were dead at the time the testimony was taken on which the case was submitted and decided in the court below. On the date mentioned the Company conveyed the land by warranty deed to Nick Harvey. Following the habendum clause in the deed appeared this separate paragraph: "It is expressly understood that a one-half undivided interest is reserved to the said Four States Lumber Company in all oil and mineral rights."

By mesne conveyances numerous persons have acquired various interests through Nick Harvey, the grantee in the deed, and this suit was filed against them by plaintiffs, who had acquired, and now own, the interest in the oil and minerals which the grantor reserved, to cancel the conveyances under which claims are asserted to the undivided one-half interest and for an accounting for the oil and gas produced from the land. The relief prayed was granted, and from that decree is this appeal.

Answers were filed, alleging the invalidity of the reservation of the undivided one-half interest in the oil and gas, and alleging also that its insertion in the deed was the result either of a mutual mistake or of an intentional fraud, and reformation of this deed was prayed, which relief was denied.

We consider first the question of the right to have the deed reformed. Harvey testified that he purchased the land for a cash consideration of $450, and that he

refused to accept a deed containing the reservation, and that the Company's agent assured him that he would procure a deed which did not contain that reservation, and another deed was delivered to him which, like the first, contained the reservation, but he was assured that it did not; that he is an illiterate man, and did not know a fraud had been practiced when the second deed was delivered.

The testimony of Harvey is corroborated by that of one Arthur Gurley, who testified that he, as the agent of the Company, negotiated the sale and delivered both deeds; that he reported to the Company's officers that Harvey would not accept a deed containing the mineral reservation, and that he was assured that another deed would be prepared omitting it, and that he supposed this had been done, and that when he delivered the second deed he assured Harvey that this had been done.

The chancellor did not credit this testimony, nor do we. The Company surrendered its charter in 1923 after disposing of its lands. Winham testified that as assistant secretary he kept the Company's records from March 15, 1917, until the dissolution of the corporation, and that practically all the Company's records have been lost or destroyed. As assistant secretary he prepared practically all the deeds, and that he wrote the deed in question. It was the invariable practice of the Company to insert the mineral reservation in all the deeds it executed, and that this reservation was printed in the blank form of deeds used by the Company, but that the deed in question was typewritten on legal size paper, and he remembers the deed because of that fact, as he wrote the deed. He knew nothing about Harvey's refusal to accept the first deed, and so far as he was aware only one deed to Harvey had ever been written. Winham further testified that he had known Gurley for twenty-five years, and that Gurley never represented the Company, had never handled any business for the Company, was never its agent, and was never authorized to sell lands for the Company.

One Armstrong testified that he was employed by the Company in the sale of its lands from 1919 until the Company was dissolved, and that he never heard of Gurley representing the Company in any matter.

It appears highly improbable to us that Gurley, after promising Harvey to secure a deed which did not contain the mineral reservation, would deliver a deed which did contain it.

In view of the rule established by many decisions of this court that deeds will be reformed only upon testimony that is clear and convincing, we think the court properly refused reformation.

It appears that one of the grantees claiming not from but through Harvey procured an abstract of the title to this tract of land, and had the title examined by a highly competent attorney and title examiner, and on a page of the abstract containing a copy of the deed to Harvey the examiner made the notation: "Under the authority of *Cole* v. *Collie,* 131 Ark. 103, 198 S. W. 710, our opinion is that the reservation is void." This notation was signed by the examiner. The land was purchased in reliance upon this opinion.

It is insisted that, inasmuch as the case of *Cole* v. *Collie* had not been overruled at the time of this purchase, the parties had the right to rely upon that case as supporting the examiner's opinion, and that the case of *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234, which overruled the Cole case, does not apply under the facts in the instant case; and further that the Beasley case should be construed as operating only prospectively.

We think no valid distinction can be made between the instant case and the Beasley case, as the deed there construed had been executed subsequent to the Cole case and before that case had been overruled; and we are, therefore, of the opinion that the law as announced in the Beasley case applies here.

There remains, therefore, only the question whether the opinion in the Beasley case should be construed as operating only prospectively and as having no controlling effect upon deeds executed prior to its rendition.

It will presently appear that the Beasley case is not the only one which overruled the Cole case.

It must be confessed that this court has not been consistent in its holdings as to the effect to be given recitals found in the habendum or other clauses of a deed conflicting with those found in the granting clause.

It is urged that under the rule of *stare decisis* the authority of the Cole case should not be impaired, but that if this is done the impairment should operate only prospectively, having no effect upon titles acquired while the Cole case was the declared law.

It may be answered that, if the rule of *stare decisis* prevents a change in a holding of this court which affects rights acquired under a previous holding, the Cole case itself violates that rule, as it contravenes the first holding of this court on the question now under consideration announced in the case of *Doe, Ex. Dem., Phillips' Heirs,* v. *Porter,* 3 Ark. 18, 36 Am. Dec. 448. In the case just cited, it was held to quote from the headnotes, that "All deeds are to be construed favorably, and as near the intention of the parties as possible, consistently with the rules of law.

"The construction ought to be put on the entire deed, and every part of it, for the whole deed ought to stand together, if practicable, and every sentence and word of it be made to operate and take effect.

"If two clauses in a deed stand in irreconcilable conflict to each other, the first clause shall prevail, and the latter be regarded as inoperative; and the law will construe that part of a deed to precede which ought to take precedence, no matter in what part of the instrument it may be found."

This holding cannot be reconciled with the *Cole* v. *Collie* case, which did not indicate any intention of over-

ruling the Doe case, *supra*. If the Doe case is sound law, and it has never been overruled, the *Cole* v. *Collie* case was unsound, and it would necessarily follow that the undivided half interest in the oil and mineral rights here involved were not conveyed, but were expressly reserved.

Now, it is true, of course, that the Cole case is a later case, and insofar as the cases are in conflict the last case would control; but the point is that cases, even those under which property rights were acquired, may be overruled.

Chancellor Kent, in his Commentaries, vol. 1, p. 477, warns against the use of this power, which inheres in courts of last resort, for the reason that the law should be certain, and that rights acquired under earlier decisions should not be lightly disturbed; but he then proceeds to say: "But I wish not to be understood to press too strongly the doctrine of *stare decisis,* when I recollect that there are more than one hundred cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. (This text was written more than a hundred years ago, and such cases now number, not hundreds, but thousands.) It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."

Blackstone, in his Commentaries, vol. 1, p. 70, expresses the same views. The courts' power and duty, in proper circumstances, to overrule cases, is recognized by him, and he says: "For if it be found that the former decision is manifestly absurd or unjust, it is declared,

not that such a sentence was *bad* law, but that it *was not law*; that is, that it is not the established custom of the realm, as has been erroneously determined."

This view is criticized in two recent very learned articles in the Columbia Law Review, vol. XVII, No. 7, p. 593, and vol. XVIII, No. 1, p. 230; but it is the view expressed by Chief Justice COCKRILL, who would have adorned any Bench, in the case of *Taliaferro* v. *Barnett*, 47 Ark. 359, 1 S. W. 702, in which case he said: "A decision of this court is adhered to in all subsequent stages of the same case, although it may be clearly erroneous. It becomes an adjudication between the parties to the suit from which the Supreme Court itself is not, upon a second appeal, at liberty to depart. But strangers to the suit acquire no such right, nor, indeed, any right to the decision in any case, further than it may be as a guide to their conduct. An exception is made, by statute, as to some criminal acts. Mansf. Dig., § 6340. A decision of the court when overruled stands as though it had never been, and the court in the reversing judgment declares what the rule of law was in fact when the erroneous decision was made."

The power of the court to overrule the case of *Cole* v. *Collie* is expressly conceded in the able brief filed by learned counsel for appellants; and the right of the court to refuse to make its opinion prospective only is also conceded in the brief.

This view comports with the decision of the Supreme Court of the United States in the case of *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254. That court reviewed a decision of the Supreme Court of Montana in which a prior decision of the Montana court had been overruled; but it was held that retroactive effect would not be given to the opinion. The right of the court to thus limit the effect of the decision was challenged on the appeal to the Supreme Court of the United States; but the right was upheld. Justice CARDOZO, speaking for the court, there said: "The choice for any state may be

determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew."

It will be observed that the Supreme Court of the United States did not say that the Supreme Court of Montana should have held as it did. It was decided only that the Montana court had this power.

But we do not elect to use that power. If so used the use would not be consonant with Judge COCKRILL's statement in the Taliaferro case from which we have just quoted.

Now, courts do not make the law. Their function is to declare what is law, and their declaration as to what is law is the highest and the conclusive evidence of that fact, and remains so until changed by a subsequent declaration or by legislative or constitutional enactment. But in the meantime no one can be said to have acquired a vested right to have the benefit of an erroneous decision.

But we are not presently overruling cases. On the contrary, we are upholding recent cases which received our most careful consideration. Those cases are: *Luther* v. *Patman,* 200 Ark. 853, 141 S. W. 2d 42; *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234; *Stewart* v. *Warren,* 202 Ark. 873, 153 S. W. 2d 545.

In the case of *Mason* v. *Jackson,* 194 Ark. 236, 106 S. W. 2d 610, 111 A. L. R. 1071, the case of *Cole* v. *Collie*

was cited and approved, and this was done for the reason, there stated, that a recital in the habendum clause would be disregarded if in conflict with the recital of the granting clause. The reading of the opinion in the Mason case can leave no doubt that the opinion flaunted the express unambiguous intent of the parties, because it was believed that this rule of construction required that holding. The necessary and inevitable effect of that opinion was to give the grantee something he had not bought and to take from the grantor an interest he had expressly reserved. Any rule of construction leading to that result must necessarily be unsound, unjust, and illogical; and we so stated when the question was next presented in the case of *Luther* v. *Patman, supra.* In that case Mr. Justice HUMPHREYS, speaking for an undivided court, quoted with approval the statement of the law from 16 Am. Jur., § 237, p. 570, to the following effect: That the modern and now widely accepted rule to determine the estate conveyed by a deed with inconsistent clauses has for its cardinal principle the proposition that if the intention of the parties is apparent from examination of the deed "from its four corners" without regard to its technical and formal divisions, it will be given effect even though, in doing so, technical rules of construction will be violated. And, further, that, under this view the rule that an habendum clause creating an estate contradictory of or repugnant to that in the granting clause must be rejected, is not a rule of property, but is merely a rule of construction, which will be resorted to only where the court cannot determine which of the clauses was intended to be controlling, and that the intention of the parties, if it can be gathered from the instrument in the entirety, must control.

The case of *Luther* v. *Patman* did not expressly overrule either the case of *Cole* v. *Collie* or *Mason* v. *Jackson,* which approved it; but it did necessarily impair and destroy their authority as to the effect of this rule of construction.

Following the *Luther* v. *Patman* case came the case of *Beasley* v. *Shinn, supra,* in which we said: "To the

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

The opinion in the Beasley case gave effect to a mineral reservation, and if it had been intended that this case overruling others should be given prospective effect only, that fact should and would have been stated, as the deed there construed was dated August 26, 1927, a date long subsequent to the date of the rendition of the opinion in the *Cole* v. *Collie* case.

It may be true that the parties to the Beasley case were unaware of the holding in the *Cole* v. *Collie* case, and did not rely upon it; while here they were aware of the case and did rely upon it. But this is not a controlling difference. The law would be rendered too uncertain for practical enforcement if an application or lack of application of a rule of construction were made dependent upon proof of a party's knowledge of that rule. We would not know how to construe a deed until we first knew what the party's knowledge was, which might be present in one case and absent in another.

Next came the case of *Stewart* v. *Warren, supra,* which expressly approved the Beasley case, and it would now be vacillation to the nth degree to overrule those three cases above cited, which all disapproved the case of *Mason* v. *Jackson* and necessarily the case of *Cole* v. *Collie,* also.

As pointed out in the text cited and approved by Justice HUMPHREYS in the *Luther* v. *Patman* case, we have not changed a rule of property, but only refused to follow a rule of construction which was believed to be illogical, unsound, and unjust.

It is with great reluctance that a court overrules a prior decision, even though it is not a rule of property, and one of the chief reasons for this reluctance is that the change may disturb rights which apparently had vested. Of course, if such an opinion were applied pros-

pectively only, it would not have that effect, and courts would be less reluctant to overrule a case.

The instant case demonstrates the wisdom of the change of the rule of construction, and the fact that the beneficial results to be obtained by a departure from the rule stated in *Cole* v. *Collie* will greatly exceed any disastrous effects likely to flow therefrom. This departure will, in the instant case and all other similar cases, operate to prevent the grantee being given an interest he had not bought and taking from the grantor an interest which he reserved and had not sold.

These views are in accord with the decree of the court below, and it is, therefore, affirmed.

ROBINS, J. (dissenting). I respectfully dissent.

The decision of the majority in this case is a far-reaching one.

For the first time in the history of the state, the Arkansas Supreme Court is today saying that an investor who, in buying land, implicitly relies on an unequivocal declaration by this court that such a conveyance as he is obtaining will vest in the purchaser good title to the property he is paying for, must lose his investment if, years afterwards, this court decides to overrule the decision on which the investor properly, and necessarily, relied.

One effect of the rule being announced today is that henceforth a lawyer who examines titles to Arkansas lands must not only know what this court has, heretofore, held as to the meaning and operation of a given form of deed, but he must also know what this court will say about this same kind of deed in the future.

In my humble opinion, this rule is not good law, and it contravenes, in a dangerous way, sound public policy. Stability of contracts is a prime essential to our economy. To destroy this stability is to invite chaos.

In the case at bar it is undisputed that:

First. Under the law of this state, as declared in 1917 by its highest court, in the case of *Cole* v. *Collie,* 131 Ark. 103, 198 S. W. 710, and in other similar cases, in force on the date of the deed of the Four States Lumber Company to Harvey, and on the date of Harvey's deed to appellant Collins, the reservation of mineral rights in the lumber company's deed to Harvey was a nullity, and Harvey's deed to Collins was effective to convey the fee simple title, including all mineral rights, to Collins.

Second. Before Collins bought the land from Harvey he consulted one of the leading lawyers of Arkansas, who advised Collins, citing *Cole* v. *Collie,* 131 Ark. 103, 198 S. W. 710, that the attempted reservation in the lumber company's deed to Harvey was void; and that Harvey could convey a good title to the mineral rights; and that, relying on this pronouncement of the Supreme Court of Arkansas to the effect that a mineral reservation such as was attempted in the lumber company's deed was a nullity, Collins invested his money in the land and took a deed from Harvey.

Third. Collins and Harvey both testified that Harvey understood that he was selling and Collins understood he was buying the mineral rights in this land.

So, here we have a situation where a man made an investment on the faith of what this court said the law was; and now, because, twenty-three years afterwards, this court recanted and changed its mind about the law, the investor must lose his investment.

The decision in the case of *Cole* v. *Collie* was never overruled until it was nullified by the language of this court in the case of *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234.

I have no quarrel with the result in *Beasley* v. *Shinn.* As the court in its opinion in that case pointed out, the facts there shown justified a reformation of the deed involved so as to include therein in unmistakable terms the reservation of mineral rights that all parties thereto agreed was intended. In reality, that part of the opin-

ion relating to overruling of former decisions was unnecessary, because these decisions did not stand in the way of the result that was achieved. There is no need to resort to *any* rule of construction when there is no dispute among the parties to a contract as to what the contract means. It would have been entirely proper for the opinion to have set forth that the court was re-examining the rule laid down in *Cole* v. *Collie, supra,* and other kindred cases; and thus the bar and the citizens would have been put upon notice that the rule might be changed in the future, thereby precluding blind reliance upon it by investors. Frequently, in the past, when the court purposed to change a rule, even in matters of procedure, it has been deemed proper to give some warning of the impending change. See *Anheuser-Busch, Inc.,* v. *Manion,* 193 Ark. 405, 100 S. W. 2d 672.

A rule of this court, under which a particular construction is accorded to a deed whereby real estate is conveyed, if not a rule of property, is certainly such a rule as vitally affects property rights, and it ought never to be suddenly changed without some sort of warning that such a change is being contemplated. Therefore, even though this court in the opinion in the case of *Beasley* v. *Shinn, supra,* did not limit its operation so as to prevent its being retroactive in effect, I think we should so construe it, especially insofar as it affects the rights of one who, like the appellant Collins, went to the trouble of ascertaining what this court had said and relied thereon, in spending his money.

It is conceded that, if the decision in *Cole* v. *Collie, supra,* had been made in construction of a statutory or constitutional provision, it would have become a rule of property and its overruling could not affect adversely investments made on the faith of it. In such a case it is held that the decision becomes in reality a part of the law and an overruling thereof cannot affect vested rights because of constitutional bans on retroactive laws. But it is held by the majority that no such restraint on the power of the court exists when this court purposes to

overrule a decision on a question of common or general law.

Why should there be any difference in the two situations? The reason the framers of the constitution saw fit to forbid retroactive statutes was a realization of the stark injustice of such legislation. They did not believe that, once men had invested their savings on the faith of the law, they should be impoverished because legislatures might afterwards see fit to alter the law. Ought not this court have the same regard for stability and the same zeal to create and maintain confidence as inspired the wise men who wrote our constitution?

Many rules of great importance in conveyancing depend for their existence, not on legislative enactments, but on decisions of the Supreme Court of Arkansas construing the language of deeds and other conveyances. Every day trades are made and property changes hands under contracts that are made on the faith—not of any statute—but of what the judges of this court have solemnly said these contracts mean—what obligations are imposed by them and rights are acquired by virtue of them. Examples of this statement may be multiplied. One example is the effect, under the decisions of this court, of a conveyance of land to a man and his wife. Without any statutory authority whatever this court has, time and again, held that by such a deed there is created a joint tenancy with right of survivorship, instead of a tenancy in common, as would be the case if two persons not husband and wife were the grantees. The principal reason for the genesis of this rule was the ancient idea of merger of identity between those who took the vows that made them man and wife. Now, this unity of spouses has largely been annihilated by constitutional provisions, statutes and court decisions.

Should this court some day come to the conclusion that, since the ancient reasons for the rule construing into existence a joint tenancy, with survivorship, under such a deed have failed, the rule itself should fail, would this be another case for the retroactive enforcement of

the overruling decision? Would all those investors who have been buying from the surviving joint tenant, because the Supreme Court of Arkansas has repeatedly said that the surviving joint tenant had complete title, awaken to find that their confidence had been misplaced and that in reality they owned only half of the title?

Dealing with this very question, the Kentucky Court of Appeals, in the case of *Mutual Life Insurance Company* v. *Bryant,* 296 Ky. 815, 177 S. W. 2d 588, 153 A. L. R. 422, said: "It is insisted for appellant that in the event we overrule the minority rule and adhere to the majority rule, the opinion should be given a retroactive effect and applied to all such contracts entered into subsequent to the opinion in the O'Brien case, 155 Ky. 498, 159 S. W. 134, because the overruled opinions do not involve the construction of any statutory or constitutional provision, but are mere decisions expressive of general or common law. . . . Since the decisions of a court of last resort is the law of the state, whether it be the construction of a statutory or constitutional provision, or an expression of general or common law, we are not favorably impressed with the vague distinction drawn by the authorities, *supra.*"

The majority, to sustain its position, adopts and applies the philosophy expounded by Blackstone and other early English jurists to the effect that, when a court finds that its previous decision is erroneous and overrules it, the earlier decision must be regarded as never having existed. In other words, according to the majority, the law, as declared by the later decision has always existed in some Utopia, beyond the ken of mortals, whence it was evoked and put in operation by an enlightened court—and the previous erroneous decision should be deemed as never having had any existence.

Mr. Justice Cardozo, in discussing the subject here involved, said in the case of *Great Northern Railway Company* v. *Sunburst Oil & Refining Company,* 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254: "A state in defining the limits of adherence to precedent may

make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Company* v. *Flanagan,* 263 U. S. 444, 68 L. Ed. 382, 44 S. St. 197, *supra*), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration, as law from the beginning. . . . The alternative is the same whether the subject of the new decision is common law."

Chancellor KENT, in the case of *Lyon* v. *Richmond,* 2 Johns. Chr. 51, said: "A subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement, . . . and, to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to most mischievous consequences."

In the case of *Hill* v. *Atlantic & North Carolina Railroad Co.,* 143 N. C. 539, 55 S. E. 854, 9 L. R. A., N. S., 606, it was said: "The people are supposed to have confidence in their highest court, at least to the extent of ascribing to it the virtue of consistency and a desire to see that by no lack of stability in its decisions shall any citizen be jeopardized or prejudiced in his rights because he has simply acted upon the supposition that what the court has so solemnly determined will again be its decision upon the same state of facts, or that at least

if it does change its mind, his rights and interests will be thoroughly safeguarded."

"Parties have the right to act upon the decisions of this court in acquiring titles and such titles will not be disturbed or the parties prejudiced by a subsequent reversal of the decision." *Jones* v. *Williams,* 155 N. C. 179, 71 S. E. 222, 36 L. R. A., N. S. 426.

The Georgia Court of Appeals, discussing the effect of decisions overruling previous decisions of the same court, in the case of *Mutual Life Insurance Company of New York* v. *Barron,* 70 Ga. App. 454, 28 S. E. 2d 334, said: "But there is an exception to the general rule, to-wit: 'An overruling decision cannot operate retrospectively so as to impair the obligations of contracts entered into, or injuriously affect vested rights acquired, in reliance on the overruled decision.' 21 C. J. S., Courts, § 194, p. 329. . . ."

This was said by the Supreme Court of Oklahoma in the case of *Oklahoma County* v. *Qeen City Lodge No. 197, I. O. O. F.,* 156 P. 2d 340: "Though some courts and legal minds differ, we find much respectable authority to the effect that the overruling decision may, in the legal and equitable discretion of the court, be made to operate prospectively only. The rule is almost universal in the protection of property and contract rights. . . ."

In the case of *Jones* v. *Woodstock Iron Company,* 95 Ala. 551, 10 So. 635, the Supreme Court of Alabama had to deal with almost the identical problem that we have in the instant case. In many of the earlier decisions of the Alabama court the authority of the chancery court to vest, by decree, the legal title to property was upheld. A later decision, *Prewitt* v. *Ashford,* 90 Ala. 294, 7 So. 831, declared that the chancery court did not possess such authority. In the Jones case, *supra,* the overruling decision was urged to defeat a title acquired while the earlier rule was in force. Refusing to give the overruling decision this effect, the court in that case said: "This early decision has become a rule of property, and to hold

otherwise now would upset a great many legal titles. . . ."

I conclude that sound authority, as well as reason and justice, dictates that, when a citizen invests his money on the assurance by the highest court of the state that he is getting good title, he ought not to be deprived of the property so acquired by him simply because the same court at a later date changes its mind and overrules the decision relied on by the investor.

I am authorized to state that Mr. Justice HOLT and Mr. Justice MILLWEE join in this dissent.

WILBORN *v.* ELSTON.

4-7816 191 S. W. 2d 961

Opinion delivered January 28, 1946.

Jno. S. Gatewood and *W. J. Dungan,* for appellant.

Ross Mathis, for appellee.

MINOR W. MILLWEE, Justice. This is the second appeal of this case. The suit was originally brought by appellants, claiming to be the three duly elected trustees of the Church of God in Christ at Cotton Plant, Arkansas, for recovery of possession of the church property. The present appellees, two of whom claim to be lawful trustees of said church, were made party defendants. We do not attempt a restatement of the facts which were set forth in our opinion in the former appeal in *Elston* v. *Wilborn,* 208 Ark. 377, 186 S. W. 2d 662, 158 A. L. R. 179.

As stated in the former opinion, the issue for trial in the chancery court was whether the present appellants, as plaintiffs below, were the duly elected trustees of the church at the time of the filing of the suit. The Chancellor, apparently being unable to determine this question from a consideration of the testimony offered on this point in the first trial, ordered an election for that purpose. On the basis of the result of such election, appellants were declared to be the duly elected trustees and a decree was rendered in their favor.

On the former appeal we held that the issue, whether appellants were the duly elected trustees, should have been determined on the basis of facts as they existed prior to filing of the suit, and not by the results of an election ordered by the court. The decree of the trial court based on the results of the election was reversed, and the cause remanded, "for a trial and decree on the question, whether the plaintiffs, at the time they filed the ejectment suit, were the duly elected trustees of the church, and also for the court to determine whether there is any merit to the lien claimed by appellant Bowe in the cross-complaint."

After the opinion of this court was rendered on the former appeal, the present appellants filed a motion and brief for rehearing in which it was strongly urged that a preponderance of the testimony in the original record, aside from any consideration of the election ordered by the court, showed that appellants had been properly elected trustees. It was further argued that the case had been fully developed and that a final decree should be entered. The motion for rehearing was denied and mandate was issued on the original opinion.

When the cause was presented to the trial court for retrial on the opinion and mandate from this court, both parties declined to offer additional testimony. Upon consideration of the mandate, and the record in the former appeal, the trial court dismissed the complaint of appellants for want of equity, and this appeal follows.

We try chancery cases *de novo,* and the usual practice on appeal is to end the controversy here by final judgment, or by direction to the trial court to enter a final decree. There are, however, exceptions to this practice, and it rests in the discretion of this court to determine whether, upon reversal of a cause, the same should be opened for a new trial. If the cause is heard and determined by the chancellor on an erroneous theory, or if it is not sufficiently developed in the trial court, this court may remand for further hearing on the whole case, or on certain issues. *Carmack* v. *Lovett,* 44 Ark. 180; *Long* v. *Chas. T. Abeles & Company,* 77 Ark. 156, 93 S. W. 67; *Gaither* v. *Gage,* 82 Ark. 51, 100 S. W. 80; *Carlile* v. *Corrigan,* 83 Ark. 136, 103 S. W. 620. This practice was followed in the instant case on the former appeal, where the cause was heard by the chancellor on what we determined to be an erroneous theory, and the testimony on what we conceived to be the pertinent issues did not appear to us to have been fully developed.

Appellants now contend, as they did on rehearing in the former appeal, that a preponderance of the evidence adduced on the original hearing supports the finding that they were the duly elected trustees of the church

at the commencement of the suit. It is insisted that the taking of additional testimony on retrial of this issue, under the mandate and opinion rendered in the former appeal, was unnecessary, and that the trial court, therefore, erred in dismissing the complaint. The evidence touching the validity of the election of appellants, Prator and Hampton, as trustees to succeed appellees, Leaks and Elston, does not appear to have been fully abstracted on this appeal. However, we have carefully re-examined the record on this point, and conclude that the validity of such election is not supported by the greater weight of the testimony.

It seems to be undisputed that appellant, Wilborn, and appellees, Leaks and Elston were the duly elected and acting trustees up to the time of the church division. When differences arose, that part of the congregation favoring appellants moved to the home of one of the members and, at a meeting there held, proceeded to elect appellants, Prator and Hampton, as trustees to replace appellees, Leaks and Elston. Testimony offered on behalf of appellants on the question, was to the effect that Leaks and Elston had quit the church and gone off with another organization. This was stoutly denied by appellees and we think a preponderance of the testimony fails to disclose the creation of a vacancy in the office of the trustees by their abandonment thereof, or otherwise. The theory of a vacancy existing in the offices of the trustees is not mentioned in the minutes of the election meeting. While there is some evidence that Leaks was notified of the election meeting, it is not contended that any of the other members of the congregation who continued to use the church as a meeting place received notice of the meeting. In *Monk* v. *Little,* 122 Ark. 7, 182 S. W. 511, where a part of the membership of a congregational church met at the home of an individual member and attempted to remove other members from the church, it was held that such action was irregular and without sanction of church authority. Appellants, therefore, failed to meet the burden of showing, by a preponderance

of the evidence, that they were the duly elected trustees at the time the suit was instituted.

It is also insisted by appellants that, regardless of the validity of their election as trustees, they are still members of the church, and, under the doctrine of virtual representation, had a right to maintain the suit. We held on the former appeal that appellants' right to maintain the suit was dependent upon the validity of their election as trustees. This decision is now the law of the case and was binding on the trial court on a second trial of the cause. *Biscoe* v. *Tucker,* 14 Ark. 515; *Perry* v. *Little Rock & Fort Smith Railroad Company,* 44 Ark. 383; *Henry* v. *Gulf Refining Company,* 179 Ark. 138, 15 S. W. 2d 979; *Morris & Company* v. *Alexander & Company,* 180 Ark. 735, 22 S. W. 2d 558.

It might be appropriate in passing to note that, insofar as this record reflects, all the laity involved in this controversy are still members in good standing of the Church of God in Christ at Cotton Plant. While there seems to be some disagreement regarding the individual preachment of one of the clergy, and the moral conduct of another, no differences in doctrine seem to exist between the warring factions. Appellees disclaim any right on their part to the exclusive use of the church property, and say they have repeatedly invited appellant faction back into the fold. This invitation was extended at the original hearing. No differences appear to exist between the factions that will not readily yield to the orderly processes of their democratic system and the slightest application of the spirit and teachings of Him to whom they profess allegiance and loyalty.

The decree is affirmed.

ADAY *v.* CHIMES SCHOOL DISTRICT NO. 49.

4-7810 191 S. W. 2d 963

Opinion delivered January 28, 1946.

Opie Rogers, for appellant.

W. F. Reeves, for appellee.

ED. F. MCFADDIN, Justice. This is a controversy between a school district and one of the teachers, and necessitates the determination of the effect, each upon the other, of Act 96 of 1943 and Act 136 of 1943.

On April 14, 1944, appellant, Mrs. Opal Aday, entered into a written contract with the appellee (hereinafter called "District"), whereby appellant taught the school for the district for the full term beginning July 17, 1944, and ending March 3, 1945. At the time of signing

this contract, Mrs. Aday was related to one of the directors (Carl Mathis) within the fourth degree; so, in compliance with Act 96 of 1943, she secured and filed with the district a petition signed by the requisite number of qualified electors as designated and specified in said act. After the close of the school term (on March 3, 1945, as aforesaid) the district did not give Mrs. Aday any written notice that her contract would not be renewed for the next school term (beginning July, 1945); neither did Mrs. Aday notify the district in writing of her resignation. Such notices are specified by § 3 of Act 96 of 1943, which amended § 4 of Act 319 of 1941 which last-mentioned act is called the "Arkansas Teachers' Salary Law."

In the annual school election in the spring of 1945 Clifford Aday was elected director. He was the husband of Mrs. Opal Aday. Thus, Mrs. Aday was related to two of the three members of the new school board: being the niece of Carl Mathis and the wife of Clifford Aday. Dissatisfaction and dissension arose in the district; and someone suggested that the previous petition of Mrs. Aday (under Act 96 of 1943) expired with the term she had already taught, and that she would have to secure and file with the district a new petition signed by the requisite number of qualified electors in compliance with Act 96 of 1943 before she could teach the school term beginning July 16, 1945, and ending in March, 1946. No such new petition covering the 1945-46 term was filed with the district, and the district, therefore, refused to allow Mrs. Aday to teach in the term beginning July, 1945. Thereupon Mrs. Aday filed action against the district for damages. From an adverse judgment in the circuit court, she brings this appeal.

Mrs. Aday claims: (1) that she secured the petition in 1944 signed by the majority of the qualified and designated electors of the district in compliance with Act 96 of 1943; (2) that on said petition she was employed by the district under a written contract which the law (§ 3 of Act 136 of 1943) stipulated would automatically be renewed for the next term unless notice in writing be given to the contrary; and (3) that the district gave her no such notice. On these facts she claims the right to teach for

the term beginning in July, 1945. In other words, Mrs. Aday contends that the automatic renewal provision of § 3 of Act 136 of 1943 made it unnecessary for her to secure any further petition from the electors of the district under Act 96 of 1943. The district denies these contentions. Counsel for appellant states the issue as follows:

"The one question before this court is, was it necessary for appellant to secure a petition from the qualified electors of this district in order to renew or extend her contract, since she was not notified that she would not be retained and did not notify the directors that she would resign."

Such is the issue before this court.

I. *Act 96 of 1943* is the most recent amendment of a statute that has existed in one form or another since 1901. The history of that statute, and a study of the cases construing it is enlightening and apropos:

(1) The original act against the employment of relatives seems to have been Act 205 of 1901, and became § 7616 of Kirby's Digest; and was amended by Act 206 of 1913, and became § 9029 of Crawford & Moses' Digest.

(2) This last-mentioned section does not appear to have been expressly repealed by Act 169 of 1931 (The School Law), but was superseded by subdivision D of § 96 of Act 169 of 1931, which last-mentioned subdivision became subdivision (d) of § 11535 of Pope's Digest.

(3) The subdivision, as mentioned, was amended by Act 389 of 1941, which, in turn, was amended by Act 96 of 1943. The last-mentioned act was the law in effect when the contract was made between appellant and appellee on April 14, 1944.

Act 96 of 1943 has not been construed by this court; but when § 7616 of Kirby's Digest (as amended by Act 206 of 1913) was in effect, and when § 9029 of Crawford & Moses' Digest was in effect, the statute, with certain omissions not here material, read as follows:

"Hereafter all school directors . . . are hereby prohibited from employing any person as teacher in said

school related to them by consanguinity or affinity within the fourth degree, unless 2/3rds of the patrons of said school shall petition them to do so."

Under that statute this court held in 1920 in the case of *School District* v. *Perrymore,* 143 Ark. 64, 219 S. W. 316; and also in 1923 in the case of *Neal* v. *Bethea,* 158 Ark. 403, 250 S. W. 336, that the petition of the patrons would have to be filed for *each term* of the school where the teacher so related was employed. In *Neal* v. *Bethea, supra,* the court said:

"In *School District* v. *Perrymore,* 143 Ark. 64, 219 S. W. 316, we said: 'In view of the fact that the citizenship of a school district is constantly changing and that patrons might change their minds from time to time, it is not probable that the Legislature had the purpose and intent in enacting the statute to allow one expression of opinion on the part of the patrons to govern all subsequent employments. We think the purpose and intent of the act was to make each employment of a relative of any member of a board of directors, within the prohibited degrees, dependent upon the consent of two-thirds of the existing patrons of the school. In other words, that a petition, bearing the requisite number of names, can justify an employment for one period of time only.'

"In that case the petition was to authorize the directors to employ a teacher for the summer school for 1917 and any succeeding school they might see fit to employ him. We held that the petition for 1917 or 'any succeeding school they might see fit to employ him to teach' would not authorize the employment to teach the school in 1918-1919. The petition in the case at bar was for the summer and winter term, and contemplated only one contract of employment for a definite term. It did not vest the board, as in the case above cited, with a 'roving commission' to employ a teacher for an indefinite term."

The germane language in Act 96 of 1943 reads:

"Neither the husband nor wife of a school director, nor any person related within the fourth degree of consanguinity or affinity to any member of the school board

shall be employed by the school board in any capacity except as follows: (a) Teachers may be elected upon written petition of fifty per cent. of the qualified electors from the group constituting the parents of the grade group or groups to be taught by the teacher in question *for the school year for which the election is made.*" (Italics our own.)

In view of the holdings of this court in *School District* v. *Perrymore, supra,* and *Neal* v. *Bethea, supra,* and in view of the above italicized language, it is clear that if Act 96 of 1943 is still in effect, then Mrs. Aday was required to secure a new petition in 1945 signed by a majority of those specified in the act before she could teach the 1945-46 term. The question then becomes whether Act 96 of 1943 is still in effect.

II. *Act 136 of 1943 is Claimed by the Appellant to have Repealed Act 96 of 1943 by Implication.* No express repeal is claimed. The part relied on by Mrs. Aday as effecting such repeal is § 3 of Act 136 of 1943, which reads:

"Every contract of employment hereafter made between a teacher and a board of school directors shall be renewed in writing on the same terms and for the same salary, unless increased or decreased under the provisions of the law, for the school year next succeeding the date of termination fixed therein; unless within ten days after the date of the termination of said school term, the teacher shall be notified by the school board in writing delivered in person or mailed to him or her at last and usual known address by registered mail that such contract will not be renewed for each succeeding year, or unless the teacher within ten days after close of school shall deliver or mail by registered mail to such school board his or her written resignation as such teacher, or unless such contract is superseded by another contract between the parties."

The quoted language, except as to differences not here essential, is found in § 4 of Act 319 of 1941. In considering the question of a repeal by implication, the primary object is to ascertain the legislative intent; and in

this effort there are certain well recognized rules to be considered. Three of these are:

(1) Repeals by implication are not favored. *Vick Consolidated School District* v. *New,* 208 Ark. 874, 187 S. W. 2d 948, and authorities therein cited.

(2) To result in a repeal of an earlier act by implication, either (a) the later act must be on the same subject and plainly repugnant to the former act, or (b) the later act must cover the whole subject of the earlier, and plainly show that the latter was intended as a substitute for the former act. *Coats* v. *Hill,* 41 Ark. 149; *C., R. I. & P. Ry. Co.* v. *McElroy,* 92 Ark. 600, 123 S. W. 771; *Carpenter* v. *Little Rock,* 101 Ark. 238, 142 S. W. 162; *Anthony* v. *St. L. Ry. Co.,* 108 Ark. 219, 157 S. W. 394; West's Digest, "Statutes," § 161; see, also, 50 Am. Jur. 550.

(3) "Another cardinal rule of construction is that, where two acts were under consideration of the Legislature at the same time, and were passed at the same session, this strengthens the presumption that there was no intention to repeal one by the other. *Mays* v. *Phillips Co.,* 168 Ark. 829, 275 S. W. 5, 279 S. W. 366, and *Standley* v. *County Board of Education,* 170 Ark. 1, 277 S. W. 550." This quotation is the language of Mr. Chief Justice HART in the case of *Merchants' Transfer Co.* v. *Gates,* 180 Ark. 96, 21 S. W. 2d 406. See, also, *McCain* v. *Farmers' Electric Coop. Corp.,* 206 Ark. 15, 172 S. W. 2d 933; and see, also, 50 Am. Juris. 553. Concerning the two acts here involved, the legislative records reflect: Act No. 96 of 1943 was H.B. No. 92, introduced January 21, 1943; passed by the House January 22, 1943; passed by the Senate February 22, 1943; approved by the Governor February 24, 1943. Act No. 136 of 1943 was Senate Bill No. 91, introduced in Senate January 25, 1943; passed by the Senate February 11, 1943; passed by the House February 19, 1943; approved by the Governor March 1, 1943.

Applying these three rules as aids in the determination of the legislative intention in the case at bar, we reach the conclusion that § 3 of Act 136 of 1943 does not

repeal Act 96 of 1943. With both acts given full effect, the section of Act 136, quoted hereinbefore, means that the district cannot renew in writing for the next term the contract, of any teacher, related to any school director within the prohibited degree, unless, within the prescribed time (ten days after the close of the term) the teacher so related files the petition required by Act 96 of 1943. This construction avoids a repeal by implication, demonstrates that there is no irreconcilable conflict between said acts 96 and 136, and allows to stand both acts passed at the same session of the Legislature.

It follows that the judgment of the circuit court was correct, and is in all things affirmed.

JONES *v.* BARTLETT.

4-7813 191 S. W. 2d 967

Opinion delivered January 28, 1946.

A. D. Chavis, for appellant.

J. Bruce Streett, for appellee.

RORINS, J. Appellant was made a defendant in an action brought in the lower court in March, 1944, by appellees, in which appellees asserted title to eighteen acres in a square in the southeast corner of the southeast quarter of the northwest quarter of section 35, township 12, south, range 18, west. Appellant filed answer, in which he claimed ownership of one acre of the tract involved.

A decree was rendered in that case on February 7, 1945, under which appellees were adjudged to be the owners of the land and a writ of assistance, to enable appellees to obtain possession of the land was awarded.

No appeal was taken from this decree, but in August, 1945, another suit was filed in the same court, in which appellant and others were plaintiffs and appellees were made defendants. In this last suit there is involved the title to the same land as that involved in the earlier case.

After the institution of the second suit, appellees, successful parties plaintiff in the first suit, had the clerk issue, under the provisions of the decree in their favor, a writ of assistance directed to the sheriff for the purpose of putting appellant off the land held by him under his claim of title, which was decided adversely to him by the court in the first case.

Appellant thereupon filed a petition, in which he set up that he did not appeal from the decree in the first case "because all of the heirs and interested parties in said lands were not made parties to this suit; that a new suit has been filed and is now pending in this court, involving the same land and the same issues, together with some new issues." The prayer of appellant's petition was that appellees and the sheriff be restrained from serving or enforcing the writ of assistance until disposition of the second case.

On hearing of appellant's petition the lower court made an order denying the temporary injunction. To reverse that order appellant prosecutes this appeal.

Apparently no evidence was offered at the hearing of the application for temporary injunction—in any event no such evidence is shown in the record before us.

Appellant argues that the lower court should have granted the temporary injunction under the provisions of § 7508, Pope's Digest, which is as follows: "Where it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which could produce great or irreparable injury to the plaintiff, or where, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act, in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute."

This statute, of course, merely authorizes the granting of a temporary restraining order in cases where a proper showing therefor is made.

The granting of a temporary restraining order is, to a large extent, a matter within the sound discretion of the trial court, and this court ordinarily will not interfere in such cases, unless it appears that the trial court has abused its discretion. *Riggs* v. *Hill,* 201 Ark. 206, 144 S. W. 2d 26. There is nothing in the record before us to indicate that the trial court, in denying the application of appellant for temporary restraining order, acted arbitrarily or abused its discretion in any respect.

The order appealed from is therefore affirmed.

CITY OF PARIS *v.* STREET IMPROVEMENT DISTRICT NO. 2, OF PARIS.

4-7807 191 S. W. 2d 968

Opinion delivered January 28, 1946.

Luke Arnett and *Donald McKenzie,* for appellant.

Geo. A. Hall, for appellee.

SMITH, J. This is the second suit brought by Street Improvement District No. 2 of the City of Paris, Arkansas, against that city, to enforce performance of the provisions of Ordinance No. 228, passed by the Council of that municipality. The first suit reached this court, and the history of the ordinance is recited in the opinion in the case of *City of Paris* v. *Street Improvement District No. 2,* 206 Ark. 926, 175 S. W. 2d 199. The purpose of both suits was to compel the payment of money to the Improvement District promised by the ordinance, the history of which, as recited in the former opinion, may be summarized as follows. To encourage the formation of improvement districts for the purpose of improving the streets of the city it was provided in Ordinance No. 228 that the city would pay annually out of its street fund a sum of money amounting to one-fifth of the maturing bonds and interest thereon for each year until the indebtedness of the district incurred in the construction of the

street improvement had been paid. After making certain payments the city made default in others, and a petition for mandamus was filed requiring the city to perform this obligation.

The Circuit Court granted the relief prayed, and ordered the city to pay, and that order was affirmed in the case above cited, and those payments were made. Subsequently the city made default in payments maturing under the ordinance for the years 1943 and 1944, and a second suit was filed to compel their payment. That relief was again granted, and from that order and judgment of the Circuit Court is this appeal.

The testimony shows that at the end of both the years 1943 and 1944 there were in the city treasury only a few dollars to the credit of the street fund. But the testimony shows also that for the year 1943 collections for the benefit of this fund amounted to $2,763.83, and for the year 1944 collections for this fund were $2,548.65. This money was apparently all expended in payment of contractual obligations, and it was not shown that any of it had been paid in satisfaction of statutory claims. There was, therefore, sufficient money to the credit of the street fund to have paid these obligations in the years in which, under the ordinance, they were payable.

Here, there is no question as to the validity or amount of the District's demand against the city, and payment of the demand is resisted upon the ground only that to pay it would violate Amendment No. 10 of the Constitution, which prohibits the cities, towns and counties of the State from incurring, in any one year, any obligation for that year in excess of the revenues of that year from which it could be paid.

The case is somewhat similar, on the facts, to the recent case of *Manhattan Rubber Co.* v. *Bird, Mayor,* 208 Ark. 167, 185 S. W. 2d 268, 159 A. L. R. 1257. There, a valid contractual obligation of the city was not paid because the revenues of the city had been used in the payment of other contractual obligations. The city

sought to excuse its default by saying that its revenues had been used and would be required in the repair of its sewers. We held that this did not excuse the city's default and in so doing said: "The city should not use its revenues for the repair of the sewers, when, to do so, would defeat its ability to pay the administrative expenses of the city government, whether statutory or contractual. The claim here involved is contractual, and not statutory, and should be paid as such, subordinated only to statutory claims against the city, which should first be paid. *Miller County* v. *Beasley,* 203 Ark. 370, 156 S. W. 2d 791."

In other words, demands arising from the performance of statutory requirements shall first be paid, after which demands arising out of contracts shall next be paid, and these in the order of their priority or the time the obligation became payable and demand of payment made.

The demand here in question is contractual and, therefore, subordinate to any statutory liability; but if there are no such demands—and none is shown—the contractual liability should be paid when the money is available for that purpose, and the city should not continue to defeat or postpone payment by expending its revenues in payment of subordinate contractual obligations. To this end the court below ordered that revenues collected for the benefit of the street improvement fund be impounded until a sufficient fund had been accumulated to pay the District's demand, and it was ordered that a proper warrant or voucher be drawn for that purpose and delivered to the improvement district.

It was shown at the trial from which is this appeal that the city collected each year for the benefit of its street improvement fund a sum in excess of the amount which would have sufficed to discharge the obligation of the city under Ordinance No. 228, if the city had not disbursed these funds in payment of other current and subsequent obligations. It was shown that on account of such disbursements the city did not have on hand the

funds to pay the delinquent installments which Ordinance No. 228 had obligated the city to pay.

It is argued, therefore, that mandamus should not issue for the reason that the record shows that neither at the end of the year 1943 nor the year 1944 were there funds available for the payment of the District's demand. If this argument is sound the city need never pay this demand. Its payment may be continuously postponed and entirely defeated by expending those funds for other purposes. But this is not the law, for, as we have said, contractual demands must be paid in the order of their priority, and the judgment of the court from which is this appeal requires that this be done, and to that end it was ordered that this fund be impounded and disbursed in that manner, and that the District's demand be paid in its turn, that is, in the order of its priority.

The judgment of the court below conforms to these views, and it is, therefore, affirmed.

GRIFFIN SMITH, C. J., concurs.

TARWATER *v.* STATE.

4402 192 S. W. 2d 133

Opinion delivered February 4, 1946.

E. M. Ditmon, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

SMITH, J. An information was filed against appellant containing two counts, in the first of which he was charged with the crime of forgery, and, in the second, with having uttered the instrument alleged to have been forged.

At his trial he was found not guilty on the first count, and a mistrial was entered as to the second count, the jury having failed to agree.

Thereafter, by consent, appellant was tried by the court without a jury, upon the second count, pursuant to § 3912, Pope's Digest, and while the court announced no findings of fact or declarations of law, appellant was adjudged guilty, and given a sentence of two years in the penitentiary, and from that judgment is this appeal.

The only errors assigned in the motion for a new trial are, that the judgment is contrary to the law, and contrary to the evidence, and contrary to the law and the evidence.

The writing in question was a check reading as follows:

"FORT SMITH, ARK., 9-4-1945 No.....

"THE FIRST NATIONAL BANK

"Pay to Charley Tarwater OR ORDER $757.85

Seven Hundred Fifty Seven 85/100 . . . . Dollars

"/s/ M. E. Marderd

"Endorsed:

Charley Tarwater"

No testimony was offered by appellant in explanation of the state's testimony, which was to the following effect. W. B. Robertson operates a grocery store in the city of Fort Smith, and had from time to time sold appellant groceries, but always for cash. Appellant came to Robertson's place of business, and asked Robertson to cash the check in question, but Robertson did not have enough cash on hand to do so. Appellant asked Robertson to advance him $20 on the check, and when Robertson agreed to do so, the request for an advance was increased to $22 and that sum was given appellant, and appellant told Robertson to cash the check and pay him the balance. There was some conversation as to whether the check was good, and appellant said if it was not, that he lived only three doors away, and appellant explained that the check had been given him in payment of a bunch of hogs and some cattle, which he had sold and he had stated that he had almost given away his cattle.

Robertson presented the check to the bank on which it was drawn, and was told that the drawer was unknown at the bank, and never had an account with the bank. One of the bank's bookkeepers confirmed this statement. Robertson received the same answer, when he inquired at the other banks in the city, whether appellant carried an account with any of them.

Appellant returned to Robertson's place of business the following day and asked: "Have you got my money?" and was told that the check was "As hot as a pistol," and that the officers of the law had the check and were looking for him. Robertson explained to appellant that he had given the check to the officers because he had learned that appellant had moved from the place where he said he resided, and he did not know what else to do. Appellant said if the check was given to him, he would return the sum of money advanced, but he made no tender of the money, and while they were talking police officers came into Robertson's store and took appellant into custody.

On the way to the jail appellant stated to the officer who had him in custody that the check had been given

him in payment of money he had won in a game of craps played at Moffet, Oklahoma. The state caused a summons to be issued for the drawer of the check, which was not served for the reason that no such person could be found. A summons was sent to officers at Moffet, Oklahoma, which was not served for the same reason. The court evidently found, and the facts recited support the finding, that the name signed to the check was that of a fictitious person, and while the jury acquitted appellant of the charge of having forged the check, it is certain that he uttered it. These are separate offenses and one might be guilty of the offense of uttering the forged instrument, although not guilty of the offense of having forged it, and he would be guilty of the latter offense if, knowing the instrument was a forgery, he had uttered it as a valid instrument.

The opinion in the case of *Maloney* v. *State,* 91 Ark. 485, 121 S. W. 728, 134 Am. St. Rep. 83, 18 Ann. Cas. 480, announces the principles of law applicable and controlling here. There a conviction for uttering a forged instrument, which was a check drawn upon the Bank & Trust Company of Walnut Ridge, Arkansas, was reversed because it was not shown by competent testimony that the drawer of the check did not have an account with that bank. Here that testimony was supplied. In that case, it was contended that the conviction should be reversed because it was not proved that the name of C. B. McDonald, affixed to the check as the alleged drawer, was a forgery. But it was there said:

"In a prosecution for uttering a forged writing, before there can be a conviction, the state must prove that the instrument offered was forged, and that the defendant knew it was forged. It is true that no witness testified that this was not the signature of C. B. McDonald; but if C. B. McDonald was a fictitious person, and such name was signed to the instrument, then it would be a forged writing. 'To constitute forgery the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious.' 13 Am. & Eng. Ency. Law (2d Ed.) 1088. It is for the jury to determine under the

evidence whether the person whose name appears signed to the instrument is a real or fictitious person. If they should find upon evidence that the name was of a fictitious person, then the inference arises that the person who utters and publishes such instrument as true either forged the name or knew it to be forged. (Citing cases.)"

It was there further said: "And it is competent to show that the person whose name is affixed to a check as drawer is fictitious by the evidence of the proper officer of a bank upon which such check is drawn that no person bearing such name kept or had an account with such bank or was a customer of such bank. (Citing cases.)"

The undisputed testimony in the instant case meets these requirements of the law to sustain a conviction for uttering a forged instrument. That it was uttered is certain and that appellant knew it was forged appears equally as certain. Appellant offered two conflicting explanations of his acquisition of the check, one of which was necessarily untrue, and the other, no doubt, equally false. It was only by proving appellant's statements that any explanation of his possession of the check was furnished, and we think the court was warranted in finding that the name appearing on the check was that of a fictitious person, and that appellant was aware of that fact. The instrument was, therefore, a forgery. The judgment must be affirmed, and it is so ordered.

WEST *v.* STATE.

4400 192 S. W. 2d 135

Opinion delivered February 4, 1946.

Wils Davis and *Cecil B. Nance,* for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

ROBINS, J. Appellant was convicted by a jury of the crime of rape and his punishment fixed at death. He has appealed.

For reversal it is first urged by appellant that the lower court erred in permitting the prosecuting attorney to ask the prosecuting witness numerous leading questions. We have examined carefully the testimony and find that this assignment of error should not be sustained. While some questions addressed to this witness were leading in form, we have often said that control of the examination of witnesses as regards to propounding of leading questions on direct examination is a matter within the discretion of the trial court. *Murray* v. *State,* 151 Ark. 331, 236 S. W. 617; *Crank* v. *State,* 165 Ark. 417, 264 S. W. 936; *Wallace* v. *State,* 177 Ark. 892, 9 S. W. 2d 21. There was no abuse of discretion by the lower court in allowing the questions complained of to be asked.

For his second ground for reversal appellant urges that the lower court erred in permitting the prosecuting attorney to read a written report made by the superintendent of the State Hospital for Nervous Diseases as to appellant's mental condition.

After his arrest appellant was, by order of the circuit court made under authority of the provisions of § 11 of Initiated Act No. 3 of 1936, Acts 1937, p. 1384, sent to the State Hospital for Nervous Diseases for observation. The superintendent of that institution, as required by the statute, made a written report, the substance of which was that appellant was sane and was responsible for his acts.

On the trial of the case certain testimony tending to show abnormal mental condition of appellant was introduced. After this testimony had been heard, no official of the State Hospital for Nervous Diseases was offered as a witness, but the lower court, over the objection of appellant's counsel, permitted the prosecuting attorney to read to the jury the report made by the superintendent of the State Hospital for Nervous Diseases as to the mental condition of appellant. This was error, because as was stated by us in the case of *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173, such proceeding violated the provision of our constitution (Art. II, § 10) guaranteeing to the accused the right to be confronted by witnesses against him and the privilege to cross-examine them. The same rule was announced in *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190.

On behalf of the state it is urged that admitting this report in evidence, even if erroneous, was not prejudicial to appellant, because there was no evidence from which the jury could have found that appellant was mentally irresponsible.

The evidence offered to show insanity of appellant was somewhat meager, but it cannot be held that it was insufficient to make an issue as to the mental condition of appellant. The lower court evidently considered that such an issue was created by the testimony, because it permitted the reading of the report of the superintendent of the State Hospital for Nervous Diseases, which report, of course, would have been entirely irrelevant in the absence of some showing that appellant was of unsound mind; and the lower court further recognized the existence of this issue by giving an instruction on the

degree of insanity necessary to excuse commission of a crime. We cannot say that the lower court was wrong in its conclusion that there was some substantial testimony to support appellant's contention that he was irresponsible.

For the error indicated the judgment of the lower court must be reversed and the cause remanded for new trial.

GRIFFIN SMITH, C. J., dissenting. The opinion correctly holds there was sufficient evidence that the eleven year old girl was lured into a truck, then taken to a secluded wooded area and raped. Details are too revolting, and I agree with Mr. Justice ROBINS (who wrote the majority opinion) that it is best not to emphasize them or give unnecessary publicity to a course of conduct too vile for men to engage in—a practice that even some of the lower animal groups disdain.

Torn, bleeding, and frightened to a degree difficult to express, the little victim was returned to her tenant environment, where she immediately told what had happened. When Maxine (while with appellant in the woods) realized that something unusual was about to occur—just *what* she did not know—her screams were silenced by West who threatened to use a stick, and who also said he would drown her if she cried. Clotted with blood, confused, haunted by fear and perhaps *wondering* regarding man's inhumanity, this little girl who must go through life bearing the scars of a married man's lust told a jury how and when she had been outraged; and she took officers to the concealed spot not far from a highway where impressions on the ground and other physical factors lent support to the story she had told. The defendant did not testify.

The court, by a majority vote, has reversed the judgment and has said that appellant was unfairly tried because an official report made under authority of law by State Hospital was read to the jury. In the report Dr. A. C. Kolb, superintendent, expressed the opinion that West was and had been sane. We have heretofore held

that the defendant, in circumstances such as we are dealing with, has the right to be faced by the witness, and to cross-examine him. But such holdings were in cases where insanity was a defense. In the case at bar West entered a plea of not guilty. It is true that under this plea want of capacity to form an intent may be shown by reason of insanity. No such proof was introduced. There was testimony that West drank to excess; and his wife and a brother-in-law thought he acted queerly. Mrs. West was asked: "Now, on the day your husband was arrested and that morning he took you to Memphis; had he been drinking that day—that morning before he went?" Answer: "There was something the matter with him. I couldn't say whether he had been drinking or not, but I know he was highly nervous. When he came home he acted like a crazy man." Q. "He acted like a crazy man? Can you describe it?" A. "Well, he just wasn't himself. He was just running around in circles." Q. "What do you mean by that: 'figuratively,' or running around?" A. "[He would] go to the pump and help the little boy pump a bucket or two of water, then [go] back to the truck, and from the truck back to the pump, and so forth." Q. "What had he been drinking?" A. "I believe he would have drunk alcohol if he could have gotten hold of it. I knew there was something wrong with him long before this ever happened, by his condition and the way he acted, and the way he treated me. He was so nervous he couldn't be still; just acted foolish."

It is on this testimony and evidence less substantial given by a brother-in-law that the majority predicates its holding that the rapist was denied his constitutional right to cross-examine Dr. Kolb. There is not one line—not even a word—from any witness indicating that organic diseases was present. The doctor who examined Maxine after West had ravished her might have thrown some light on the transaction; or doubtless time would have been given for Dr. Kolb to testify.

The record shows that the Prosecuting Attorney told the court that "[Dr. Kolb] has been ready to testify in

this case, . . . but was not called, since the question of sanity was not mentioned as a defense." The court's comment was: "[In his opening statement the attorney for the defendant] stated that his contention was that if [West] did commit the crime, he was so drunk that he had no consciousness of it, and was unable, on account of drunkenness, to form an intent to commit the crime." Appellant's attorney agreed that the court's summation was correct.

The jury had all of the evidence offered by each side relating to the degree of drunkenness to which the defendant subjected himself. Every act, every transaction, his ability to drive the truck, to seek a place of seclusion, to threaten Maxine and to cover as best he could the broad trail that had been left, justified the jury in finding that he knew what he was doing, and that behind it there was design. Not a word of serious proof points to insanity. How, then, can it be said that Dr. Kolb's certificate that he was not insane was prejudicial?

Mr. Justice McHaney and Mr. Justice Holt join in this dissent.

Watnick *v.* Bockman.

4-7814 192 S. W. 2d 131

Opinion delivered February 4, 1946.

A. D. Whitehead, for appellant.

K. T. Sutton, for appellee.

Ed. F. McFaddin, Justice. This appeal is an effort by the appellant to secure a court order for increase of monthly allowance to be paid by appellee for the care and upkeep of their child.

The parties are not strangers to court proceedings. They were before this court in *Bockman* v. *Bockman,* 202 Ark. 585, 151 S. W. 2d 99, and also in 204 Ark. 891, 165 S. W. 2d 256. In both of these cases, Dr. Bockman (appellee in the present appeal) was denied a divorce and ordered to pay Mrs. Bockman (appellant in the present appeal) the sum of $30 per month for the support of their child, named Sanford Bockman, and referred to herein as "Sandy," a boy now about sixteen years of age. But on February 23, 1944, Dr. Bockman obtained a divorce decree in the Phillips chancery court in a new suit based on three years' separation under Act 20 of 1939; and from that decree, there was no appeal. In the decree of February 23, 1944, Mrs. Miriam Bockman was allowed to resume her maiden name of Watnick: she is, therefore, referred to herein as Mrs. Bockman-Watnick. The 1944 decree was based on findings which recited, in part:

"The court further finds that there was born to the plaintiff and cross-complainant as a result of said marriage one child, Sanford Bockman, now aged fifteen (15) years, and that said child is in the custody of the cross-complainant, Miriam Bockman.

"The court further finds that the plaintiff, James Bockman, is a fit person for the rearing and education of said Sanford Bockman and that it is to the interest

of said child that the plaintiff be awarded custody effective June 1, 1944.

"The court further finds that the plaintiff, James Bockman, is to continue payments of the sum of $30 per month towards the support of said Sanford, the same to cease on June 1, 1944 at which time the plaintiff is to assume custody of said child."

At the time of the said decree Mrs. Bockman-Watnick held, and continues to hold a most responsible position, being superintendent of nurses in the Brooklyn Woman's Hospital in Brooklyn, N. Y., and earning approximately $300 per month. She maintained a four-room apartment in Brooklyn in order that her son, Sandy, could be with her, and attend a high school in Brooklyn. By the terms of said decree, Sandy was to come to Helena, Arkansas, on June 1, 1944, to make his home with his father; but this trip was delayed by consent of the parties until after June 30th because of Sandy's schooling. On June 6, 1944, we find Sandy writing his father, asking him to send the ticket "any time after June 30th, but make it soon."

Sandy reached Helena on July 6, 1944, and remained with his father until August 31, 1944, when his father sent him back to Brooklyn to spend the winter with his mother, and to attend Jefferson High School in Brooklyn. Evidently, Dr. Bockman concluded that this was best for the boy; and we believe it was. Sandy's letters to his father impress us that Sanday is a real American boy. He wrote his father under date of April 12, 1945:

"In your letter you said I will have to register in my draft board, and if I could operate a radio I can get a Chief Petty officer in the Navy, but here is what I want to do.

"When I do register for the draft I want to go into the Army Air Force. You know I like to fly, and I want to be a pilot; everyone says I have not the math. for it but I still want to fly.

"I can be a gunner or something in that line because a gunner is not as hard as a pilot; but I would rather

be a gunner in the Navy, because the Navy has two or three men in a plane but the Army has from five to ten men. Why I don't like the Navy is that I would not like to crash at sea; I would rather crash on land if I do ever crash. . . ."

There is not a line of evidence in the record that indicates that either parent is trying to prejudice the boy against the other. All the evidence points to the conclusion that both parents are placing the welfare of Sandy as the matter of prime importance. The fact that the mother—notwithstanding her love for her boy—was willing to have the court decree the custody to the father, shows her splendid attitude. The fact that the father—armed with the legal custody—was willing for the boy to be in Brooklyn with his mother on account of schooling, etc., shows the father's splendid attitude.

What, then, causes this controversy? It is this: When Dr. Bockman sent Sandy to Mrs. Bockman-Watnick on August 31 1944, he offered to pay her only $30 per month for the care and upkeep of Sandy for the time he was with his mother, evidently basing this figure on the opinion of this court in the former cases. Mrs. Bockman-Watnick refused this amount as wholly inadequate, and filed a petition on November 28, 1944, for increased allowance from that date. From the refusal of the chancery court (by decree of August 16, 1945) to increase this amount, Mrs. Bockman-Watnick brings this appeal.

We hold that she has made a good case for increased allowance. Under § 4392 of Pope's Digest, the chancery court has a continuing power to make modifications of the original allowance of maintenance, and will do so upon a showing of changed conditions. *O'Kane* v. *Lyle,* 123 Ark. 242, 185 S. W. 281; *Shue* v. *Shue,* 162 Ark. 216, 258 S. W. 128; *Wilson* v. *Wilson,* 186 Ark. 415, 53 S. W. 2d 990. See, also, 17 Am. Juris. 534. The rule is stated in bold type in 27 C. J. S. 1240: "The amount allowed for child support is subject to modification when required by the changed condition of the parties, by increasing or reducing the amount according to the necessity of the one and the ability of the other party."

There are two facts to be considered, being (a) the increased expenses of care and upkeep, and (b) the father's ability to pay.

(a) On the matter of increased expenses: Mrs. Bockman-Watnick showed, that if she did not have Sandy with her, then she could and would stay at the hospital and have free room and board; that, because she had Sandy with her, she was obliged to maintain a four-room apartment and a maid, at an expense in excess of $200 per month; that Sandy's food was $30 per month, and to this amount should be added spending money, clothes, shoes, and other items of expenses necessary for a sixteen-year-old boy. She should have more money. $100 per month would not be excessive for her to receive.

(b) The next question is the ability if Dr. Bockman to pay more than the $30 per month set by this court in the former appeals. In one opinion (*Bockman* v. *Bockman,* 202 Ark. 585, 151 S. W. 2d 99), we said: "Not only the needs of the child must be considered, but the ability of the father to contribute and the extent thereof must also be considered."

The amount of Dr. Bockman's present income is within his own knowledge. He parried all questions of specific increases of income, by giving only vague generalities; but there is a clear deduction from the evidence, if not an admission, that Dr. Bockman is making more money than he was making in 1941 and in 1942 when this court fixed the payments at $30 per month that he should make for Sandy's care and upkeep.

A detailed review of the evidence would prolong this opinion. We conclude from all the evidence that an increase from $30 per month to $75 per month should be made for the time Mrs. Bockman-Watnick had the care and upkeep of Sandy from November 28, 1944, until he went to Helena to be with his father in the summer of 1945. Change of custody is not sought; so the question of whether Sandy continues to stay with his mother in Brooklyn is a matter of agreement between Dr. Bockman and Mrs. Bockman-Watnick. From August 31, 1944, to November 28, 1944, Mrs. Bockman-Watnick is entitled to

the $30 per month fixed by the former order of this court; but from November 28, 1944 (the date of filing the petition for increase), to the date Sandy went to Helena in 1945 the chancery court should have allowed Mrs. Bockman-Watnick the sum of $75 per month; and the same rate of $75 per month should prevail for any other period of time thereafter that Sanday is with his mother, subject always to the chancery court changing the figure upon a showing of changed circumstances.

It follows that the decree of the chancery court refusing increased allowance is reversed; and the cause is remanded, with directions to enter a decree and proceed in accordance with this opinion. All costs are adjudged against appellee.

RIPLEY, EX PARTE.

4-7821 192 S. W. 2d 127

Opinion delivered February 4, 1946.

Suzanne Chalfant Lighton, for appellant.

HOLT, J. June 29, 1945, Charles Morrow Wilson, Carl V. Wilson and Kate Wilson Ripley, brothers and sister, filed *ex parte* petition to confirm title to three

adjoining tracts of real estate in Washington county, Arkansas.

They alleged that Charles Morrow Wilson "is the owner and in possession of tract 1 (describing it), tract 2 (describing it), and an undivided one-third interest in and to tract 3 (describing it)."

That petitioners, Kate Wilson Ripley and Carl V. Wilson, "own an undivided one-third interest each in and to tract No. 3 above described," etc.

"That petitioners have no knowledge of any other person who has or claims to have an interest in such land; that the record title is imperfect, but the actual title to said lands is in the petitioners."

Their prayer was "for a decree quieting and confirming their title in and to all of the above described land," etc.

The cause was submitted to the trial court on the petition, "record and documentary evidence" and certain affidavits, from all of which the court found "that petitioner, Charles Morrow Wilson, is the owner of tracts Nos. 1 and 2 and of an undivided one-third interest in tract No. 3 (all tracts fully described as in petition), and by reason of such ownership, adverse possession and payment of taxes, is entitled to a decree confirming and quieting his title in and to tracts Nos. 1 and 2 and to an undivided one-third interest in tract No. 3. The court further finds that there is a misjoinder of parties in that Kate Wilson Ripley and Carl V. Wilson have joined in said complaint praying for a decree confirming their alleged title in and to an undivided one-third interest each in said described tract No. 3; that neither Kate Wilson Ripley nor Carl V. Wilson assert or have title or color of title to either tract No. 1 or tract No. 2, and that by reason of such misjoinder are not entitled to the relief prayed for in the same cause of action with petitioner, Charles Morrow Wilson."

A decree was entered in accordance with these findings quieting and confirming title to tracts 1 and 2 and an undivided one-third interest in tract 3 in Charles Mor-

row Wilson, and the petition as to Kate Wilson Ripley and Carl V. Wilson was dismissed for want of equity.

Kate W. Ripley and Carl V. Wilson have appealed. This was not an adversary action. There is no question as to the ownership of the three tracts of real estate in question. The only question for consideration here is: Were the three parties who brought the original suit properly joined as plaintiffs?

Appellants earnestly insist that they were properly joined with their brother, Charles Morrow Wilson, as petitioners, and that the court erred in holding otherwise, and in dismissing the petition as to them. We think this contention must be sustained.

On the record before us, it appears that appellants and their brother, Charles M. Wilson, in order to avoid a multiplicity of suits and unnecessary costs, joined as petitioners to quiet their title to the property in question. This method of procedure was, we think, clearly given to them by Act 334 of the 1941 Acts of Arkansas. Section 1 of that act provides: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. . . . A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities." Under this section, appellants as two of the petitioners below, "need not be interested in obtaining . . . all the relief demanded" in the petition. They were each entitled to have title to an undivided one-third interest in tract 3 quieted in them. They were interested equally with their brother, Charles Morrow Wilson, in this third tract, a part of the subject-matter, and in obtaining the relief demanded as to this tract. As the plain terms of the act provide:

"Judgment may be given for one or more of the plaintiffs according to their respective rights to relief."

For the error indicated, the decree is reversed and the cause remanded with directions to enter a decree in accordance with th prayer of the petition.

BARBER *v.* BARKER.

4-7818 192 S. W. 2d 353

Opinion delivered February 4, 1946.

Rehearing denied March 4, 1946.

1. SCHOOLS AND SCHOOL DISTRICTS—DIRECTORS—QUO WARRANTO.—Where a number of districts were consolidated with the St. Paul district in 1943 under § 11486, Pope's Digest, relating to consolidation of districts in two or more counties and appellees were appointed directors of the district and elected at the next annual school election held in 1944, appellants who were the directors of the old St. Paul district should, if they desired to question the right of appellees to serve as directors, have appealed from the order of the County Board of Education and the judgment of the circuit court ordering the consolidation and having failed to do that they are in no position to raise that question in a *quo warranto* proceeding.
2. SCHOOLS AND SCHOOL DISTRICTS.—Where appellees had been acting as directors of the consolidated district since their appointment in 1943, have been recognized as such by the County Supervisor and all the districts which form the consolidated district, they are at least the *de facto* directors of the district if not *de jure* directors and appellants' complaint questioning their right to serve as such directors was properly dismissed.

O. E. Williams, for appellant.

E. M. Fowler, Rex W. Perkins and *G. T. Sullins,* for appellee.

McHaney, J. This is an action by appellants, who claim to be the duly elected directors of St. Paul School District No. 48 of Madison county, against appellees, in the nature of *quo warranto,* to oust appellees from the office of directors of the St. Paul Consolidated School District No. 48 of said county. The action was brought in the chancery court, but on motion of appellees it was transferred to the circuit court, where, without any motion to remand, it was tried before the court and a judgment was entered against appellants, dismissing their complaint from which they have appealed.

It appears that the consolidated district is the result of the consolidation of several smaller districts in Madison county with the St. Paul School District No. 48, and also the consolidation of Frazier School District No. 77 of Franklin county with said St. Paul District No. 48 which latter consolidation was effected December 21, 1943, under the provisions of § 11486 of Pope's Digest, relating to the procedure for consolidation of school districts in two or more counties, which provides also for the appointment of six directors for the consolidated district after such consolidation, who shall serve as such until the next annual school election, at which time the electors shall elect directors. Upon consolidation of the Frazier district in Franklin county with St. Paul No. 48 appellees were appointed directors of the consolidated district.

At the annual school election in 1944 appellees were elected to succeed themselves. Each of them took the prescribed oath of office for school director, entered upon his duties as such and all of them, except one who was dropped because the State Department advised they could have only five, have continued to serve as directors of the consolidated district with the knowledge, consent and approval of the county supervisor and the County Board of Education. See Act 327 of 1941, p. 838.

It also appears that the county supervisor, in order to effectuate the consolidation of these several districts, advised the patrons of such districts that the grade schools of such districts would not be disturbed, but that these schools would continue to operate for the smaller children in the lower grades and would be supervised by local directors or trustees to be elected by them, who would have authority to recommend teachers and act in an advisory capacity to the directors of the consolidated district, but with no authority to make contracts or draw any school warrants. All districts could send high school pupils to the consolidated district at St. Paul.

If appellants are making an attack on the regularity or the legality of the proceedings taken to effectuate the consolidated district, they have adopted the wrong procedure. No appeal was taken from the action of the County Board of Education to the circuit court which is the correct procedure in such a case. This was the procedure followed in *Sugar Grove School Dist. No. 19* v. *Booneville Special School Dist. No. 65,* 208 Ark. 722, 187 S. W. 2d 339. Only the right of appellees to hold the office of school director of the consolidated district is here involved and we think the trial court correctly determined that issue in favor of appellees. They have been the acting directors of said consolidated district since their appointment in December, 1943; have been recognized as such by the County Board of Education and the county supervisor and all the districts making the consolidated district, and they are at least the *de facto* directors of said district, if not *de jure.* We do not understand that appellants contend they are directors of the consolidated district, but only of old St. Paul No. 48 before consolidation. Their election in 1944, and 1945, if then elected, was to the office of trustee for the old district, which office is without authority in law, so far as we are advised. Appellants say: "It is not the purpose of this suit to attack the annexation of any territory to the St. Paul District. Furthermore, we doubt whether the orders as to annexation could be attacked at this time." Even so, appellants seem to base their action to oust appellees as directors on alleged illegalities of pro-

cedures taken in annexing the Frazier district to St. Paul district, and on the alleged failure of appellees to qualify as directors under the appointment in December, 1943. We do not think they can be ousted in this way.

In our opinion the court correctly dismissed the complaint of appellants and the judgment is accordingly affirmed.

JACKSON *v.* DILLEHAY.

4-7871 192 S. W. 2d 354

Opinion delivered February 4, 1946.

Rehearing denied March 4, 1946.

Verne McMillen and *Elton A. Rieves,* for appellant.

Buzbee, Harrison & Wright and *U. A. Gentry,* for appellee.

MINOR W. MILLWEE, Justice. This suit involves the question whether appellees or appellants were duly elected directors of The Security National Life Insurance Company in the regular annual meeting of policyholders held at West Memphis, Arkansas, on January 10, 1945.

Appellees filed their complaint alleging they were duly elected directors at the meeting, and, at a directors' meeting held immediately following the policyholders' meeting, that three of appellees were elected officers as follows: G. L. Dillehay, president; F. S. Hubbard, vice-president; and Florence V. Dillehay, secretary and treasurer. It was also alleged in the complaint that appellants claimed and asserted that they were elected directors at said meeting and purported to hold a directors' meeting immediately thereafter in which three of appellants were elected officers as follows: G. L. Jackson, president; E. M. Jackson, vice-president; and Charles J. Upton, secretary and treasurer; that the proxies held by G. L. Jackson, representing 6,974 votes by which appellants claimed to have been elected directors, were void for the reason same were not executed and filed in the manner and within the time required by the by-laws of the company; that the 6,601 proxies voted for appellees were filed and executed as required by the by-laws and appellees received a majority of the votes cast at said directors' election and were, therefore, the duly elected and acting directors and officers of the company. The complaint contained a prayer for a temporary order enjoining appellants from interfering with the control and

operation of the company by appellees, pending a final hearing.

Appellants, in their answer, denied the invalidity of the proxies voted at the election by G. L. Jackson, and denied the validity of the proxies voted by appellee Dillehay. They also alleged that they were the duly elected directors and officers of the company and prayed that the election of appellees be declared null and void, and that appellees be enjoined from interfering with the control and operation of the company by appellants.

At a hearing on appellees' prayer for a temporary order all of the parties were enjoined from interfering with the control and operation of the company by the officers and directors in control prior to the election of January 10, 1945, pending a final hearing of the cause. This board was composed of appellees, G. L. Dillehay, and F. S. Hubbard, and appellants, G. L. Jackson, and C. J. Upton. At a final hearing on February 28, 1945, appellees were declared to be the legally elected directors of the company in the election held January 10, 1945, and appellants were permanently enjoined from interfering with the control and operation of the company by appellees.

The Security National Life Insurance Company was organized in April, 1936, as a legal reserve mutual insurance company. Appellee, G. L. Dillehay, was president, and appellant, G. L. Jackson, was secretary and treasurer of the insurance corporation at the time of the January 10, 1945, meeting of the policyholders. Jackson had been with the company since September, 1936, and Dillehay since December, 1937. The business of the company had prospered under their efficient management and operation. G. L. Dillehay was elected a director and secretary-treasurer of the company in December, 1939. The board of directors at that time was composed of P. M. Harper, president; C. J. Upton, vice-president; and G. L. Dillehay, secretary-treasurer.

On January 13, 1940, a special meeting of the directors adopted an amendment to the by-laws offered by Secretary Dillehay which provided that any change in

the by-laws as to method of policyholders voting must be unanimous; and that a proxy issued on a form other than that contained in the application for insurance must be acknowledged before a notary public, and filed at least six months prior to any meeting at which it might be offered.

It seems to be undisputed that the company was in bad financial condition in 1940. Dillehay and Upton apparently concluded that such condition was attributable to the inefficient management of President Harper, and they proceeded to take steps to depose him. Letters dated June 25, 1940, were addressed to the three directors, signed by Upton as vice-president and Dillehay as secretary-treasurer, giving notice of a meeting of the board to be held on July 3, 1940. The minutes of the July 3rd meeting, which was attended by Dillehay and Upton, recite the giving of due notice of said meeting to all directors and passage of a resolution rescinding the amendment of January 13, 1940. Another resolution was adopted at this meeting authorizing the secretary to give notice of a special meeting of policyholders to be held July 27, 1940, for the purpose of removal of a director and election of an additional director, and to amend or repeal such by-laws as deemed expedient. The minutes were signed and approved by the attending directors, Upton and Dillehay.

Following the meeting of July 3, 1940, Dillehay, Upton and Jackson proceeded to procure proxies to themselves to be used at the meeting of policyholders called for July 27, 1940. These proxies, which recited cancellation of any previous proxies, were attached to a notice of the time, place and purpose of the meeting which was signed by Upton, as vice-president, and Dillehay, as secretary. These proxies were not acknowledged or filed in the manner prescribed by the amendment to the by-laws of January 13, 1940. At the policyholders' meeting of July 27, 1940, Harper was removed as president and director, and Jackson was elected a director by a unanimous vote of the policyholders present and those represented by 6,892 proxies made to Dillehay, Jackson and Upton. Following this policyholders' meeting Dillehay

was elected president and Jackson, secretary-treasurer, in which capacities they served until this controversy arose.

In May, 1944, G. L. Jackson's induction into the armed services appeared imminent and a controversy arose between Dillehay and Jackson as to the latter's status with the company in the event he should be drafted for military service. Jackson became convinced that his continuance in a responsible capacity with the company was in jeopardy. The testimony of C. J. Upton indicates that such apprehension on Jackson's part was probably justified. Jackson immediately began procuring the 6,974 proxies of policyholders which he voted in the meeting of January 10, 1945. These proxies were valid under the original by-laws, but were not acknowledged or filed six months prior to the policyholders' meeting as provided in the amendment of January 13, 1940.

The original by-laws of the company, which were filed with the Insurance Commissioner, provide that a policyholder may vote in person or by proxy at all regular or special meetings and that special meetings may be called by the president, vice-president, secretary, or a majority of the board of directors upon proper notice. By section 1 of article III of the by-laws it is provided that a majority of the board of directors shall constitute a quorum for the transaction of business, and that special meetings of the board may be held at the call of the president or secretary after proper notice. Under article IV the duties of the respective officers are set out. By section 1 the president is empowered to call special meetings of members and directors and perform other duties that the board of directors may authorize and direct. By section 2 the vice-president shall perform the duties of the president in the latter's absence. By section 3 the secretary is again authorized to call special meetings of the members and directors and is charged with the duty of keeping the books and records of the company. Article VI of the original by-laws provides that same may be amended, added to, or repealed by vote of a majority of the directors at any regular or special meeting of the board.

A decision of the question as to which group of directors and officers was elected in the annual meeting of January 10, 1945, depends upon whether the by-law of January 13, 1940, was in effect at the time Jackson procured the proxies which he used at the policyholders' meeting. Assuming that the amendment of January 13, 1940, as to acknowledgment and filing of proxies, is valid, was this amendment repealed by the directors' meeting of July 3, 1940? This meeting was called by Secretary G. L. Dillehay and Vice-president C. J. Upton, and it is earnestly insisted by appellees that these men had no authority under the by-laws to call a special meeting of directors. Our attention is directed to section 1 of article IV which, in prescribing the duties of the president, provides that the president shall have power to call special meetings of the directors; but section 3 of the same article of the by-laws, which prescribes the duties of the secretary, authorizes the secretary to call special meetings of the members and directors. The authority to call special meetings of the directors is also lodged in both the president and secretary by section 1 of article III of the original by-laws. It is clear, therefore, that Secretary Dillehay had authority to issue the call for the special directors' meeting of July 3, 1940.

It is also contended by appellees that the meeting of July 3, 1940, was not a valid meeting of directors because President P. M. Harper was not properly notified of the meeting. This contention is based on the testimony of Dillehay that he did not mail the notice to Harper. It is clear from the testimony that notices to all directors were properly written and signed by both Dillehay and Upton. It was the duty of Dillehay as secretary to see that such notices were mailed and he stated, over his signature to the minutes of July 3, 1940, that all directors had been notified in the manner and form required by the by-laws of the company. At the meeting of July 3, 1940, a resolution was passed authorizing the calling of the policyholders' meeting of July 27, 1940, which resulted in the ousting of President Harper and his replacement by Dillehay, through the use of proxies of the type which appellees now say are void. All parties,

including the deposed Harper, acquiesced in the action taken. Dillehay is thus placed in the awkward position of now complaining of a failure to give notice which resulted either from his own negligence, or fraudulent misconduct, as secretary of the company. Under these circumstances he should not be heard to say the notice was not given, and we think a preponderance of the evidence shows it was given. See Thompson on Corporations, Third Ed., Vol. 2, § 1034, pp. 430-431.

The first provision in the by-law of January 13, 1940, is as follows: "Any change in by-laws as to method of policyholders voting must be unanimous." It is contended that this was a valid enactment which prohibited future directors from changing or repealing the by-laws except by a unanimous vote of all members of the board. It may first be pointed out that it is uncertain from the language used whether the above provision means a unanimous vote of all the directors, or whether it means only a unanimous vote of a quorum present at a meeting. Assuming that the former meaning was intended, was it within the power of the board of directors to control future actions of a majority of the board? The charter of the company provides that the company shall be managed by a board of directors, and article VI of the original by-laws filed with the Insurance Commissioner provides that such by-laws may be repealed by a majority vote of the board of directors. It is also provided in the original by-laws that a majority vote of the directors shall constitute a quorum for the transaction of business. The by-law of January 13, 1940, does not attempt to specifically repeal the aforementioned provisions of the original by-laws.

In 18 C. J. S., Corporations, § 188, p. 600, it is said: "A by-law assuming to take away or limit the power of the corporation to amend or repeal by-laws is inoperative, since the restrictive by-law itself is subject to amendment or repeal." In the case of *Richardson* v. *Union Cong. Soc.*, 58 N. H. 187, which is cited in support of the above statement, it was held that a by-law of a religious society which required a two-thirds vote to alter or repeal the by-laws, might be repealed by a majority

vote only. We think the reasoning of this case is sound, and that an attempt of one board of directors to tie the hands of the majority at a subsequent meeting is an unreasonable restriction upon the powers expressly granted to the majority by other provisions of the by-laws.

Since we have concluded that the by-law of January 13, 1940, was validly rescinded by adoption of the by-law of July 3, 1940, it follows that the proxies voted by appellant G. L. Jackson in the election of January 10, 1945, were validly executed under the by-laws of the company and appellants received a majority of the votes cast for the election of directors. In view of this holding we pretermit a discussion of other questions presented in the briefs, such as the applicability of Act 139 of 1925, and the validity of those provisions of the by-law of January 13, 1940, requiring the acknowledgment and filing of proxies at least six months prior to a meeting at which they are offered.

The decree of the trial court is reversed, and the cause remanded with directions to declare appellants to be the legally elected directors of the company at the election held by the policyholders on January 10, 1945, and for such further proceedings as are consistent with the opinion herein rendered.

BOGARD *v.* POWELL.

4-7809 192 S. W. 2d 518

Opinion delivered February 4, 1946.

Rehearing denied March 11, 1946.

Cecil E. Johnson, Jr., C. E. Johnson and *Abe Collins,* for appellant.

Charles A. Maze and *Shaver, Stewart & Jones,* for appellee.

HOLT, J. Dr. John T. Bogard died August 20, 1943. He left surviving, his widow, Effie E. Bogard, one son, John T. Bogard, Jr., and two daughters, Mary Bogard Powell and Jewell Bogard Hopson. The present suit was brought by the two daughters, appellees, against their mother, Effie E. Bogard, and their brother, John T. Bogard, Jr., and Rose Marie Bogard, John, Jr.'s wife.

September 11, 1933, Dr. Bogard and his wife, Effie E. Bogard, executed a warranty deed to a valuable 161-acre pecan orchard in Little River county to their son, John T. Bogard, Jr. This deed was kept in Dr. Bogard's possession until May 8, 1937, when he delivered it to his son, John, Jr., who had it recorded May 10, 1937. At the same time that Dr. Bogard delivered this deed to his son, John T. Bogard, Jr., delivered a warranty deed to his father, Dr. Bogard, in which he, John, Jr., and his wife reconveyed the property to Dr. Bogard and Effie E. Bogard, his wife as tenants by the entirety, and this latter deed was recorded by Dr. Bogard on January 6, 1939. On May 4, 1937, Dr. Bogard recorded another deed dated November 14, 1934, in Polk county, in which deed Dr. Bogard and his wife conveyed to his son, John T. Bogard, Jr., and his wife, four lots in Mena, Arkansas.

On November 26, 1936, a collision occurred between a car driven by Dr. Bogard's driver and a car operated by Miss Martha Pride. In February, 1937, Miss Pride brought a suit *in tort* in Polk county, Arkansas, against Dr. Bogard to recover damages, and in April following, recovered a judgment in the amount of $200. In October, 1937, Dr. Bogard filed his schedule claiming exemptions in the amount of $390 and thereafter an execution against him was returned *nulla bona.* In 1938, Miss Pride sued to cancel the deed to the Mena lots, *supra,* as having been executed to defeat the collection of her judgment. Following the institution of this suit and before a decree was entered, on May 18, 1938, Dr. Bogard satisfied Miss Pride's judgment in full.

August 18, 1944, the two daughters, appellees, filed the present suit against their mother and brother, in which they alleged that the deed of September 11, 1933, from their father and mother to their brother, John T. Bogard, Jr., "was made for the sole purpose of defrauding his creditors, or apparent creditors, or with intent to do so; that it was made for the more specific purpose of defrauding the judgment creditor (Miss Pride) in the damage suit above referred to," and that the deed from John T. Bogard, Jr., to his father and mother by

mistake created an estate in the entirety in Dr. Bogard and Effie E. Bogard. They prayed that the deed, *supra,* of John T. Bogard, Jr., and his wife to Dr. Bogard and wife, Effie E. Bogard, dated May 8, 1937, and recorded January 6, 1939, "be reformed to exclude the wife of John T. Bogard, Sr., as grantee, and title to the lands above described be vested in the estate of John T. Bogard, Sr., deceased." They further alleged that the deed of Dr. Bogard and wife to their son, John T. Bogard, Jr., dated September 11, 1933, and the deed of John T. Bogard, Jr., to reconvey to his father and mother as tenants by the entirety on May 8, 1937, were executed in fraud of Miss Pride, a creditor, and that these deeds were voidable, and prayed that they be canceled as fraudulent.

Appellants' answer, in addition to a general denial, affirmatively pleaded ratification and estoppel. The trial court found all issues in favor of appellees, and more specifically, (quoting from the decree) "that the deed from John T. Bogard, Sr., and his wife, Effie E. Bogard, dated September 11, 1933, conveying fractional northwest quarter (Frl. NW ¼) of section 19, township 13 south, range 31 west, in Little River county, Arkansas, to John T. Bogard, Jr., recorded on the 10th day of May, 1937, . . . and that the deed from John T. Bogard, Jr., and his wife, Rose Marie Bogard, conveying said land to John T. Bogard, Sr., and his wife, Effie E. Bogard, recorded on the 6th day of January, 1939, . . . and that the deed from said Effie E. Bogard, dated in or about 1944, conveying said land to John T. Bogard, Jr., recorded in deed records of said Little River county, Arkansas, be and each of said three deeds is hereby canceled, set aside and held for naught, and that the title to said fractional northwest quarter (Frl. NW ¼) of section nineteen (19, township thirteen (13) south, range thirty-one (31) west, containing 161.01 acres in Little River county, Arkansas, be and the same hereby is vested in fee simple absolute in the heirs at law of Dr. John T. Bogard, deceased, namely in Mary Bogard Powell, Jewell Bogard Hopson and John T. Bogard, Jr., as tenants in common, unencumbered by any claim of title, dower,

homestead or devise which may have been or might be made or set up by or for said Effie E. Bogard, her representatives, heirs or assigns.''

This appeal followed.

Appellees contended in the trial court below that the deed of conveyance dated September 11, 1933, by Dr. Bogard to his son, John, Jr., to the 161-acre pecan orchard here and the deed by which the son reconveyed the property to his father and mother, Dr. Bogard and Effie E. Bogard, as tenants by the entirety dated May 8, 1937, were executed in fraud of potential creditors and should be canceled. They further contended that as heirs of Dr. Bogard, they had a right under the provisions of § 69 of Pope's Digest to bring the present suit to cancel these deeds for their benefit. Section 69 provides: ''Any executor or administrator of any fraudulent grantor who, by deed, grant or otherwise, shall have conveyed an estate in land, tenements or hereditaments, with intent to delay his creditors in the collection of their just demands, may apply to a court of chancery by proper bill or petition and have the same set aside and canceled for the use and benefit of the heirs at law of the fraudulent grantor saving the rights of creditors and purchasers without notice. Act April 19, 1895, p. 165.''

While we think the preponderance of the testimony in this case supports the trial court's findings that these deeds were executed and the conveyance made with the intent to hinder and delay Dr. Bogard's creditors, it does not necessarily follow, on the record before us, that these deeds should be voided and canceled. They were voidable, but not void. The deed of September 11, 1933, from Dr. Bogard to his son, John, Jr., was not delivered, and did not become effective until it was delivered to John, Jr., in May, 1937. He recorded this deed May 10, 1937. At that time, Dr. Bogard had one creditor, Miss Pride, who held a judgment against him in the amount of $200. While Dr. Bogard had conveyed away his real estate, he was not insolvent and without sufficient personal property to pay this judgment. This was evidenced by an attempted schedule which he filed disclosing personal

property in the amount of $390. Since Miss Pride's judgment was procured in a tort action, the law is well settled that Dr. Bogard was not entitled to the exemptions claimed. "Against an execution on a judgment in an action of tort defendant is not entitled to his chattel exemptions." (Headnote 4.) *Miller* v. *Mintun,* 73 Ark. 183, 83 S. W. 918.

When Dr. Bogard, on January 6, 1939, recorded the deed from his son which conveyed to the doctor and his wife as tenants by the entirety the pecan orchard tract, he owed no debts and was solvent. He could make any disposition of his property that he cared to make. Obviously, this disposition of the property wherein his wife would be well provided for, in the event that he should predecease her, was but the natural act of a husband prompted by decent motives. He might have destroyed this 1937 deed from his son reconveying the property to him and his wife, but instead, as was his right, he elected to record this deed and thereby ratify it. In so doing, the legal title passed back to Dr. Bogard and his wife, Effie E. Bogard, as tenants by the entirety and upon his death the title to the property vested in his widow, Effie E. Bogard.

We think the present case is ruled by the decision of this court in *Deniston* v. *Phillips,* 121 Ark. 550, 181 S. W. 911. In that case, Chief Justice McCulloch, speaking for this court, said: "Now, the other question relating to the intention of Deniston to convey the lands in fraud of his creditors remains to be disposed of. A statute of this state authorizes a suit to be brought for the benefit of the heir of a decedent to cancel a deed executed for the purpose of defrauding creditors. Kirby's Digest, § 81, (now § 69, Pope's Digest); *Moore* v. *Waldstein,* 74 Ark. 273, 85 S. W. 416). The evidence tends, as we have already stated, to show that the original purpose of the conveyance was to place the lands beyond the reach of Deniston's creditors, at least, that such was the design as to the deed of Mrs. Harmon. But the evidence shows that the deed was not delivered, if it was delivered at all, until long afterwards, and there is no evidence at all in the

record that at the time of the alleged delivery of the deed Deniston was indebted to anyone or that he had any purpose of defrauding creditors. On the contrary, the evidence showed that the deed to Royal was destroyed because the reason for the conveyance had ceased to exist. In other words, that there was no longer any creditors to defraud, and that, therefore, the fraudulent deed of conveyance to Royal could be destroyed. Our conclusion, therefore, on that branch of the case is that the decree of the chancellor cannot be sustained on the ground that it was a fraudulent conveyance; for even if the original execution of the deed was grounded in fraud, the title passed at the time of the delivery, and if there was no fraudulent design at that time and no creditors to suffer by reason of the conveyance, it cannot be set aside because of the original intention of the grantor at the time he executed the deed."

Appellees argue that "fraudulent intent" alone is sufficient to invoke § 69, *supra,* without any showing of insolvency, at the same time, and rely strongly on *Moore* v. *Waldstein, supra.* We think, however, that this court made it clear in *Deniston* v. *Phillips, supra,* that no such interpretation as appellees place on the *Moore* v. *Waldstein* case was intended, but that this court intended to hold, and did hold, that § 69 could be invoked only when the result of the conveyance attacked was to leave the debtor insolvent.

The cases relied upon by appellees, we think, may be differentiated on the facts peculiar to each.

As has been indicated, in the present case, Dr. Bogard had, prior to his death, recaptured the property here involved; and at a time when he was solvent and owed no debts, elected to place the title in his wife and himself, which the law permitted him to do. No creditors are complaining here nor are any creditors parties to this suit.

In *Stewart* v. *Dunham,* 115 U. S. 61, 5 S. Ct. 1163, 29 L. Ed. 329, the Supreme Court of the United States said: "It is contended by the appellees that these conveyances,

the last as well as the first, are fraudulent against creditors, *per se,* and void on their face; and such was the ground of the decree appealed from, as stated in the opinion of the court. To this we cannot accede. Assuming that the conveyance to Pintard, in trust, was of that character, according to the law of Mississippi, it does not follow that the subsequent sale and transfer, followed by delivery of possession, is tainted by the vice of the original transaction.''

And in *Sumner* v. *Hicks,* 2 Black (U. S.) 532, 17 L. Ed. 355, the court said: '' 'It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto.*' ''

We conclude, therefore, that the decree must be reversed and accordingly the cause is remanded with directions to dismiss appellees' complaint for want of equity.

MINOR W. MILLWEE, J., not participating.

GRIFFIN SMITH, C. J., dissents.

LYLE *v.* LATOURETTE.

4-7820 192 S. W. 2d 521

Opinion delivered February 11, 1946.

Rehearing denied March 11, 1946.

Claude B. Brinton, for appellant.

Foster Clarke and *Roy Penix,* for appellee.

McFaddin, J. This appeal stems from an attempt by the appellee to enforce a materialman's lien on certain real estate owned by appellant. There is considerable dispute on some of the facts; but we give the version adopted by the Chancery Court and supported by the preponderance of the evidence.

Appellant, J. E. Lyle, was desirous of repairing and improving his residential property in Jonesboro, Arkansas. P. M. Latourette owned and operated a retail lumber yard in Jonesboro under the trade name of "Jonesboro Builders' Supply Company"; and J. N. Swanson was Latourrette's trusted employee, being in fact in this case the "*alter ego*" of Latourette. In order to sell the lumber and supplies for the Lyle job, Swanson not only prepared the specifications for the work, but also persuaded Walter Hollingsworth and Ace Patillo—local carpenters—to become the contractors to do the Lyle work.

Accordingly, a written contract was signed on March 27, 1943, whereby Hollingsworth and Patillo, for $3,584, to be paid by Lyle as the work progressed, undertook to furnish all labor, materials, and supplies, and to complete the repair work and improvements, according to the specifications. One of the specifications called for ceiling the attic with insulation board or beaver board. In order to induce Hollingsworth and Patillo to take the Lyle contract at the price named, Latourette—either in person or by Swanson, who was acting for him at all times—agreed with Hollingsworth and Patillo to furnish the material and complete the attic insulation for $540 as a subcontract. This is referred to herein as the "attic subcontract," and is separately discussed. After deducting the attic subcontract, the net to Hollingsworth and Patillo was to be $3,044. As the work progressed, and up until July 28, 1943, Latourette furnished lumber, brick and supplies for the Lyle job in a total in excess of $1,400, independent of the attic subcontract. Lyle paid out on the contract during this period of time a total of $2,527, of which $1,000 went to Latourette on his said account, and $1,527 went to Hollingsworth and Patillo for their services.

The work, begun so auspiciously, ended in misfortune for all concerned: In August, 1943, Hollingsworth and Patillo found that they could not complete the contract at a profit, so they abandoned the work. Then a dispute arose between Lyle and Latourette; and on Au-

gust 9, 1943, Lyle's attorney addressed to Latourette a letter which gives most clearly the situation then existing between Lyle and Latourette:

"Confirming our telephone conversation of this morning, will say:

"The job of attic insulation is a separate and independent job which your firm received by subcontract from Patillo and Hollingsworth and upon satisfactory completion the contractors were under obligation to pay you the sum of $540.

"It is our understanding that to date Mr. Lyle has paid to Patillo and Hollingsworth $2,527, of which you received some payments on the material bill and that you have a balance charged of $317.

"It is understood that you will complete the attic insulation immediately.

"All work and material must be according to specifications of the original contract."

The $317 mentioned in the letter—by subsequent purchases and returns, and by correction of bookkeeping errors—became $401.50, for which amount Latourette filed his lien claim on September 27, 1943. Then, on October 5, 1943, Latourette filed this suit against Hollingsworth and Patillo as the contractors, and Lyle and his wife as owners, seeking to obtain and enforce a materialman's lien under § 8865, *et seq.*, of Pope's Digest. Hollingsworth and Patillo each defaulted, and gave depositions for the other defendants. Lyle, by answer and cross-complaint, made various defensive and offensive attacks upon the claim. These attacks will be listed and discussed hereinafter. The trial resulted in a default decree, against Hollingsworth and Patillo for the full amount of the claim, and also a decree and lien for Latourette against Lyle's property for $386.50 and interest at 6 per cent. as hereinafter mentioned, and also a foreclosure of the lien. Lyle brings this appeal, urging the contentions here which he urged below. The Chancery

Court made detailed findings which are in the decree, and which have been most helpful to us in our deliberations.

I. *The Position of Latourette in the Building Contract.* Lyle claims that Latourette was the real party in interest in the $3,584 contract, and that Hollingsworth and Patillo were virtual "stooges"; that Latourette and Swanson were supervising the entire work, and Lyle dealt with them and not with Hollingsworth and Patillo. On this claim Lyle contends that he should recover on his cross-complaint against Latourette for several hundred dollars which it cost Lyle to complete the repairs and improvements according to the specifications. There is much testimony going to support Lyle's contention: (1) Latourette undertook to repair the stairs which were no part of the attic subcontract. (2) Swanson approved all checks signed by Lyle before they were delivered. (3) Most of Lyle's complaints were made to Swanson, who undertook to relay them to Hollingsworth and Patillo, and thereby gave the impression that Swanson was supervising the work. As we say, these facts and others in the record are strong circumstances tending to support Lyle's contention that Latourette was the contractor in fact.

But a careful review of the record necessitates that we deny this contention. Here are our reasons: The signed contract was between Lyle on the one part and Hollingsworth and Patillo on the other. Before we would be justified in setting aside this written contract, then the evidence going in that direction would have to be clear and satisfactory. As we said in *Morrilton Ice Co.* v. *Montgomery,* 181 Ark. 180, 25 S. W. 2d 15: " 'The solemn written agreement of contracting parties cannot be reformed or amended, except upon clear and satisfactory proof that the writing fails, by reason of fraud, accident or mutual mistake in the preparation or execution thereof, to express the agreement intended to be entered into.' *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349, 105 S. W. 880 . . ."

We cannot say that the evidence, as claimed by Lyle, rises to the required level of "clear and satisfactory." Latourette and Swanson both testified that the contract, as written, reflected the real intention of the parties, and that Hollingsworth and Patillo were the contractors. Lyle identified the contract with Hollingsworth and Patillo; and even though he said he thought he was dealing with Swanson and Latourette, still Lyle did not testify that the contract was fraudulent. Patillo admitted that he and Hollingsworth made the contract with Lyle, and then sublet a portion of it to Swanson (who was acting for Latourette as we have previously stated). Here is Patillo's testimony: "Q. Ace, you and Mr. Hollingsworth, you as superintendent, made a contract with Jimmie Lyle to do what you called this second job for $3,584? A. That's right. Q. That was everything? Then following that you and Mr. Hollingsworth made a contract with Mr. Swanson for Mr. Swanson to do certain work in connection with the attic for a sum of $540? That was Jim's (Swanson's) personal contract? A. Yes, as far as I know. Q. You made the contract with him, not with Latourette? A. Yes, with Jim Swanson."

Lyle's attorney in the letter previously copied admitted that Hollingsworth and Patillo were the principal contractors and Latourette was a subcontractor on the attic insulation. With all of the foregoing evidence in the record, we cannot say that the chancellor was in error in finding, as he did, that Hollingsworth and Patillo were the principal contractors and Latourette was a subcontractor only on the attic insulation. So, we deny Lyle's contention that Latourette was the principal contractor.

II. *Delivery of the Materials.* Lyle claims that there was not sufficient proof that *all* of the materials sued for were actually delivered to the job; and he lists twelve invoices totalling $157.78 which were either totally unsigned or signed by persons whose authority to sign for Hollingsworth and Patillo was not shown. The law is well settled that a materialman must both allege and prove that the material, for which he claims a lien, was

furnished for, and used in, the work. *Hill* v. *Imboden,* 146 Ark. 99, 225 S. W. 330; *Central Lumber Co.* v. *Braddock Land & Granite Co.,* 84 Ark. 560, 105 S. W. 583, 13 Ann. Cas. 11. But in the case at bar the appellee made sufficient proof. Lyle testified that all the material used on the job was purchased from Latourette so far as he knew. Patillo examined the itemized statement sued on by Latourette and testified that all the material shown on the statement was received. There was no complaint about the receipt of the material. The only complaint was the quality of the material. Patillo said: "Q. Now, then, you have seen this itemized statement that he had—that was practically correct, wasn't it? A. That statement—if it had been correct . . . Q. Did you get the material? That's what I'm talking about. A. That's right. Q. The complaint that you have about it would be that he furnished materials that were not up to specifications? A. That's right."

The testimony of Latourette and Swanson about the itemized statement and the admission by Patillo, and the other evidence in the record, are sufficient to sustain the finding made by the Chancery Court that the material sued for was actually delivered to and used in the work.

III. *The Attic Subcontract.* It will be recalled that Latourette accepted from Hollingsworth and Patillo the subcontract to furnish the materials and ceil the attic for $540. Under date of August 7, 1943, Hollingsworth and Patillo advised Lyle in writing as follows:

"With further reference to the insulation job on your residence in the City of Jonesboro, Arkansas, this is to advise you that we, Hollingsworth & Patillo, have made a separate contract with P. M. Latourette, doing business as Jonesboro Builders Supply Co., of Jonesboro, Arkansas, to do the insulation work on your residence.

"Upon completion of insulation contract, this will be your authority to pay to Jonesboro Builders Supply Co. the sum of five hundred forty and no/100 dollars ($540)."

In a letter from Lyle's attorney to Latourette, as previously quoted, it was stated that this attic subcontract was for $540 "according to specifications of the original contract." Now, the specifications of the original contract stated that the ceiling of the attic was to be with "½ inch insulation board"; and it is undisputed that the work was done with "¼ inch wall board." Lyle asked judgment for $330.57 as the amount required to take off the ¼ inch wall board and replace it with ½ inch insulation board. To defeat Lyle in this cross-complaint, Latourette made two defenses: (a) the plans were changed before signing, so as to provide for ¼ inch wall board; and (b) Lyle accepted the attic subcontract as completed, and paid for it, so he cannot now be heard to rue back on his acceptance of the completed job. Either defense is sufficient. Without reviewing the evidence, we content ourselves by stating that Latourette did not establish his first defense, and but for the second defense we would hold for Lyle on his cross-complaint. But we must and do hold with the Chancery Court that Latourette did establish his second defense in this:

It is admitted that on August 19, 1943, Lyle paid Latourette $786.06, and received a credit for $14.85, making a total of $800.91. Latourette claimed that this $800.91 was to pay $304.31 on a personal account of Lyle for some previous work, independent of the Hollingsworth and Patillo contract, and that $540 was for the complete insulation subcontract. To support his testimony, Latourette introduced the office book carbon copy of the receipt which he claimed was delivered to Lyle, and which read as follows: "No. 848, August 19, 1943; received of Jimmie Lyle eight hundred and 91/100 dollars ($800.91) *prs. a/c and insulation* contract. Jonesboro Builders Supply Co. P. M. Latourette." The italicized words (italics our own) were testified to as meaning "personal account and insulation contract." Lyle admitted paying the money on August 19th, but denied receiving any such receipt. He admitted that part of the money was to pay the "personal account," but denied

that the balance was to pay for the attic subcontract. According to the itemized statement in the record, the personal account was $304.31. The total lien claim in this suit is $401.50. Thus, on August 19, 1943, the personal account and the lien claim here involved would be only $705.81; and this amount falls short of the $800.91 shown to have been received by Latourette. This is not explained by Lyle's testimony; and under any possible theory some part of the money from the $800.91 must have been on the attic subcontract.

We conclude that the preponderance of the evidence supports the finding of the chancellor, that on August 19, 1943, Lyle paid Latourette in full for the attic subcontract, and thereby accepted the work as complete, with the ¼ inch wall board rather than the ½ inch insulation board; and that Lyle cannot now be heard to cross-complain on the attic subcontract which he had accepted by payment. Payment in full and without reservation was an acceptance of the work. *Interstate Grocer Co.* v. *Namour,* 201 Ark. 1095, 148 S. W. 2d 175.

IV. *The Contract Price as the Limit of the Owner's Liability.* Finally, Lyle insists that a lien claimant (such as Latourette here) is limited in recovery to the contract price between the owner and the contractor, and that when the owner has paid the full amount of the contract price, he cannot be required to pay any more to anyone. This is the "contract price limitation" rule as stated in § 4975 of Kirby's Digest, as follows: "Nothing herein contained shall be so construed as to give contractors, subcontractors or laborers or material furnishers liens for any greater amount in the aggregate than that contracted for between the employer and contractor; provided, that the owner, employer or builder shall pay no money to the contractor until all laborers and mechanics employed on the same and all material furnishers shall have been paid for work done or material furnished." This rule is recognized in 36 Am. Juris. 144, as follows: "If, after the contractor has abandoned the work, the owner completes it at a cost in excess of the original con-

tract price, and pays the amount due under the contract to some lienors to the exclusion of others, he may be compelled to pay the latter their pro rata share of the original contract price, less the extra cost of completing the building, . . ."

To sustain this rule, Lyle cites such cases as: *McFadden* v. *Stark,* 58 Ark. 7, 22 S. W. 884; *Long* v. *Chas. T. Abeles,* 77 Ark. 156, 93 S. W. 67; *Cost* v. *Newport Builders' Supply & Hardware Co.,* 85 Ark. 407, 108 S. W. 509, 14 Ann. Cas. 142; *Marianna Hotel Co.* v. *Livermore Foundry & Machine Co.,* 107 Ark. 245, 154 S. W. 952; and to these might well be added *Sternberg* v. *Ft. Smith Refrigerator Works,* 87 Ark. 56, 112 S. W. 174, 20 L. R. A., N. S., 89. We refer to these as the "contract price limitation" cases.

To bring himself within the ruling of these cases, Lyle showed that the total contract price was $3,584; and that he had paid out at the time of the trial against that contract price, the following:

Paid through Hollingsworth and Patillo before they abandoned the contract	$2,527.00
Paid Latourette on August 19, 1943 (in excess of personal account)	540.00
Paid other workmen in an endeavor to complete the contract according to specifications	989.89
Total	$4,056.89

On these figures Lyle claims that he should not be required to pay the lien claim of Latourette, since Lyle has already paid out more than the contract price.

The answer to this contention of Lyle is found in the fact that the statute (which limited the extent of recovery to the contract price) was expressly repealed by § 6 of Act 446 of 1911; and the cases cited by the appellant were decided before this said repeal. A brief review will serve to clarify the answer:

Act 107 of 1873 created statutory liens for mechanics, laborers, and materialmen. Section 19 thereof pro-

vided: "Nothing herein contained shall be so construed as to give a subcontractor, or laborer, or material furnisher a lien for any greater amount than that originally contracted for between the employer and contractor." This quoted section became § 4424 of Mansfield's Digest of 1884, and was expressly left in full force by Act 57 of 1885, and was in full force and effect in 1893 when this court rendered its opinion in *McFadden* v. *Stark, supra.* This quoted statute accounts for the language in that opinion.

Then came Act 146 of 1895 which was an act of 26 sections, repealing all of Act 107 of 1873 and all of Act 57 of 1885, and making a new statute on liens for mechanics and materialmen. But § 18 of Act 146 of 1895 preserved the language of § 19 of Act 107 of 1873 (§ 4424, Mansfield's Digest), and added a proviso thereto. This entire § 18 of Act 146 of 1895 reads: "Nothing herein contained shall be so construed as to give contractors, subcontractors or laborers or material furnishers liens for any greater amount in the aggregate than that contracted for between the employer and contractor; *provided,* that the owner, employer or builder shall pay no money to the contractor until all laborers and mechanics employed on the same and all material furnishers shall have been paid for work done or material furnished." This § 19 of Act 146 of 1895 became § 4975 of Kirby's Digest of 1904, and was in full force and effect in 1905 and in 1908 when this court rendered the opinions in *Long* v. *Abeles, supra*; *Cost* v. *Newport Co., supra*; *Sternberg* v. *Ft. Smith Refrigerator Works, supra*; and was also in effect in 1910 at the time of the contract involved in the case of *Marianna Hotel Co.* v. *Livermore, supra.* Although that case was not decided by this court until 1913, it was governed by the law that existed when the materials were furnished in 1910.

Then came Act 446 of 1911 which was approved June 2, 1911, and became effective ninety days later. Section 6 of this last-mentioned act says: "Section 4975 of Chapter 101 Kirby's Digest of the Statutes of Arkansas is hereby repealed."

It was this § 4975 of Kirby's Digest that had limited the lien claimants to the original contract price between the owner and the contractor; and the effect of the repeal of this section was to remove the limitation on the lien claimant. In *Beloate* v. *W. L. Baker & Co.*, 126 Ark. 67, 189 S. W. 354, we stated that § 4975 of Kirby's Digest was repealed.

We have seen fit to elucidate on this point, because the appellant has cited *Terry* v. *Klein,* 133 Ark. 366, 201 S. W. 801, decided in 1918, as a case in which the "contract price limitation" rule was mentioned, and not stated to be repealed. It is true that this rule was mentioned in that case, but the rule was not enforced; and because it was not enforced, the court saw no occasion to state that the rule had been outmoded by the legislative enactment of 1911.

The result of Act 446 of 1911 is to allow lien claimants to establish their liens against the buildings, etc. (as stated in §§ 8865-67 of Pope's Digest), for the full amount of their correct claims, just as is stated in § 8893 of Pope's Digest. Of course, if and when the lien is foreclosed, and the money brought into court, then *in the proceeds*, the parties participate *pro rata,* as stated in § 8879 of Pope's Digest. But the allowance of the claims in the first instance is not limited now—since Act 446 of 1911—by the original contract price, as was the rule in the cases decided before Act 446 of 1911 became effective.

It follows, therefore, that the contract price limitation is no longer the law in this state, and is therefore no defense available to the appellant herein; and on the whole case we affirm on the direct appeal of Lyle.

V. *Appellee's Cross-Appeal.* The appellee prayed for judgment for "$401.50 with interest and costs," and that the same be adjudged a lien on the property of Lyle. The Chancery Court fixed the lien claim of appellee to be $386.50 with interest, as hereinafter stated, and allowed appellee only one-half of the costs up to the time of the decree. Appellee by cross-appeal complains of the $15

taken off of his claim, and of the failure to recover all costs and all interest. We now examine these contentions: (a) The $15 was deducted from the $401.50 because of some defective workmanship; and we cannot say that the decision of the Chancery Court on this issue was against the preponderance of the evidence. (b) The costs were divided in the Chancery Court because Latourette had been obliged to retake most of his depositions through no fault of Lyle. This being a chancery case, the matter of costs was in the sound discretion of the chancellor, and we believe he wisely exercised his discretion. *Mt. Nebo Anthracite Coal Co.* v. *Martin,* 86 Ark. 608, 111 S. W. 1002 and 112 S. W. 882; *Bank of Dermott* v. *Measel,* 172 Ark. 193, 287 S. W. 1017.

(c) The interest issue has given us considerable concern. The trial court allowed interest at six per cent. from August 21, 1943 (the date of the last item furnished), to January 1, 1945 (the date the case was submitted to the Chancery Court), and from September 7, 1945 (the date of the decree), until paid. In other words, the Chancery Court held the case under submission from January 1, 1945, until September 7, 1945, and disallowed interest during that time. The appellee complains of this loss of interest for eight months and seven days.

The studious effort of the Chancery Court to correctly decide the various legal issues and the highly controversial facts is splendidly shown in the court's findings, to which we have previously made reference. But when interest once begins to run on a claim, it continues to run pending decision by the courts, if the delay is not the fault of either party. In 33 C. J. 245 the rule is stated: "The pendency of litigation between the parties to an existing debt concerning the same will not of itself suspend interest on such debt during such litigation, where the money is not paid into court." So, we hold that interest continued to run during the time this case was under consideration by the Chancery Court.

But we hold that the interest did not commence to run until September 27, 1943. In *Rogers* v. *Yarnell,* 51

Ark. 198, 10 S. W. 622, Chief Justice COCKRILL, speaking for this court, said: "It is the rule in this state to allow interest on open accounts after the term of credit has expired. *Roberts* v. *Wilcoxson,* 36 Ark. 355; *Texas & St. L. Railway* v. *Donnelly,* 46 Ib. 87; *Tatum* v. *Mohr,* 21 Ib. (349) 355." We adhered to that rule in *Busch* v. *Gecks, ante,* p. 431, 190 S. W. 2d 625.

In the case at bar Latourette wholly failed to allege in the complaint, or to show in the proof, that interest commenced on any date prior to the filing of the lien claim on September 27, 1943. So far as we have been able to find, no invoice or statement of account in the case recites that interest would begin when the items were furnished or at any time thereafter. The filing of the lien claim on September 27, 1943, was thus the first declaration of the maturity of the account.

We hold, therefore, that the Chancery Court should have allowed interest at six per cent. on the $386.50, from September 27, 1943, until paid; and only to this extent do we modify the decree of the Chancery Court on the cross-appeal.

We tax the costs of this court equally between appellant and appellee.

THOMPSON *v.* THOMPSON.

4-7826 192 S. W. 2d 223

Opinion delivered February 11, 1946.

John R. Thompson, for appellant.

Taylor Roberts, for appellee.

GRIFFIN SMITH, Chief Justice. Our problem, like the issue facing a celebrated king of Israel, is exceedingly perplexing. Unfortunately we are without that high degree of wisdom that actuated the judge who so skillfully deduced the essential fact upon which a just decree there rested. 1 Kings, 3:16-27.

When testimony was given May 23, 1945, Marcelyn Thompson was twenty-four years of age and Henry, her husband, was thirty-eight. They were married in October, 1939. A daughter, Yvonne, was born July 11, 1940. In February, 1944, the husband (hereafter referred to as appellee) was called into the U. S. naval service. He received a furlough in June and came to Little Rock for a visit with his wife and child, and with other relatives. Mrs. Thompson (appellant here) sued for divorce May 2, 1945, alleging indignities, etc. Appellee was then in California, but responding to a telephone call from a sister, he procured an emergency furlough and came home. Between June, 1944, and May, 1945, appellant had written numerous letters to her husband, but had not mentioned divorce. May 17, 1945, appellee filed answer; and cross-complained. The decree was in his favor. Custody of little Yvonne was given the father's mother, with whom appellant and the child had lived most of the time since 1939. The husband's government allotment in favor of wife and child was received by Marcelyn, and was, to the extent of "about $75 per month," paid appellee's mother. Included in the payments so made (other than $30 every two weeks) was $3 per week to compensate appellee's mother for training in substitution for training in a nursery school. The only right reserved to appellant in the decree is that she may have Yvonne ". . . each week from Saturday at 4:00 p. m. until Sunday at 4:00 p. m., at which time said child shall be returned to the care and custody of [appellee's mother]."

There is testimony by witnesses for appellee from which inferences of immorality may be drawn, but which more appropriately fall within the class of conduct called misbehaviour, or amounting to indiscretions. Appellee employed private detectives to trail his wife, seemingly reported his suspicions to relatives and friends who assumed duties of surveillance, and some of whom in other respects brought clearly to the attention of the young mother their distrust; and this occurred, to a very substantial extent, while appellant was working at salaries ranging up to $150 per month and thereby supplementing the family income. The so-called "other man in the case" —a boyhood friend whom appellant admittedly admired, and who had "dated" her during high school days—was likewise trailed, and the two were sometimes seen together in situations giving rise to speculation; and, certainly, aggravating the suspicions of critics.

However, any discord or incompatibility that may have existed prior to February 18, 1944, or any ground for divorce occurring before appellee entered the naval service, was condoned; for the leave-taking was most pleasant. According to appellee's testimony Marcelyn had more than once confessed to him that she still loved her boyhood sweetheart; that he (the husband) had killed any affection she may have had for him; that she had "been out" with the other man, but that in spite of these things they should "try to make a go" of their marital relationship, and this was agreed to. In fact, when appellee returned in June, 1944, he and appellant lived together, ". . . and [Marcelyn] paid to me the attentions that a dutiful wife should pay [a] husband." *Buck* v. *Buck,* 207 Ark. 1067, 184 S. W. 2d 68.

There was his further testimony that ". . . not until I [received a telegram saying suit for divorce had been filed] did I know anything about any *present* troubles between my wife and me."

Appellee testified that Yvonne is "a well-developed, a well-cared for, and a healthy child." There is this testimony by the father: Question: "So, for two years,

[Marcelyn] was a good mother and took good care of the child; and since you have been in the service you are not going to tell the Court whether she neglected the child or not?" A. "That's right." Q. "And the child has been carefully trained?" A. "Yes."

The paternal grandmother did not testify to facts materially at variance with what her son had said, although, obviously, the closest ties have been established between grandmother and granddaughter.

One witness testified that for many months Marcelyn had been a regular Sunday School attendant at First Baptist Church and was leader in a visitation program which required meetings each Thursday night, with consequent duties. Mrs. O. A. Cates, who taught the Sunday School class, said that when Marcelyn came she brought Yvonne. Question: "Does she come regularly?" A. "Yes, because quite often we take her to the church building for church services."

The evidence shows that appellant has established a home in Little Rock with an aunt who has cordially received her; that she is now working and is paid $150 monthly, and that all necessary arrangements have been made for taking care of Yvonne. As far as this record discloses the father is still in the naval service and his only home is with his mother. In fact, the rival claims relating to custody are between Yvonne's mother and the child's paternal grandmother.

There is not a suggestion, a hint, nor a scintilla of evidence, pointing to abandonment by Marcelyn. Reared at Georgetown in White County, she came to Little Rock as a young girl under twenty and at least for the time being thought she was in love with a man fourteen years her senior in age. Appellant had procured employment and was earning a substantial income when the older and more experienced personality persuaded her to become his wife. He was then unable to maintain a home, or to fully pay for the ordinary necessities married life entails, although it should be said to his credit that he soon

attained an income which permitted the couple to rent an unpretentious cottage and undertake the task of balancing a family budget.

While matrimonial suspicions were being fostered, little Yvonne came; and she must inherit the woes that inevitably attend a child deprived so young in life of the companionship of either parent. Yet a choice must be made, and we are not willing to say that the evidence preponderates in favor of a course of judicial action that stamps as unfit the mother who gave birth to this little girl.

Reversed, with directions that the custody of Yvonne be restored to Marcelyn; appellee, to have the right to visit the child at appropriate times.

McFaddin, J., concurring. There are previous holdings of this Court which cause me to vote to reverse the Chancery Court in the case at bar. These are:

1. Where the mother has never abandoned the child, the custody of a child of tender years will not be taken from the mother *solely* because of her infidelity to the husband. Some such cases are: *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41; and *Blain* v. *Blain,* 205 Ark. 346, 168 S. W. 2d 807.

2. Here the paternal grandmother, who was awarded the custody of the child, was not a party to the record. We held, in *West* v. *Griffin,* 207 Ark. 367, 180 S. W. 2d 839, that it was error to award a child's custody to one who was not a party to the record.

Because of the holdings, as above listed, I concur in the result reached by the majority in the case at bar.

4-7815 192 S. W. 2d 225

Opinion delivered February 11, 1946.

H. J. Denton, for petitioner.

GRIFFIN SMITH, Chief Justice. O. H. and Minnie Ray were divorced on testimony supporting the husband's cross-complaint. An appeal from the decree reached this Court in 1936 and was disposed of April 27th. *Ray* v. *Ray,* 192 Ark. 660, 93 S. W. 2d 665. Result was that an award of $30 per month as alimony was reduced to $15, but each of two minor children was given $7.50 monthly maintenance. After the children became of age and were no longer living with their mother, the latter petitioned for an increased allowance. In October, 1942, she was decreed $25 per month. The former husband prosecuted an unsuccessful appeal. *Ray* v. *Ray,* 205 Ark. 765, 170 S. W. 2d 681.

Payments under the new order were made until 1945, but were omitted for May and June of that year. Information to this effect having come to the Chancellor's attention (no formal complaint appearing to have been

filed by Mrs. Ray), the Clerk was directed to issue a citation commanding Ray to appear and show cause why he should not be dealt with as for contempt. Through error the Clerk issued an ordinary summons, effect of which was to inform the defendant that he had been sued and that unless defense should be made within the time prescribed by law allegations of the complaint would be taken for confessed. The Sheriff's return shows the summons was served June 25, 1945.

When Ray called at the Clerk's office to procure a copy of the complaint, he was informed by the Clerk that no pleadings had been filed, but that he (the Clerk) had been directed by the Chancellor, who called by telephone, to issue the summons. In appellant's brief, testimony of the Clerk is quoted to the effect that Ray was told no pleadings had been filed, ". . . and that he was directed orally by the Chancellor to issue the summons." The Clerk, however, testified that he inadvertently violated the Court's instruction; so a fair inference arises that the nature of the proceeding was made known to Ray. This conclusion is strengthened by the fact that Ray went directly from the Clerk's office to see his attorney.

On July 10th Mrs. Ray petitioned the Court for further modification of the decree. This transaction is not involved in the instant controversy because Ray's conversations with the Clerk and with his attorney occurred before the petition was filed.

When Court convened at 10 o'clock the morning of July 16th, Ray appeared with his attorney and was informed by the Chancellor regarding the charges. His defense was that no citation had been served. This amounted to a challenge to jurisdiction. Ray was directed to appear at 1 o'clock the same day, and did so, but again protested for the same reason. Witnesses were heard, in consequence of which the respondent was ordered to pay the two twenty-five-dollar delinquencies on or before August 1, under penalty of contempt. The Sheriff was instructed, in the event of default, that Ray be taken into

custody and confined in jail "until such time as he makes the payments."

Did the Court have jurisdiction? In *Ex Parte Coulter,* 160 Ark. 550, 255 S. W. 15, it was held (quoting from *CarlLee* v. *State,* 102 Ark. 122, 143 S. W. 909) that the accused was entitled to be informed with reasonable certainty "of the facts constituting the offense, . . . and [be given an opportunity] to make defense thereto—his day in court . . . The statute [as to contempt] says only that [the accused] shall be notified . . . and have a reasonable opportunity to make his defense. There must be an accusation before the accused can be notified of it, and there is no reason why the Court in session cannot recite that the matter offending has come to its knowledge, setting it out in an order, and directing a citation thereon to show cause."

In another paragraph of the same opinion it is said (repeating) that there must first be an accusation in some form, made either by the judge himself or by someone in possession of the facts, sufficient to constitute a *prima facie* case."

It is definitely settled by our decisions and elsewhere that the Court wherein a contemnor is in default may initiate the process for adjudication. That is exactly what was done in the case at bar. The Chancellor had information that the payments had not been made. He directed the Clerk to issue citation and deliver it to the Sheriff for service. The Clerk apparently understood what the objective was, but erroneously assumed that a summons would suffice. If Ray had not appeared July 16th to dispute the Court's jurisdiction the result would be different. But he did respond, with his attorney, and the Chancellor told him what the complaint was. If at that time he had made reasonable representations that a tenable defense could not be established unless witnesses then not available should be procured, or if under his own testimony doubt had been cast upon deliberate contempt, the penalty now complained of would not be before us. Certainly, when told at 10 o'clock in the morning that the

hearing would proceed three hours later, Ray had ample time within which to state that he had a defense and to tell the Court what witnesses were needed. Having elected to rely upon the defense that there was no jurisdiction, and being wrong in that respect, it follows that the order must be affirmed.

RHODES *v.* SURVANT.

4-7812 192 S. W. 2d 880

Opinion delivered February 11, 1946.

Rehearing denied March 25, 1946.

Gaughan, McClellan & Gaughan, for appellant.

Francis W. Wilson and *J. Bruce Streett,* for appellee.

SMITH, J. This suit was filed by R. S. Clark and L. K. Survant to enforce the specific performance of a contract to lease a certain building owned by Arthur Rhodes in the City of Camden, to be used as a cafeteria. The only parties to the contract were Survant and Rhodes, but the complaint alleged that at the time of the execution of the contract, and at all times since, Clark was and has been a partner of Survant, and as such was entitled to the benefit and subject to the obligations of the lease agreement. Inasmuch as Clark was not named as a party to the lease agreement, the court, on motion of Rhodes, struck Clark's name from the complaint and the cause proceeded with only Survant and Rhodes as parties.

The contract was negotiated a few days after it had been publicly announced that a Naval Ordnance Plant would be erected near Camden, which would cost many millions of dollars, and give employment to thousands of men, and within a very short time the population of the City of Camden was doubled. The housing problem became very acute, and Rhodes began the construction of a tourist court, and contracted with Survant to lease the building here in question, which Survant testified had been used as a garage.

The lease here sought to be enforced provided for a rental of $200 per month for the first two years, and $250 per month for the remaining three years, and that "rent shall be payable in advance, and the term of this lease is

five years from the date when it (the building) is ready for occupancy."

The lease agreement recites that:

"Lessee has paid to lessor the sum of five hundred ($500) dollars advance rent, receipt of which is hereby acknowledged, and shall pay on the date when the building is ready for occupancy the sum of $700. The two payments aggregating twelve hundred ($1,200) dollars shall apply on the first six (6) months rent."

Under the contract, had it been fully performed, Rhodes would have received from Survant $13,800 rent, but on February 20, 1945, Rhodes executed another lease to one Drew, which would, if performed, have paid Rhodes $21,000 as rent for the same period of time. The relief prayed was granted, and Rhodes was ordered to deliver possession to Survant, and there was a stipulation incorporated in the decree as a part thereof, as to what the damages would be if that decree were affirmed. The lease contained also the following recital:

"In the event the lessee should fail to pay the monthly rental within twenty days after such rental is due, or in the event the lessee should be adjudged a bankrupt, or lessee's property should be seized for taxes, or an attachment, or other liens, lessor shall have the right to terminate this contract and upon the termination of the contract for said cause, or any other reason, lessor shall have the right to immediate possession of the leased premises without the necessity of resorting to any legal proceedings."

Rhodes insists that there was a judgment against Survant upon which an execution issued, and the property of Survant was seized, and that the provisions of the contract, just quoted, authorized him to cancel the lease, and, on February 2, 1945, a letter was written advising Survant that Rhodes had exercised this option and had canceled the lease. His right to do so constitutes, we think, the decisive question in the case.

This was the view of the court below expressed in the written opinion of the chancellor which contained the finding of fact that there had been no seizure of Survant's property under the execution and this appeal is from the decree based upon that finding of fact.

It appears that a judgment for $1,370.81 had been recovered against Survant in the Jefferson circuit court, on which an execution issued December 16, 1944, upon which the sheriff made the following return:

"This execution came to hand December 18, 1944, and I hereby certify that I have duly served same on same date, the defendant L. K. Survant saying that he had nothing which we could levy upon, and on February 15, 1945, upon request of attorney for plaintiff hereby return this execution to court as unsatisfied." It is insisted by appellant, however, that notwithstanding this return, there had been in fact a seizure under this execution of appellee's property in Jefferson county, consisting of a restaurant. The attorney for the judgment creditor testified that, "I instructed the sheriff's office that if Survant so desired and promised that he would take care of the property, and not make any attempt to dispose of it, or any part of it, to allow it to remain in his possession and custody and use it in the operation of his restaurant business," and that nothing further transpired until February, 1945. In the meantime the attorney learned that an equipment company in Little Rock, dealing in restaurant fixtures, had a lien on this property, and the attorney was not sure that Survant had an equity of sufficient value to realize the amount of the judgment. The attorney learned also that Rhodes had in his hands $500, paid to him by Survant, and he had a writ of garnishment issued, which was served February 5, 1945, and the attorney had the sheriff post notice of sale of the property in this restaurant, which notice was posted February 9, 1945. It then came to the attention of the attorney that the sale date of February 20, 1945, fixed in the notice, would be after the expiration date of the execution, which had been issued December 16, 1944, and the

attorney then procured the issuance of an alias execution on February 14th. Under this last execution, notice of levy was posted in the building containing the property, this being done February 14, 1945, and the sheriff was directed to lock up the place of business, but Survant called the attorney and promised to satisfy the judgment the next day, and the order to the sheriff to lock up the place was countermanded, but the sheriff was told to post notice of the levy and the sale. On February 16th, the judgment was satisfied.

The question suggests itself, although it is not argued in the briefs that the provisions of the contract providing for its annulment contemplated a delinquency in payment of the rent for 20 days after the rent was due. Now the contract required an advance payment of $1,200 of which $500 was actually paid. As to the balance of $700, more will presently be said. As a matter of fact, Survant was never placed in possession and the right of Rhodes to take possession was conferred, if and when Survant defaulted in payment of rent, and he was not in default in that respect. But we pretermit that question, and return to a consideration of the question upon which the court below decided the case, that is, whether there had been a seizure of Survant's property under the execution.

The attorney for the judgment plaintiff in the case in which the execution issued, further testified that the sheriff levied the execution upon Survant's property in Jefferson county and evidenced that fact by posting notices in January, 1945, but admitted that Survant's possession was not disturbed. Now an execution might be levied by a seizure of the property of the judgment defendant, without actually taking the property from the defendant's possession, provided the defendant was left and placed in possession, by the sheriff, with directions to hold it for the sheriff. In other words, the custody must be changed. Section 225, Ch. Executions, 23 C. J., p. 436; § 97, Ch. Executions, 33 C. J. S., p. 244. In the text last cited it is said: "There must be some act which

amounts to a change of possession, or which is equivalent to a claim of dominion over the property, coupled with the right to enforce it."

In the case of *Brown* v. *Vaughan,* 184 Ark. 364, 42 S. W. 2d 558, the facts were that an execution issued against Vaughan's property, and the sheriff proceeded to Vaughan's law office to serve it, and seized and listed certain law books, but left them in Vaughan's custody. After returning to his office the attention of the sheriff was called to the fact that he had failed to include in the list of books which he had levied upon certain other law books, and he amended the list to include them. All the books were sold in bulk and the sale was held to be void, not because the books had been left in Vaughan's possession, but because the sheriff had not assumed dominion over all of them when he had prepared the list of books upon which he made the levy. In other words, the sheriff to have made a valid levy should have assumed control or dominion over all the books, and he was authorized to sell only those books of which he took dominion which he could have done although after assuming dominion he had left the books in Vaughan's possession.

But even though the notice of his levy was posted in January, had the sheriff taken Survant's property in his possession? No one would know as well as he whether he had done so or not, and when the sheriff made his return upon the execution, he stated he had found nothing upon which he could levy. This return could not have been made if he had in fact taken the restaurant into his possession. The statute provides, § 5368, Pope's Digest, that "if (the execution is) levied . . . and no property has been found he must state the fact."

In the case of *Justice, Sheriff,* v. *Hoch,* it was held by the Supreme Court of Colorado, 84 Colo. 528, 271 Pac. 1116, to quote the headnotes in the case, that the "Lien given by statute under writ of execution does not clothe officer with any property, special or general, nor with any present possessory right until valid levy has been made under writ," and further that a valid levy had not

been made when the officer, without taking possession of the defendant's goods, had merely made up a list of goods, "and tacked up notice of levy on building" in which the goods were located.

We conclude, therefore, that the court below was warranted in finding, as was found, that there had been no seizure of appellee's goods within the meaning of the provisions of the lease set out above.

The purpose of this provision was, of course, to assure Rhodes of the solvency of his tenant and of the tenant's ability to pay the rent, and we think the testimony shows that he was able to pay. He had taken Clark into partnership to operate the cafeteria in the building in question, and Clark's solvency was shown. Clark voluntarily made himself a party to this suit, and offered to sign the lease or any other instrument if required, which would bind him to the performance of its conditions. It was shown also that Survant had arranged with one Steed for financial assistance and Steed testified that he was ready and willing and able to render any assistance required. Steed's solvency was shown and not questioned.

Rhodes learned that Survant was indebted to the Dixie Equipment Company of Little Rock on an account for fixtures used by Survant in his Pine Bluff restaurant, upon which the execution was supposed to have been levied. Survant would have required additional fixtures to operate the cafeteria in Rhodes' building, but the manager of the Equipment Company testified that he had received, and would have filled, and even now would fill this order, notwithstanding Survant's arrearage in his account. A final and binding order for this equipment was not given, but Survant testified that he was unwilling to give the order until the building was ready for occupancy.

The lease contemplated an advance payment of $1,200 on account on the rent, of which only $500 had been paid Rhodes. But the lease did not require this payment until the building was ready for occupancy and the

testimony shows that the building was never completed and made ready for occupancy until after Rhodes had made the second lease to Drew, which was dated February 20, 1945. However, Survant tendered and paid this balance of $700 into court.

We conclude that the decree of the court below should be affirmed for the reason that the condition which authorized the cancellation of the lease did not exist.

That decree appears to be correct for an additional reason. Survant was notified in a letter dated February 2, 1945, that the lease had been canceled because his property had been seized under execution, but no offer to return the $500 paid Rhodes was made. On the contrary the notice of cancellation stated:

"You paid $500 advance rent at the time the contract was executed. We are not certain whether you are entitled to a refund of this money and for the present, Mr. Rhodes is holding it until we can reach a decision as to whether he should return it to you or not."

It is an elementary principle of law that if one would rescind his contract, he must return or offer to return the consideration which induces its execution. Numerous authorities are cited in the note to § 451 of the chapter on Contracts, 12 Am. Jur., p. 1031, to the effect that the very idea of rescinding the contract implies that what has been parted with shall be restored on both sides, and that releasing one party from his part of the agreement and excusing him from making the other party whole is not agreeable to reason or justice, and that the general rule is therefore that if a party wishes to rescind an agreement he must place the other party in status quo.

We think the decree conforms to the principles of equity and is sustained by testimony and it is therefore affirmed, but since real estate is involved, the cause is remanded to the chancery court with directions to enter a judgment in conformity with the stipulations of the parties.

GRIFFIN SMITH, C. J., dissents.

COOK, COMMISSIONER OF REVENUES, *v.* ARKANSAS-MISSOURI POWER CORPORATION.

4-7824 192 S. W. 2d 210

Opinion delivered February 11, 1946.

O. T. Ward and *R. S. Wilson,* for appellant.

C. M. Buck and *J. G. Sudbury,* for appellee.

ROBINS, J. The question in this case is whether appellee, a Delaware corporation, maintaining a domicile in Arkansas and doing business in Arkansas and in Missouri, is liable, as part of its income tax due to Arkansas, for tax on dividends received on stock owned by it in a Missouri corporation transacting all its business within that state.

Appellee is engaged in the production and sale of electricity and ice, having its principal place of business at Blytheville and branches in various towns in Arkansas and Missouri. During the years involved (1938 to 1942, inclusive) forty-seven per cent. of appellee's gross oper-

ating revenues came from operations in Arkansas and fifty-three per cent. thereof from operations in Missouri.

Appellee owned 14,547 shares of common stock of the East Missouri Power Company, a Missouri corporation, a public utility whose operations were entirely within Missouri. From this stock appellee received certain dividends which the Commissioner of Revenues for the State of Arkansas, appellant's predecessor in office, deemed to be subject to the Arkansas income tax. A levy and demand for payment being made, appellee paid under protest the taxes demanded, $3,337.98, and thereupon, under authority of § 14055 of Pope's Digest, brought this suit against the Commissioner of Revenues to recover the taxes alleged by it to have been thus illegally exacted.

In its complaint appellee set forth the facts recited above as to the alleged accrual of the taxes and the payment thereof under protest. Appellant demurred to the complaint, and, when his demurrer was overruled, elected to stand thereon and the court rendered decree in favor of appellee against appellant for the amount of taxes involved. To reverse that decree this appeal is prosecuted.

The law authorizing collection of income tax in this state was enacted by the General Assembly of 1929, and this statute (Act No. 118, approved March 9, 1929) appears as §§ 14024 to 14066, inclusive, of Pope's Digest. Some amendments to the original Act have been made, but they do not affect this suit.

Section 14038 of Pope's Digest (§ 15 of Act No. 118 of the General Assembly of Arkansas, approved March 9, 1929) provides: "If the entire trade or business of a nonresident individual or a foreign corporation is carried on in the jurisdiction of this state, the tax imposed by this Act shall be computed upon the entire income of such nonresident individual or foreign corporation. In the case of *foreign corporations* or nonresidents *whose income is derived from sources partly within and partly without the state,* the following items of gross income shall be treated as income from sources within the state:

1. Insurance premiums, interest on bonds, notes, or other interest bearing obligations of residents, corporate or otherwise; the amount received as dividends from domestic corporations . . ., *or from foreign corporations more than fifty per centum of whose gross income was derived from sources within the state*; compensation for personal services or labor performed within the state; rents or royalties from property or any interest in property within the state; gains, profits, and income from the sale, operation or ownership of any property within the state." (Italics supplied.)

In the case at bar it was alleged in the complaint, and admitted by appellant's demurrer, that (a) appellee was a foreign corporation whose income was derived from sources partly within and partly without this state; and (b) the income here involved was received as dividends from a foreign corporation, none of whose gross income was derived from sources within this state.

It thus appears there is no authority under the Act herein invoked to lay any tax on the income arising from dividends received by appellee from the East Missouri Power Company. The legislature classified as income (in the case of foreign corporations doing business in this, as well as another state) dividends received by such corporation from stock owned by it in foreign corporations "more than fifty per centum of whose gross income was derived from sources within the state"; but the legislature did not see fit to include for taxation as income (of corporations of the class of appellee) dividends received by it from a foreign corporation, none of whose gross income arose in Arkansas.

A statute imposing a tax must be strictly construed against the taxing authority. "A tax cannot be imposed except by express words indicating that purpose." (Headnote 3) *Wiseman* v. *Arkansas Utilities Company*, 191 Ark. 854, 88 S. W. 2d 81.

"Where the intent or meaning of tax statutes, or statutes levying taxes, is doubtful, they are, unless a con-

trary legislative intention appears, to be construed most strongly against the government and in favor of the taxpayer or citizen. Any doubts as to their meaning are to be resolved against the taxing authority and in favor of the taxpayer. . . ." 51 Am. Jur. 366.

"The general rule is that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayers. . . ." 61 C. J. 168.

Another rule, often applied by the courts in construing statutes, is that the express designation of one thing by the legislature may properly be construed to mean the exclusion of another. *Hall* v. *State,* 1 Ark. 201; *Watkins* v. *Wassell,* 20 Ark. 410; *Little Rock & F. S. R. R. Co.* v. *Clifton,* 38 Ark. 205; *Chisholm* v. *Crye,* 83 Ark. 495, 104 S. W. 167.

"Where an Act undertakes to regulate the subject of which it treats, and points out the manner and place in which the act regulated may be done, there is an implied inhibition against doing it otherwise or elsewhere. In such cases the maxim *expressio unius est exclusio alterius* becomes a canon of construction." *St. Louis, Iron Mountain & Southern Railway Co.* v. *Branch,* 45 Ark. 524.

"Generally speaking a 'legislative affirmative description' implies denial of the non-described powers. *Durousseau* v. *United States,* 6 Cranch (U. S.) 307, 3 L. Ed. 232." *Continental Casualty Co.* v. *United States,* 314 U. S. 527, 86 L. Ed. 426, 62 S. Ct. 393.

We conclude that when the General Assembly, dealing with the subject of income taxes to be collected from foreign corporations carrying on business in this and another state, expressly prescribed that dividends received by such corporations on stock in foreign corporations which obtained more than fifty per cent. of their revenues within Arkansas should be deemed as income of the corporations receiving such dividends, and failed to make any provision for collection of any tax on dividends collected by the taxpayer foreign corporations on divi-

dends received from foreign corporations obtaining fifty per cent., or less, of their revenues from within Arkansas, this amounted to a legislative declaration that where such dividends come from stock in corporations not obtaining more than fifty per cent. of their gross receipts from within Arkansas, such dividends were not to be taxed as income of the described corporations. The propriety of the exemption thus afforded is, of course, a matter for legislative determination.

We have carefully examined other portions of our income tax law, urged by appellant as supporting the legality of the tax herein involved, and we do not find that they apply in the instant case. Nor is there anything in our opinions in the cases of *Wiseman* v. *Arkansas Utilities Company,* 191 Ark. 854, 88 S. W. 2d 81, and *Southeast Power & Light Company* v. *McCarroll,* 200 Ark. 565, 140 S. W. 2d 1001, which conflicts with the holding of the lower court. In neither of those cases was there involved a situation such as we have here.

The lower court correctly applied the law. Therefore, the decree appealed from is affirmed.

FINE *v.* FINE.

4-7823 192 S. W. 2d 212

Opinion delivered February 11, 1946.

Wesley Howard, for appellant.

Abe Collins, for appellee.

HOLT, J. Appellant, Nettie Fine, and appellee, A. R. Fine, were married October 26, 1940. Appellant had three children by a former marriage and appellee two by a former marriage, a girl, 10 years of age, and a boy, 8. This was appellee's third marital venture.

October 31, 1944, appellant instituted suit against appellee for a divorce on the ground of indignities such as to render her condition in life intolerable (5th subdivision of § 4381 of Pope's Digest). She prayed for divorce, alimony, costs, attorney's fees and restoration of her former married name, Nettie Bailey. Appellee's answer was a general denial and by way of cross-complaint alleged that "at the time of their marriage plaintiff (appellant) owned a home in DeQueen, Arkansas, with one rent house and soon thereafter plaintiff and defendant (appellee) agreed that by their joint efforts they would build additional rent houses on said property so as to provide an income for them in old age. Pursuant to this agreement materials were bought and charged to the plaintiff sufficient to build two rent houses and the bills were paid through the joint earnings of plaintiff and

defendant and from the rents collected on said houses,'' and sought recovery for cost of improvements which he had placed upon appellant's property. Appellant responded to appellee's cross-complaint with a general denial.

Upon a hearing a decree was entered denying to appellant all the relief for which she prayed and granted the prayer of appellee on his cross-complaint in the amount of $300 for expenditures made by him in improvements on appellant's property, and declared a lien in his favor for said amount. This appeal followed.

Appellee has cross-appealed from that part of the decree awarding him $300 for money expended by him on improving appellant's property.

Appellant's first contention is that the court erred in denying her a divorce. While we try the cause *de novo* here, under our well established rule, unless we can say that the finding of the trial court that appellant was not entitled to a divorce on the ground of indignities was against the preponderance of the testimony, we must affirm.

The testimony on this issue appears to be in irreconcilable conflict. It could serve no useful purpose to detail this testimony here. It suffices to say that, after reading the evidence, we think that appellant's testimony is not supported by corroborative evidence which is necessary in order to obtain a divorce.

In the recent case of *Calhoon* v. *Calhoon, ante,* p. 80, 189 S. W. 2d 644, we said: ''Assuming, without deciding, that appellee's own testimony sufficiently established grounds for divorce, there was no corroboration thereof; and, under the long established rule in this state, the party seeking a divorce must establish grounds therefor by evidence other than his own. *Rie* v. *Rie,* 34 Ark. 37; *Kurtz* v. *Kurtz,* 38 Ark. 119; *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Arnold* v. *Arnold,* 115 Ark. 32,

170 S. W. 486; *Welborn* v. *Welborn,* 189 Ark. 1063, 76 S. W. 2d 98."

Here the effect of testimony introduced by appellant other than her own is that appellant was alone a few times when she was ill after appellee went to Texas in search of work, with appellant's consent. There was also testimony that appellant had difficulty in controlling appellee's two children and that they did not show her the proper respect. This and other similar evidence offered by appellant, we think, falls far short of corroborating her own testimony.

Appellant next questions the court's refusal to award her alimony, attorney's fees and court costs. Here the wife instituted suit for divorce against the husband and was denied the relief sought. The husband did not ask for a divorce. At the time the suit was filed, and when tried, appellant owned her home and some small rent houses in DeQueen with a gross income of from $75 to $100 a month.

It was within the sound discretion of the trial court to deny appellant alimony, attorney's fees and court costs. This appellant frankly concedes, but insists that there has been an abuse of discretion here. It appears that the wife, appellant, had a home and income-producing property of her own whereas appellee possessed no real property, but a small amount of cash, and due to a serious injury following his marriage to appellant and while employed in Texas was totally and permanently disabled. In the circumstances here, we think no abuse of discretion has been shown. See *Slocum* v. *Slocum,* 86 Ark. 469, 111 S. W. 806.

Finally appellant insists that the court erred in decreeing $300 to appellee for improvements made by him on her property and we think this contention must be sustained. Appellee alleged in his cross-complaint that he and appellant, after their marriage, entered into a partnership agreement whereby they would construct some rent houses on appellant's property in order to

have an income to live on in their old age, and testified to this effect. Appellant denied any such agreement. She testified that appellee told her that whatever he spent on her property was for her benefit and a gift to her because she had done so much for his children.

The record reflects that at the time these parties were married, appellee was working on a W.P.A. project in DeQueen. He, together with his two children, moved into his wife's home. He made small contributions to their support, but the major portion came from the wife, appellant, who owned and operated a small grocery store. Some months later, appellee's W.P.A. job terminated and he went to Texas and secured employment at approximately $119 a week on some government project, but after working about a week, received serious and permanent injuries which have incapacitated him since. As a result of these injuries, he recovered compensation for a total of $5,950, which included $1,130 from accident insurance. Appellee paid his brother $1,000 out of this money in satisfaction of a debt which he owed him, paid out substantial amounts for necessary medical treatments for himself, and for the support of his wife and children. He deposited $1,130 in his wife's (appellant's) bank account, the greater portion of which was used in improvements on his wife's property. As indicated, the court found that the expenditures he made on his wife's property, for which he should recover, amounted to $300.

In a long line of decisions in this state, the rule appears to be well settled that where a husband advances money to improve his wife's property, there is a rebuttable presumption that such advances are intended to be gifts and the law does not imply a promise on the part of the wife to repay such advances. In *Ward* v. *Ward,* 36 Ark. 586, this court held (headnote 2): "If a husband purchases property and has it conveyed to his wife, or expend money in improving her property, the advances will be presumed to be gifts. The law will not imply a promise on her part to repay them."

The rule is also equally well settled that "the proof necessary to overcome the presumption of gift to the wife where the husband purchased land and caused the deed to be executed to her must be clear and convincing." *Parks* v. *Parks,* 207 Ark. 720, 182 S. W. 2d 470, (headnote 2), and in the body of the opinion, we said: "Moreover, his subsequent improvements, payment of taxes and insurance are all 'referable to his natural desire to manage and care for his wife's property.' "

Most, if not all, of the controlling testimony as to the alleged agreement claimed by appellee between him and his wife was the testimony of the parties themselves and which is in conflict. After a careful review of all the testimony, we think it falls short of that full, "clear and convincing" effect which the law requires in order to establish the alleged agreement and trust relationship sought to be established by appellee here. See *Quattlebaum* v. *Hendrick,* 179 Ark. 494, 16 S. W. 2d 591.

Accordingly, that part of the decree denying appellant a divorce, alimony and attorney's fees is affirmed. That part of the decree awarding to appellee $300 for expenditures in improving appellant's property is reversed and the cause remanded with directions to enter a decree consistent with this opinion. All costs to be shared equally by the parties.

WOODRUFF, ADMINISTRATOR, *v.* MILLER.

4-7829 192 S. W. 2d 527

Opinion delivered February 18, 1946.

Harvey L. Joyce and *Glen Wing,* for appellant.

G. T. Sullins and *Rex W. Perkins,* for appellee.

McHaney, Justice. Sarah A. Bales Cover died intestate in Washington county, Arkansas, on August 30, 1945, leaving no direct descendants, but a number of collateral heirs, including appellant and appellee who are nephews. On August 31, 1945, appellant filed application for letters of administration, made bond and was by the court appointed administrator of said intestate's estate. This was done by him in violation of an agreement between him, appellee and one Niccum, another nephew of intestate, to meet at 1 p. m. of said date to agree on some suitable person to be appointed as administrator of said

estate. On the same date appellant filed for record a deed purporting to have been executed by intestate in 1941 and conveying to himself and his bodily heirs several tracts of real estate.

On September 6, 1945, the court, on its own motion, entered an order suspending appellant from acting as administrator, and directing that the cause be resubmitted to it on September 12, upon the application for appointment. On the latter date, appellee filed a motion and affidavit duly verified, alleging among other things embezzlement of the estate by appellant and praying his discharge, to which appellant demurred and answered with a general denial. The cause was continued to September 26, by agreement. In the meantime, the clerk by direction of the court, notified many of the heirs, or as many as possible, of this setting, and that the question to be determined was whether the letters theretofore granted appellant, Woodruff, should be revoked or permitted to stand. A majority of those heard from indicated a desire to have Woodruff removed.

On September 26, a hearing was had, although appellant was not present in person and could not be examined touching the matters charged, and an order was entered discharging appellant as administrator, ordering a settlement by him and appointing a successor to administer said estate who is not related to any of the parties. The court made these findings: "From the evidence before the court, oral, documentary and from the files of the clerk, and from other matters and things before the court, the court finds that pursuant to his appointment Fred Woodruff qualified as administrator by filing of bond as such; that such appointment was procured by him notwithstanding an agreement entered into by himself and other heirs of deceased whereby selection and appointment of an administrator was agreed to be deferred until as many of the heirs as possible could agree upon some suitable person to act as such; that in procuring his appointment notwithstanding said agreement, said Woodruff practiced constructive fraud upon the other heirs parties to such agreement. The court further finds that

said Woodruff is not a person of sufficient business and general experience to qualify him properly to administer the affairs of this estate. The court further finds that a majority of the heirs responding to said communication from said clerk have expressed their dissatisfaction with the appointment of said Woodruff. The court further finds that on the day subsequent to the death of the deceased that said Woodruff filed for record, and caused to be recorded, a purported deed of conveyance to himself from deceased, conveying various tracts of real estate; that said purported deed was executed in 1941, and that a suit is contemplated by various of the other heirs to cancel said deed as being fraudulent. The court further finds that it would be inequitable to prefer one heir over the others by an appointment of any of them as administrator, unless by agreement of said heirs or a majority of them, and the court further finds that the interests of the estate and of said heirs would be best served by the appointment and service of an administrator not a beneficiary of said estate and wholly disinterested therein by consanguinity or affinity to or with deceased or any of said heirs."

This appeal followed.

Section 8, Pope's Digest, reads as follows: "To Whom Granted. Letters of administration shall be granted to the representatives of the intestate who may apply for the same and are qualified, preferring first the husband or wife, or one of the persons entitled by law to a distribution of the intestate's estate, as the court or clerk may be of the opinion will best manage and improve the estate; and if no such person applies for letters within thirty days after the death of the intestate, letters of administration may be granted to any creditor of the intestate who may apply for the same within sixty days after the death of the intestate, or to such other person as the court may appoint; and the court, or clerk thereof in vacation, on the application of any person interested, may issue a citation to any person entitled to administration as aforesaid, calling on him to take out letters of administration."

Appellant makes two contentions for a reversal. The first is that he has a first or prior right to administer said estate because he is a member of a statutory preferred class, and that the statute is mandatory; second, that having been appointed by the court, he cannot be removed except upon at least one of the statutory grounds of disqualification and removal, not one of which is shown.

While the statute, § 8, above quoted says letters "shall be granted to the representatives of the intestate who may apply for same and are qualified," preferring the persons named, and then says, "as the court or clerk may be of the opinion will best manage and improve the estate," this statute clearly gives the court discretion in the granting of letters of administration. First, is the applicant "qualified" and second will he, in the opinion of the court, "best manage and improve the estate"? These inquiries apply to all persons applying for letters and especially to those entitled by law to a distribution of the intestate's estate. They are named as a preferred class on the conditions named in the statute. The court is not required to appoint blindly a member of the preferred class where there is no member of that class qualified or where the applicant of that class is not qualified, or who, in the opinion of the court, will not best manage and improve the estate, even if otherwise qualified.

Evidently, the court made no inquiry regarding these matters when appellant's application was first presented to him. But it shortly came to the court's attention that appellant might not be a proper person to administer said estate, and on the 6th day after said appointment, the court suspended appellant as administrator and set a day to hear and determine his qualifications. On the final hearing the court found that he was not a proper person to administer said estate and gave the reasons therefor, and we cannot say any abuse of the discretion vested in the court has been shown. We think all the findings of the court, as set out above, are supported by the evidence and are sufficient to support a revocation of the letters theretofore granted. See § 37, Pope's Digest, relative to waste and mismanagement of the estate. In *Bocquin*

v. *Theurer,* 133 Ark. 448, 202 S. W. 845, it was held that the probate court had the right to remove an executor named in the will and appoint another in his place under proper case made citing this same § 37.

Appellant was the only person of the preferred class who applied for letters. All others of said class waived the right to appointment by asking that a disinterested person be appointed, and the power is given in that section to the court to grant letters "to such other person as the court may appoint."

Affirmed.

GRIFFIN SMITH, C. J., not participating.

LIENHART *v.* BRYANT AND BRYANT *v.* LIENHART.

No. 4-7769, No. 4-7822 192 S. W. 2d 530

Opinion delivered February 18, 1946.

Ward Martin, for appellant.

O. W. Pete Wiggins, for appellee.

O. W. Pete Wiggins, for appellant.

Ward Martin, for appellee.

GRIFFIN SMITH, Chief Justice. For the purpose of an opinion two cases are consolidated: *Henry Lienhart* v. *L. F. Bryant,* and *L. P. Bryant, doing business as Bryant Bus Lines,* v. *Henry Lienhart, doing business as Houston-Bigelow Bus Lines.* The parties will be referred to as Lienhart, and Bryant.

In November, 1944, Lienhart applied to the Corporation Commission (now Public Service Commission) for a certificate of convenience and necessity authorizing him to operate a bus line.

Because of objections by carriers who contended they would be adversely affected unless certain restrictions were made, a stipulation between Lienhart and a carrier other than Bryant was filed with the Commission December 28th.

December 29th the Commission issued its certificate to Lienhart, authorizing him to operate in this way:

"State Highway 60 Perryville to Houston: Highways 60 and 113 Houston to Bigelow; Highway 113 Bigelow to

George's Store; County road George's Store to Roland; County Road Natural Steps to intersection of Highway 10 known as Joe T. Robinson; Highway 10 to Little Rock as follows: No authority is granted to pick up passengers between and including the Junction of county road and highway No. 10 (known as Joseph T. Robinson corner) and Little Rock for discharge between and including the Junction of county road and Highway No. 10 (known as the Joseph T. Robinson corner) and Little Rock, and the operation between said points shall be with closed doors. No authority is granted to pick up passengers at Perryville, Arkansas, and destined for Little Rock, Arkansas, or beyond and no passengers shall be picked up at Little Rock, Arkansas, and destined for Perryville, Arkansas, or beyond; also closed doors between Roland and Joe T. Robinson School House."

February 5, 1945, the Commission issued what was termed an amended order, but stated that the purpose was to clarify the certificate of December 29th "because said order has been misconstrued." It was then said that the order of December 29th was intended to invest Lienhart with authority to operate "over the following route:

"State Highway 60, Perryville to Houston; Highways 60 and 113, Houston to Bigelow; Highway 113, Bigelow to George's Store; County road George's Store to Roland; County Road, Natural Steps to intersection of Highway 10 known as Joe T. Robinson; Highway 10 to Little Rock, with the following restrictions: No authority is granted to pick up passengers between and including the Junction of county road and Highway No. 10 (known as Joseph T. Robinson corner) and Little Rock for discharge between and including the Junction of county road and Highway No. 10 (known as Joseph T. Robinson corner) and Little Rock, and the operation between said points shall be with closed doors. No authority is granted to pick up passengers at Perryville, Arkansas and destined for Little Rock, Arkansas, or beyond and no passengers shall be picked up at Little Rock, Arkansas and destined for Perryville, Arkansas or beyond. Under

this Certificate applicant is restricted from handling passengers from Roland to Little Rock and Little Rock to Roland and from Roland and intermediate points to Joseph T. Robinson school house and from Joseph T. Robinson school house and intermediate points to Roland. The operation from Roland to Joseph T. Robinson school house and in the reverse direction from Joseph T. Robinson school house to Roland shall be with closed doors."

An undated "stipulation to correct order" is in the record, signed by counsel representing Lienhart and Bryant. It mentions the order of December 29 and recites that an error was made by the Commission when substance of the original stipulation was incorporated in the certificate, ". . . in that the word 'inclusive' was omitted by the Commission in writing its final order." It was then agreed that the December 29th order be amended ". . . by adding the word 'exclusive' immediately after the phrase 'also closed doors between Roland and Joe T. Robinson School House'."

Difficulty in construing what the Commission did and in determining whether Pulaski Circuit Court erred in declining to interfere with the administrative order of February 5th (also difficulty in determining whether Pulaski Chancery Court erred in declining to enjoin Lienhart at Bryant's instance) is not met until Lienhart's operations approach the Little Rock area. Lienhart was given authority to use the designated highways from Perryville to Houston, then to Bigelow, and on to George's Store. At that point the route authorized is east and northeast over a county road, with a final sharp turn south to Roland. The questions are, Under the certificate what rights attach, beginning at Roland, thence to Natural Steps, and to the Joe T. Robinson School House, (where Highway No. 10 intersects) thence to Little Rock?

It is clearly expressed in the certificate of December 29 that "No authority is granted to pick up passengers *between and including* the junction of the county road with Highway 10 [the Joe T. Robinson School House] and

Little Rock for discharge *between and including*" the school house and Little Rock. While it might be argued that "between and including" as applied to the school house and Little Rock does not expressly say that in leaving Little Rock and proceeding west Lienhart is not prohibited from taking on passengers *at* Little Rock destined for the Robinson area—and some support for this contention may be found in subsequent language providing that ". . . no passengers shall be picked up at Little Rock and destined for Perryville or beyond—still a rational construction would exclude operations between the school house and Little Rock, each terminus included.

But the situation is different regarding Robinson School House and Roland, the restriction being that Lienhart shall operate *between* the two points with closed doors. There is nothing in the record showing that the Commission intended to prohibit Lienhart from taking on passengers *at* the stops in question; and as to those places the term "inclusive" is not applied. Nor did the December 29th order prevent the certificate-holder from taking on passengers *at* Roland and transporting them to Little Rock, or taking them on *at* Little Rock for passage *to* Roland. To this extent the authority originally given was circumscribed.

Section 14(a), Act 367, of 1941, provides that certificates may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, *after* notice and hearing, be suspended, changed, or revoked, etc.

A statutory requirement (Sec. 9(b), Act 367) is that before a certificate of convenience and necessity may issue in the first instance notice must be given the interested parties for at least twenty days. By clear implication the public is an interested party. This is true because its convenience and necessity are subjects of first concern. When notice has been given, a hearing had, and an opportunity to be heard has been extended to persons residing in the territory to be affected, the Commission has before it (presumptively) all information essential to a fair de-

termination of relative rights, including conflicting claims of competing carriers, or those who would be carriers; and certainly those who are to be served have not been ignored.

It appears to have been the legislative policy to safeguard rights by providing that changes in the transportation status could not be made without notice to "the interested parties." We think the act of a carrier in taking on or putting off passengers at a particular place in derogation of orders issued at a time when the public had been informed a hearing would be held, involves—or may involve—substantive matters in respect of which notice must be given. At least the General Assembly seems to have settled on such a formula; hence it was error for the Commission to impose the restrictions of February 5th in the way it did. This being so, Circuit Court should have adjudged the so-called amendment void.

The Chancellor declined to enjoin Lienhart from interfering with Bryant's business. Under the pleadings and proof, and in view of our determination of the Circuit Court appeal, this was not error, and the decree is affirmed. The Circuit Court judgment is reversed, with directions to set aside the Commission's amendment of February 5th.

BRITT TRUCKING COMPANY *v.* RINGGOLD.

4-7827 192 S. W. 2d 532

Opinion delivered February 18, 1946.

Fred A. Isgrig and *McRae & Tompkins,* for appellant.

J. H. Lookadoo, for appellee.

SMITH, J. This litigation arose out of a collision between an automobile and a truck, and, as is usual in such cases, the driver of each vehicle excuses himself of negligence and blamed the driver of the other vehicle for the collision.

On the afternoon of November 15, 1944, J. H. Ringgold was driving a 1937 model automobile along highway 67, about two miles north of Gurdon. He was a tie inspector, and was on his way to inspect certain ties stacked along the Womble Branch of the Missouri Pacific Railroad, and to reach these ties he had to turn off highway 67 to the left. There was no one in the car with him. Britt Trucking Company of Lamesa, Texas, owned and operated a truck, which at the time of the collision was being driven north along highway 67 by D. W. Hornbeck. In the truck with Hornbeck was C. T. Isaacs of Lamesa, Texas.

According to Ringgold, he began to slacken the speed of the automobile as he approached the place where he was to turn off highway 67, and had been holding his arm horizontally out of the window of his car, while he traveled a distance of about 140 feet, but during all this time his car was traveling on the right hand side of the highway, and just before he reached the place where he was to turn off the highway, his car was struck from the

rear by the truck, and was sideswiped, and badly damaged, and he himself, sustained severe personal injury. Suit for $3,000 was brought to recover compensation for the car damage, and the personal injury, and upon the trial, Ringgold recovered judgment for $3,000, the exact amount sued for. The verdict of the jury, upon which the judgment was pronounced, from which is this appeal, fixed the damages to the car at $250, and allowed $2,750 for the personal injury.

Ringgold testified as follows: ". . . when I got 10 or 15 feet from where I intended to turn off, this truck drove up behind me and hit the left rear bumper of the car and knocked the car to the right and this slap behind it bent the bumper in and bent the fender, the rear fender on the left hand side of the car—it bent it and come up the running board and knocked it off and dented the door in and knocked two holes in the body between the hood and the door and knocked the front fender off and bent the wheels all down and it seemed to me like the front bumper of the car hung on the truck some way or other. When this truck hit me, it knocked me and jerked me, and when it stopped, it hit me the second time. The first time he hit me in the rear of the car, it knocked it up a piece because he was going faster than I was," and that the truck hung on the front bumper of his car and pulled it over, and the car was carried to the left across the highway and the truck, after becoming disengaged, continued across the highway, ran into a ditch, and ran over the adjacent railroad track and into a concrete post, which was knocked down.

The driver of the truck, and his companion riding with him in the truck, both testified that they were trailing the car when, without giving any signal of his intention to do so, the driver of the car turned it to the left off the highway, and the collision became inevitable and unavoidable, that to avoid striking the car "broadside" the truck was turned so sharply to the left that it ran into the ditch.

The cause was submitted under instructions of which no complaint is made, except that appellants say that a

verdict should have been directed in their favor, as the verdict of the jury is contrary to the physical facts disclosed by the testimony.

This contention is based upon the following testimony. Two brothers, one 18 and the other 13 years of age, were engaged in stacking wood on the side of the highway, and they went at once to the scene of the collision. These two boys, and both Hornbeck and Isaacs, testified that the car was standing upright on the left hand side of the road, off the concrete, and that the window of the door on the left hand side was up. If this testimony is true, Ringgold could not have given the signal which he testified that he did give, of his intention to turn left off the highway. Hornbeck and Isaacs testified that no such signal was given, and that had it been given the collision would not have occurred.

The court correctly charged the jury "That it was plaintiff's duty, under the Arkansas traffic law, before making a left turn, to extend his hand and arm, and to keep the same extended during the last 100 feet traveled by his car before turning, and that the burden of proof was upon him to show that he had complied with this law. This requirement is imposed by paragraph (b) of § 6725, and § 6727, Pope's Digest."

The chief insistence for the reversal of the judgment is that the physical facts show that this signal was not given and could not have been given for the reason that the window of the door on the left side of the car, where the driver sat, was up after the collision occurred, and if it were the signal could not have been given. This, of course, is a physical fact, which no testimony could contradict. Hornbeck testified that after the collision he undertook to lower the window, but was unable to do so, because the door was sprung.

Ringgold testified that the collision addled him, and that he has a very hazy and indistinct recollection of what he did for several hours thereafter; that he has no recollection of having lowered the window, but he testified that when he returned to the scene of the collision on the

following day, to get his car, he found the window down, and that the seat of the car was wet, showing that the window had been down for some time.

The jury might, therefore, have found, and evidently did find, that it was not a physical impossibility that Ringgold gave the signal as he testified he did do. If the signal was given for the time and in the manner testified by Ringgold, it was the duty of the driver of the truck to have observed it, and to have regulated his speed accordingly. We are unable therefore to say, as a matter of law, that a verdict should have been directed in favor of the defendants.

It is insisted that the verdict is excessive, and while it is very liberal, we are not able to say that it is not sustained by substantial testimony. After the collision, Ringgold caught a car and returned to Gurdon to see, not a doctor, but a lawyer, and he did not see the doctor until the following day.

The doctor testified that he found Ringgold's back and neck bruised and swollen, and a bruise on his left side about the tenth rib, which he thought was fractured, although he did not take an X-ray picture; that he strapped Ringgold's side, and attended Ringgold twice that week, and twice a week for three weeks, and then once a week for a couple of months, altogether about eight or ten times; and that his bill for his services amounted to $75. The doctor further testified that at first he gave Ringgold sedatives, on account of the pain which he suffered, and to enable him to sleep; that Ringgold had, even yet, a stiff neck and back, and that in his opinion, Ringgold would never completely recover on account of his age. This doctor also testified that Ringgold ". . . can't get down without going to his knees, and that Ringgold's neck is still swollen and very stiff," and that "I have tried to catch him when he was not noticing to see if his neck would turn without his body."

Ringgold admitted that he was now earning a salary as great as that he was being paid before the injury, but testified that he had no assurance of the permanency of

the employment, and that he would be unable to perform any work which required him to do any lifting or bending.

A Dr. Townsend, whose competency was admitted, examined Ringgold and made X-ray pictures of him, and was unable to find any evidence of an injury, and testified that the conditions of which Ringgold complained were all subjective, that is, that there was no visible evidence of any condition showing that an injury had been sustained. He admitted, however, that many persons suffer from aches and pains of which there is no visible evidence. This examination was made April 22nd, following the collision, which had occurred in the preceding November, and was made to enable the doctor to testify at the trial.

The jury allowed $2,750 for the personal injury and we are unable to say that the testimony is not sufficient to support that recovery. Damage to the car was assessed at $250, and as to this but little need be said. Ringgold testified that he had been offered $800 for the car before the collision, and that it was not worth more than $250 after the collision, and that he would take that sum for the car. He testified that he had certain work done on the car, as to the cost of which he was very evasive. But he testified that he had a reputable mechanic employed by the local Chevrolet Company to estimate the cost of repairs, which the mechanic placed at from three to four hundred dollars.

Upon the whole case we find no error, and the judgment must, therefore, be affirmed.

GREGORY *v.* CRUTCHFIELD.

4-7830 192 S. W. 2d 534

Opinion delivered February 18, 1946.

S. J. Reid, for appellant.

D. D. Glover, for appellee.

HOLT, J. September 14, 1944, a petition was filed in the Grant county court in part as follows: "Petition—Davis Township—We, the undersigned qualified electors of the townships designated herein, constituting twenty-

five per cent of the qualified electors therein, as shown by the election returns for Governor at the last election preceding the date of this petition, hereby petition the court for the privilege to vote on the question of restraining goats and swine from running at large in said county and or townships; and further petition that the court make necessary orders for such election to be held at the next general election of county or state officers or special election." (Then follows list of signers.)

A hearing was held on the petition October 2, 1944, and the court, among other things, found "that twenty-five or more per cent of the qualified electors of Fenter Township, Merry Green Township, River Township, DeKalb Township, Davis Township, which are three or more townships in a body in the county, as shown by the election returns for Governor at the last election preceding the date of the petitions, have petitioned the county court for the privilege to vote on the question of restraining goats and swine from running at large in these townships; that the court has jurisdiction of the subject matter and of the parties herein; that said election is prayed for under § 335 of Pope's Digest of the Statutes of Arkansas," etc., and ordered that an election be held in Fenter Township, Merry Green Township, River Township, DeKalb Township and Davis Township, at the next general election which is November 7, 1944, and the same is to go on the ballots with the following ballot title, to-wit: " 'For restraining goats and swine from running at large.' 'Against the restraining goats and swine from running at large'," etc. Thereafter on November 9, 1944, the election officials certified the returns of the election, held in obedience to the court order above, as follows:

"DeKalb	FOR	41	AGAINST	13
Fenter		54		33
River		108		18
Davis		30		46
Merry Green		265		182"

May 5, 1945, appellants filed their "petition for injunction" against appellee, clerk, in which it was alleged "that on the 14th day of September, 1944, there was filed in the county court of Grant county, Arkansas, a petition by certain citizens of Davis Township a petition to the county court asking that an election be held in said township and other townships in the county to vote on the proposition of restraining goats and swine from running at large in said township and county; that in pursuance of the prayer of said petition, along with the petition of citizens of four other townships, the county court made an order that an election should be held on November 7, 1944, in accordance with the prayer of said petitions; that under and in pursuance with said order the proposition or question was submitted to the qualified electors on the above date; that the vote in Davis Township was 30 for and 46 against. After said election and the certification by the Election Commissioners, the County Court made an order purporting to declare the result of said election in Davis, DeKalb, Fenter, River and Merry Green, in favor of said restraining order. Petitioners further show that the order of the County Court based on the petitions is void and of no effect for the following reasons: (a) The order was improperly made based on each township as a unit instead of three or more; (b) that the order shows on its face that it is void as not declaring the notice and declaring the results of the election was given by the Clerk; (c) that no notice was given by the clerk as required by law; that the defendant, W. S. Crutchfield, has attempted and will attempt to publish the results of said election if not restrained," etc. Their prayer was "that an order issue restraining the defendant from the publication of the result of said election, and that on final determination of this cause of action, said election and orders of the court be, and the same declared null and void," etc.

Appellee responded to appellants' petition denying that appellants were entitled to any relief, and upon hearing, the trial court found the issues against appellants and dismissed their petition.

This appeal followed.

For reversal, appellants say: "first, the order of the County Court was improperly made, being based on each township as a unit instead of three or more townships. Second, no notice was given by the Clerk as required by law as to result of the election."

1.

We think neither of these contentions can be sustained.

The electors of the five townships, *supra,* have proceeded under the provisions of §§ 335-337, inclusive, of Pope's Digest. Section 335 provides: "Whenever twenty-five per cent of the qualified electors of three or more townships in a body in any county in the State of Arkansas as shown by the election returns for Governor at the last election preceding the date of the petition, shall petition the county court for the privilege to vote on the question of restraining horses, mules, asses, cattle, goats, swine, and sheep, or any two or more of the said animals, or the male species thereof from running at large, the county court shall make an order for such an election in said townships to be held at any general or special election of county or State officers. Provided, that said petition shall have at least twenty-five per cent of the qualified electors of each of the respective townships. Act March 19, 1915, p. 676, § 1, as amended by act March 27, 1919, p. 328."

We are confronted here with what appears to be an incomplete record in that only the first page of the petition, *supra,* for an election in five adjoining townships in Grant county is included in the transcript. However, it appears plain from the pleadings and the order of the County Court above that DeKalb, Fenter, River, Davis and Merry Green townships in a body were all embraced in the one petition. For the convenience of the electors signing in each township, and in order that the County Court might readily determine whether the required twenty-five per cent in each of the townships had signed

the petition for that township, it was not improper that there be a separate space, page or pages allotted to each township as appears to have been done in this case, the first page, as above noted, being allotted to Davis township.

The statute provides "whenever twenty-five per cent of the qualified electors of three or more townships in a body in any county . . . shall petition the county court for the privilege to vote, etc., the county court shall make an order for such election in said townships, etc. Provided, that said petition shall have at least twenty-five per cent of the qualified electors of each of the respective townships."

Here, as we view the record, five townships in a body in Grant county filed petition on September 14, 1944. The court found that the petition contained twenty-five per cent of the qualified electors in these townships and ordered an election and made one order on the petition calling an election. Appellants make no contention that the electors who signed the petition did not represent twenty-five per cent of the qualified electors in each of the five townships. We think it clear, therefore, that the County Court's order was based on the petition of "three or more townships," in a body, instead of upon the petition of each township as a unit as appellants contend.

The case of *Fesler* v. *Eubanks*, 143 Ark. 465, 220 S. W. 457, strongly relied upon by appellants, is not controlling here. In that case, six townships in Greene county, by six separate and independent petitions, sought an order for an election. "The respective petitions limited the territory to be organized into a stock district to each township." Each of the six petitions was presented to the court separately on different days and an order made upon each petition. As above noted, but one order was made in the instant case which ordered an election in the five townships comprising the district selected by the petition of the qualified electors aforesaid. In the Fesler-Eubanks case, it is said: "The county court's authority is limited to granting the privilege to vote in the district selected by petition, or petitions, of the voters afore-

said." The fact that it appears that the vote in one of the townships herein, Davis, was against the formation of the stock law district, does not defeat it for the reason that it was the intention of the statute to permit a majority of the electors voting in the proposed district to control the creation and formation of the district thereof. We so held in *Sailer* v. *State,* 192 Ark. 514, 92 S. W. 2d 382. There we said: "It is obvious that it was the legislative intent to permit a majority of the electors voting in the proposed district—and not a subdivision thereof— to control the creation and organization of said proposed district."

We, therefore, hold that there has been a compliance with the provisions of § 335, *supra.*

2.

Section 337 of Pope's Digest provides: "If a majority of the legal voters voting for and against the provisions of this act shall vote at such election, whether general or special, for enforcing the law restraining the animals named in the petition from running at large, the clerk of the county court shall enter upon the court records the result of said election, and file the papers and returns thereof in his office, and shall immediately give notice of the results of said election by publishing the same in a weekly newspapers published in said county, and by causing notice thereof to be posted up in at least three public places in each township in said county," etc.

Here appellants alleged that appellee (clerk) "has attempted and will attempt to publish the results of such election if not restrained, etc." The statute, *supra,* required the clerk, since the vote was in favor of the stock law district, immediately to publish the result in a weekly newspaper in Grant county and by causing the notice thereof to be posted in "at least three public places in each township in said county." Appellants admit that appellee has attempted to publish the result of the vote. Just how or when this attempt was made, the record does not disclose. The burden was on appellants to show that the publication required by this section was not made and

this they failed to do. Appellee was not required to use both of the prescribed methods of publication, either was sufficient. We so held in *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92, wherein we said in construing § 337, *supra*: "We are of the opinion, . . ., that the statute with respect to the notice is merely directory and that substantial compliance with its terms is sufficient. While the direction is to publish the notice in two methods, the publication thereof by one of the methods prescribed is sufficient."

The decree of the trial court reflects, as above noted, that all issues were found in favor of appellee and appellants' petition for injunctive relief dismissed.

Finding no error, the decree is affirmed.

HYDROTEX INDUSTRIES *v.* FLOYD.

4-7832 192 S. W. 2d 759

Opinion delivered February 18, 1946.

Rehearing denied March 18, 1946.

W. C. Rodgers, for appellant.

Boyd Tackett, for appellee.

ROBINS, J. Appellants brought this suit against appellee to recover $488.90, the purchase price of two shipments of liquid roof coating sold and delivered by appellants to appellee. Appellee answered, denying generally all allegations of the complaint, and also set up a counterclaim for damages alleged to have been sustained by him on account of defective condition of the roofing material.

The case was tried to a jury, who returned a verdict, not allowing appellee any damages, but disallowing appellants' claim for purchase price of the roofing material. From judgment entered on this verdict appellants have appealed, and for reversal urge:

I. That under the contract of sale appellee was to apply the material and that the failure to stop the leaks was caused by improper method of application of the roofing material.

II. That there was no implied warranty of the fitness of the roofing material, because, (a) appellee had an opportunity to inspect the merchandise bought, and (b) that there was no evidence that appellants are manufacturers.

III. That the Act of the General Assembly of Arkansas (Uniform Sales Law, Act No. 428, approved March 31, 1941) is unconstitutional in that it impairs the obligation of the contract sued on by adding thereto, as a burden on appellants, the provision for implied warranty of fitness.

IV. That because there was an express warranty contained in the "bond" sent to appellee by appellants, appellee was limited to the relief afforded by the terms of this "bond."

V. That appellee is estopped from asserting any defense to appellants' cause of action by his conduct in placing a second order, for an increased amount of material, after the first shipment had proved ineffectual to stop the leaks.

VI. That since the agreement was formed by the acceptance by appellants at Dallas, Texas, of appellee's written order, it thereby became a Texas contract, subject to the laws of Texas; and that for this reason the Arkansas Uniform Sales Law, *supra,* and decisions of this court, did not apply in the interpretation and enforcement of the contract.

I.

Appellants' first ground for reversal, that the failure of the roofing material to stop the leaks in appellee's roof was caused by improper application made by appellee, may be disposed of by pointing out that there was no testimony to support any such contention. The only testimony adduced on this phase of the case was that of the workman, recommended by appellants' salesman, who applied the liquid coating. This workman testified that he was experienced in repairing roofs and that he properly applied the material in accordance with the directions sent along with it by appellants. His testimony was in no manner contradicted.

II.

As to appellants' contention that there could be no implied warranty of the fitness of the roofing material because appellee had an opportunity to inspect it before using it, it may be said that appellee testified that he knew nothing about such material and for that reason an inspection of it by him prior to its use would not have revealed its defective quality. Therefore there was no such opportunity of inspection as would prevent operation of an implied warranty of fitness. *S. F. Bowser & Co., Inc.,* v. *Kilgore,* 100 Ark. 17, 139 S. W. 541.

Appellants cannot consistently urge that it was not proved that they were manufacturers, because they introduced in evidence a letter written by them to appellee in which they stated in so many words that they were manufacturers of roofing material.

III.

It is unnecessary for us to discuss at length appellants' argument that the Uniform Sales Act (Act 428, approved March 31, 1941), is unconstitutional. If this Act should be held invalid, the common law rule as to implied warranty in force at the time of the passage of this Act might be invoked; and under this rule, as frequently announced by this court, where an article is sold by a manufacturer and there is no opportunity of inspection

before the purchase, the law implies a warranty that the article sold shall be reasonably fit for the purpose for which it is sold. *Main* v. *Dearing,* 73 Ark. 470, 84 S. W. 640; *Main* v. *El Dorado Dry Goods Company,* 83 Ark. 15, 102 S. W. 681; *Southern Produce Company* v. *Oteri,* 94 Ark. 318, 126 S. W. 1065. It may be said, however, that the Uniform Sales Act has been adopted by a majority of the states of the union, and in none of them, so far as we have been able to discover, has this Act been held to violate any constitutional provision. On the other hand, it has been held not to interfere with the right to contract. 46 Am. Jur. 198; *Kirby* v. *Gibson Refrigerator Company,* 274 Mich. 395, 264 N. W. 840, 103 A. L. R. 1343.

IV.

It is next contended by appellants that the sole remedy for appellee, in event the roofing material proved unsatisfactory, was provided under the terms of the "bond" sent along with the material by appellants, which "bond" provided that in event the roof coating should be applied according to printed instructions and thereafter the roof should fail to remain water-tight for a period of ten years appellants would furnish sufficient additional material to recoat the surface. One answer to this contention is that the written order, setting forth that it contained the entire contract, makes no reference whatever to this "bond." Since this "bond" was not a part of the contract of purchase it did not limit appellee's right to rely on an implied warranty of fitness.

Furthermore, the testimony shows that after the application of the original shipment of roof coating had proved ineffectual appellee did call upon appellants for more of the roofing material which, though properly applied, failed to prove water-tight.

In support of their contention that appellee was limited to the relief provided by the terms of the "bond," appellants cite the case of *Primrose Petroleum Co.* v. *Allen,* 219 N. C. 461, 14 S. E. 2d 402. While that case involved a contract similar to the one under consideration herein, the opinion recites that the "bond," or undertak-

ing on the part of the seller to furnish additional material if the first shipment proved ineffective, was a part of the original contract. As pointed out above, this was not true in the instant case. But in the *Primrose Petroleum Co.* case the trial court's instruction to the jury (whose finding against the buyer was sustained by the appellate court) that there was an implied warranty that the roofing material was "good for the purpose that liquid roofing is generally good for" was held proper.

V.

It cannot be said that appellee, by calling on appellants for additional material after the first lot proved worthless, thereby estopped himself from relying on the implied warranty. Such action on the part of appellee was in reality for the benefit of appellants, because it gave them another opportunity to furnish material reasonably fit for the purpose for which it was sold.

VI.

It is finally urged by appellants that the contract here involved was executed in Texas, that for that reason it must be construed in the light of the laws and decisions of that state, and that the Arkansas Uniform Sales Law, a portion of which was included in the charge to the jury by the lower court, has no application to the contract between appellants and appellee. Assuming, without deciding, that this was a Texas contract, no error prejudicial to appellants is shown by the record.

The undisputed testimony shows that appellee, a merchant in Nashville, Arkansas, desiring to repair the roof of his store building, consulted appellants' salesman, showed the salesman the roof, and told him to make out an order for the amount of proper material necessary to repair the roof; that the salesman did this and sent a mechanic from Texarkana to apply the material for appellee; that this man made application in the manner directed by appellants; that after application of one shipment failed to stop the leaks another lot was ordered and applied in the same manner and with like unsatisfactory

results; and that appellee was finally forced to tear off the roof and replace it entirely. This testimony was sufficient to show that the material was not reasonably fit for the purpose for which it was sold.

We have been referred by appellants to no decision of any Texas appellate court under which it is held that there is no implied warranty of fitness in the sale of personal property. On the contrary, under the Texas decisions, where the vendee purchases an article from the manufacturer for a specific purpose, the article not being present, the law implies a warranty that the article is reasonably fit for the purpose for which it was sold.

In the case of *Houk* v. *Berg,* 105 S. W. 1176 (Texas Court of Civil Appeals), the court quoted with approval this language from the case of *French* v. *Vining,* 102 Mass. 132, 3 Am. Rep. 440: "And it is perfectly well settled that there is an implied warranty, in regard to manufactured articles purchased for a particular use, which is made known to the vendor, that they are reasonably fit for the use for which they are purchased." To the same effect also is the holding in the cases of *Missouri, K. & T. Ry. Co. of Texas* v. *Interstate Chemical Co.* (Tex. Civil App.), 169 S. W. 1120; *El Paso & S. W. R. Co.* v. *Eichel & Weikel* (Texas Court of Civil Appeals), 130 S. W. 922; *Brantley* v. *Thomas,* 22 Tex. 270, 73 Am. Dec. 264.

Since the undisputed testimony showed that the roofing material sold by appellants to appellee was not reasonably fit for the purpose for which it was sold, there was breach of the implied warranty of fitness, whether the contract be construed under the Uniform Sales Act of Arkansas, or under the common law rule in force in this state prior to enactment of said Act, or under the law as declared by the courts of Texas.

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

JORDON *v.* MCCABE.

4-7825 192 S. W. 2d 538

Opinion delivered February 18, 1946.

[redacted]

H. J. Denton, for appellant.

Nat T. Dyer, for appellee.

ED. F. MCFADDIN, Justice. Appellee sued appellant for $300 in the circuit court. Appellant pleaded *res judicata;* and appeals to this court from a judgment adverse to that plea.

For convenience, we refer to the parties by name. On March 15, 1944, Jordon agreed to pay McCabe a balance of $300 in sixty days. The money was not paid, and on July 12, 1944, McCabe filed complaint in the justice of the peace court. Summons was served, returnable at 10:00 a. m. on July 24th. On the return day

McCabe appeared at 10:00 a. m., and announced that he desired to dismiss the action, so that he could refile the cause in the circuit court. The justice of the peace advised that the hearing would be delayed until 1:00 p. m. McCabe was to return at that time, but he was delayed about 30 minutes, and did not reappear before the justice of the peace until 1:30 p. m. In the meantime (at 1:00 p. m.) Jordon appeared, and—finding McCabe absent—moved to have the case dismissed for want of prosecution. The justice of the peace stated that he would enter a judgment dismissing the case, so Jordon left. Then at 1:30 p. m. McCabe returned, and assisted the justice of the peace in writing the judgment, which was entered and signed by the justice, and which—omitting previous portions—stated that the plaintiff's "case is dismissed without prejudice, at cost of plaintiff."

There were no further proceedings in the justice court, but on the same day (July 24, 1944) McCabe filed this present action against Jordon in the Marion Circuit Court for the $300 due as aforesaid. In the circuit court Jordon pleaded the dismissal in the justice of the peace court as *res judicata*; claiming that the justice of the peace judgment was to be entered as a dismissal "for want of prosecution" rather than "without prejudice," as the justice court record showed.

There were other issues in the trial in the circuit court, but at the conclusion of all the evidence each side asked for an instruced verdict and no other instruction. Thereupon the court directed a verdict for McCabe. On this appeal Jordon has waived all questions except the plea of *res judicata,* and relies most strongly on the case of *Browne-Hinton Wholesole Grocery Co.* v. *Grubbs,* 172 Ark. 796, 291 S. W. 65. In that case we held that when a cause of action was dismissed in a municipal court or justice of the peace court "for want of prosecution," and such dismissal was never set aside, then the said judgment of dismissal prevented the institution of another suit in the justice court on the same cause of action, unless § 6448 of Crawford & Moses' Digest (now § 8410, Pope's Digest) was followed. We there stated and decided the

question: "The only question for decision by this court is whether a plaintiff who files a suit before a justice of the peace, or a municipal court with the jurisdiction of a justice of the peace, such as the municipal court of Fort Smith, and suffers a dismissal of such suit for failure to prosecute, may refile or institute and prosecute another suit on the same cause of action and ignore § 6448 of Crawford & Moses' Digest. We hold that he cannot."

We hold that the Browne-Hinton case is not applicable to the case at bar. There is no occasion at this time for us to comment on the holding in the Browne-Hinton case, *supra,* as compared with the holding in such cases as *Jernigan* v. *Pfeifer Bros.,* 177 Ark. 145, 5 S. W. 2d 941, and *Floyd* v. *Skillern,* 121 Ark. 454, 181 S. W. 298, as to whether a dismissal for want of prosecution is the same as a voluntary nonsuit, because, quite independent of this question, there are two reasons why the Browne-Hinton case does not apply to the case at bar. We discuss these reasons.

I. *The Justice of the Peace Judgment in the Case at Bar Was a Dismissal "Without Prejudice" and not a Dismissal "For Want of Prosecution."* The justice of the peace introduced in evidence in the hearing in the circuit court the judgment he actually entered, and that judgment stated that the plaintiff's "cause is dismissed without prejudice, at cost of plaintiff." Section 8372 of Pope's Digest provides that all the proceedings prescribed for the circuit court "as far as the same are applicable and not herein changed, shall be pursued in justices' courts." Section 1485 of Pope's Digest provides "An action may be dismissed without prejudice to a future action: first, by the plaintiff before the final submission of the case . . ." We have repeatedly held that where the plaintiff dismisses his suit before final submission, then the order of dismissal is not *res judicata* in a subsequent suit involving the same parties and issues. *Baughman* v. *Overton,* 183 Ark. 561, 37 S. W. 2d 81. Therefore, since the record of the justice of the peace shows that the action was dismissed "without prejudice,"

and since such a dismissal is not *res judicata,* it follows that the trial court correctly instructed against Jordon.

II. *The Justice of the Peace Judgment as Introduced Could Not be Impeached Collaterally.* Jordon urges that the judgment as written by the justice of the peace was not the judgment that the justice had agreed to render; and that the judgment actually agreed to be rendered by the justice was a dismissal "for want of prosecution." On this question, the justice of the peace testified in the circuit court that at the time he rendered the judgment, it was his real and announced intention to dismiss the case before him in such a way that the cause could be refiled in the circuit court. Considerable evidence was heard in the circuit court as to the kind of judgment the parties understood would be entered in the justice court; but all of this evidence might have been held incompetent, since it constituted a collateral attack on the judgment as actually entered by the justice of the peace. In 35 C. J. 684, the rule is stated: "Where a justice has jurisdiction of the subject matter of an action and of the parties, his judgment is no more subject to collateral attack than the judgment of courts of general jurisdiction." This court specifically decided that point in *Carroll* v. *Waddell,* 180 Ark. 667, 22 S. W. 2d 395, and made reference to other cases.

That the oral testimony was an attempt to impeach the justice of the peace judgment as entered is clearly shown by the cases of *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, and *Brooks* v. *Baker,* 208 Ark. 654, 187 S. W. 2d 169. Jordon could not, in a collateral attack, offer evidence to vary the judgment of the justice of the peace as entered. If Jordon felt aggrieved because the justice of the peace judgment as entered was not what he understood the judgment to be, then he should have filed a motion in the justice of the peace court to correct the judgment by order *nunc pro tunc.* Such procedure was discussed in the case of *Brooks* v. *Baker, supra,* and also in the case of *Mitchell* v. *Federal Land Bank,* 206 Ark. 253, 174 S. W. 2d 671. Jordon failed to pursue that, or any other, proper remedy to reform the judgment to have

it comport with his understanding. The judgment of the justice of the peace dismissing the action "without prejudice" stands as the judgment of that court until it is set aside; and the testimony offered by Jordon in the circuit court constituted a collateral attack on that judgment.

It follows that the circuit court correctly denied the appellant's plea of *res judicata,* and the judgment of the circuit court is in all things affirmed.

BECKLEY-CARDY COMPANY, INC., *v.* WEST POINT SPECIAL SCHOOL DISTRICT NO. 3.

4-7835 192 S. W. 2d 540

Opinion delivered February 18, 1946.

Owen C. Pearce and *Culbert L. Pearce,* for appellant.

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

MILLWEE, J. Appellant, Beckley-Cardy Co., Inc., is a foreign corporation located in Chicago, Illinois, and engaged in the manufacture and sale of school furniture and supplies. Appellee, West Point Special School District, is a special school district in White county with a board of directors of five members. The district is divided by Little Red River, and two of the four schools operated by the district are located north of the river.

D. E. Norton, one of the five directors, resides north of the river and was authorized to make small purchases of supplies locally for use of the schools on the north side without consulting the other directors. In July, 1940, W. L. Grissom, the agent of appellant at Bald Knob, Arkansas, solicited an order from Norton in the amount of $300 for desks and other school fixtures. Norton declined to sign the order without consulting the other members of the board and accompanied Grissom to the home of Jess Ray, secretary of the board. Ray refused to approve the order, or sign a warrant without action thereon by the board of directors and invited Norton and Grissom to present the proposal at the next regular board meeting to be held the following Tuesday night.

Norton did not attend the board meeting. The other four directors were present at the meeting and Grissom presented the order which had been reduced to about one-half the amount of the original proposal. The board disapproved the amended order and authorized the school superintendent to ascertain the needs of the two schools north of the river, which resulted in the purchase of 17 desks in Jonesboro, and these were delivered to the two schools.

After the directors had declined approval of the order, Grissom again called on Norton and obtained his signature to an order for desks, seats and blackboards in

the amount of $147.98. The order was signed by Norton on condition that Grissom obtain the signature of at least one other director. Grissom failed to do this, and forwarded the order to appellant with only the signature of Norton thereon. The supplies were shipped to director Norton at Bald Knob in August, 1940. Upon arrival of the order, Norton obtained money with which to pay the freight bill from the Collison Co. in Bald Knob, where the district carried an account, and the company charged the amount of the freight to the district. Norton delivered and installed part of the supplies to the schools north of the river and part of them were stored in his barn. This delivery was made after Norton had assisted in installation of the 17 desks which were purchased by the district at Jonesboro.

Letters exchanged between the company and the superintendent of the schools, and the secretary of the board and the company, were introduced in evidence. Letters intended for Jess Ray, secretary of the board, were addressed to "Jim Ray," and according to the testimony of the board's secretary these letters did not reach him until on or about April 4, 1941, when he wrote the company requesting information about the order for supplies. In response to a letter furnishing such information, secretary Ray, on April 21, 1941, advised appellant that the board declined to pay for the order which it had turned down, and the company was advised that the supplies were still there if it wanted to return them. In reply to this letter, appellant indicated a refusal on its part to accept return of the merchandise, and urged the district to keep the property and reconsider its action in refusing payment therefor. Appellant continued to write letters to director Norton in June, July and August, 1941, urging him to persuade the district to reconsider its action and pay for the supplies.

Appellant instituted this action June 11, 1943, for recovery of the supply account and interest. The complaint alleged execution of the purchase order by Norton, delivery of the property and refusal of the district to pay the account. The following allegation is set out in the

complaint: "By receiving said articles and putting them to use before offering to rescind the contract and to return the articles so purchased, defendant waived any irregularities in the execution of the contract, if any, and ratified its terms." The answer of appellee contained a general denial and alleged repudiation of the unauthorized contract by other members of the board of directors as soon as they received knowledge of its execution and learned that the supplies had been delivered to the district. The cause was tried before the court, both parties waiving trial by a jury, resulting in a judgment for the district and dismissal of the complaint of the company. A cross-complaint filed by the district was also dismissed.

It is well settled in this state that all persons who deal with school officers are presumed to have knowledge of the extent of their powers to make the particular contract. *First National Bank of Waldron* v. *Whisenhunt,* 94 Ark. 583, 127 S. W. 968; *Arkansas National Bank* v. *School Dist. No. 99,* 152 Ark. 507, 238 S. W. 630; *Rural Special School Dist. No. 50* v. *First National Bank,* 173 Ark. 604, 292 S. W. 1012. By paragraph (K) of § 11535, Pope's Digest, as amended by Act 316 of 1939, school directors are empowered to purchase supplies necessary for the efficient operation of the schools. It is also provided in this section of the statute that, for rural schools such as appellee, said supplies should meet the approval of the county supervisor in price and merit. The directors, therefore, had the power to purchase the articles involved in the instant suit. The contract of purchase is not void to the extent that it is beyond the powers conferred on the directors and, therefore, incapable of ratification, as was held by this court in the case of *First National Bank* v. *Whisenhunt, supra.*

The contract of purchase was made by only one of the five directors, and not at a regular or special meeting of the board of directors, and was invalid. The pertinent question, therefore, is whether the district ratified the contract by use of the supplies prior to a repudiation of the contract in April, 1941. The burden was upon appellant to prove a ratification of the contract. The trial

court, by its action in dismissing the complaint, necessarily found against appellant on this issue. If there is substantial evidence supporting such finding, when the testimony is considered in the light most favorable to appellee, the judgment must be affirmed.

It is held generally that a ratification, to be effective, must be made by a party who had the power or authority to do the original act, and it must be made with knowledge of the material facts. 2 C. J. S. page 1072; *Western National Bank* v. *Armstrong,* 152 U. S. 346, 14 S. Ct. 572, 38 L. Ed. 470; Trusler, Essentials of School Law, p. 351. In 56 C. J., p. 516, § 587, it is said: "A school contract entered into without proper authority or in an informal manner, may be ratified by accepting and retaining the benefits of the contract with a full knowledge of all the facts; but in the absence of circumstances indicating an intention to ratify, ratification will not be implied from a temporary or necessary use of the property, particularly where the district has no knowledge of the unauthorized acts." See, also, annotation, L. R. A. 1915A, p. 1033. At page 1036 of the annotation, it is said: "Thus, the character of the contract, the situation of the property, and the circumstances, may be such as to authorize a public corporation to take possession of property purchased in its behalf under an invalid contract, without the act in any way raising a presumption that the right of possession was asserted under the contract, or that the corporation intended thereby to assume the burdens thereof. In such a case, taking possession of and using the property will not have the effect of ratifying the contract."

Applying these principles to the evidence in this case, the purchase contract could not be ratified by the acts of the lone director who made the invalid contract unless the board of directors, or at least a majority thereof, had knowledge of the unauthorized acts and acquiesced in the use of the property by the district with full knowledge of the facts. Director Norton executed the invalid order, received the supplies and placed a part of them in use in the schools near his residence. He was the only director residing in that part of the district, and there is no evi-

dence that he informed any of the other directors of his actions. Some time after a part of the articles ordered from appellant were placed in the two schools north of the river, the superintendent of the district and Jess Ray, secretary of the board, removed some of the desks to the two schools south of the river. It is insisted that the district waived any irregularity in the contract by these acts. Secretary Ray testified, however, that he was unaware of the invalid order, or that the desks removed were those shipped by appellant, at the time the removal was made. He also testified that he knew nothing about the supplies having been ordered or used until he received the letter which the company had sent to Jim Ray, and that he immediately wrote the company and offered return of the supplies which was refused.

Appellant relies on such cases as *Springfield Furniture Company* v. *School District No. 4 Faulkner County,* 67 Ark. 236, 54 S. W. 217; *A. H. Andrews Co.* v. *Delight Special School District,* 95 Ark. 26, 128 S. W. 361; *School District No. 47* v. *Goodwin,* 81 Ark. 143, 98 S. W. 696; and *Dell Special School District No. 23* v. *Johnson,* 129 Ark. 211, 195 S. W. 373. These cases hold that where a board of directors or their successors accept property or services under an unauthorized contract and use the property, or accept the services, with full knowledge of the contract so made, then ratification is complete. In *Springfield Furniture Co.* v. *School District No. 4 Faulkner County, supra,* the contract of purchase was made by two of the three directors of the district and the third director learned of the contract a week after it was made. In that case the court said: "It is shown, therefore, that all the directors knew of the contract, and that the desks had been received, and were being used, yet no action was had by the board to annul the contract and cancel the warrants for more than a year." In *A. H. Andrews Co.* v. *Delight Special School District, supra,* this court said: "Furthermore, the board of directors of the original district and its successors accepted the desks and had used them continuously since the purchase thereof with full knowledge

of the contract so made. They have thereby in effect fully ratified such contract."

In all the cases cited by appellant on the question the school directors, or municipal officers, had full knowledge of the unauthorized contract, and the property was used, or services performed, with such knowledge. The distinguishing feature between those cases and the case at bar is that, in this case, there was substantial evidence that a majority of the directors were unaware of the unauthorized contract and use of the property for several months, and the contract was immediately repudiated when the facts were ascertained. The board of directors being without knowledge of the invalid contract, and not having acquiesced therein, there was no ratification. The judgment of the circuit court, so holding, is accordingly affirmed.

SULLENBERGER *v.* O'LEE.

4-7831 192 S. W. 2d 543

Opinion delivered February 25, 1946.

L. B. Smead, for appellant.

Francis W. Wilson and *J. Bruce Streett,* for appellee.

HOLT, J. Appellee, Mrs. Tommie O'Lee, sued appellants, Ed Sullenberger and wife, to cancel a contract of sale and to rescind a subsequent deed to a house and lot in Camden, Arkansas, for return of the purchase price with interest from date of payment, and for alleged damages growing out of the transaction. She alleged in her complaint that she bought the property (describing it) for a cash consideration of $10,000; that in the contract of purchase and deed of conveyance, the property was erroneously described and failed to convey all the property which she purchased, and that this erroneous description was the result of "a mutual mistake of the parties or as a result of a mistake of plaintiff (appellee) induced by fraud and misrepresentation of the defendants (appellants), Sullenbergers." She further alleged that she had mortgaged the property to the First Federal Savings & Loan Association for $5,000, to secure part of the purchase money.

Appellants answered with a general denial. The Loan Association entered its appearance and adopted appellee's complaint.

Upon a trial, the court found "that the defendants (appellants), Ed Sullenberger and Ida Elizabeth Sullenberger, sold and the plaintiff (appellee), Mrs. Tommie O'Lee, bought what is known as the Sullenberger home place on Monroe Street in the city of Camden, Arkansas; that the boundaries of said home and the lot upon which it is located are clearly defined by established hedge row, sidewalk, driveway, and other boundary line marks, and that the legal description of the property included within these clearly defined boundaries is correctly set out in the complaint; that the property to which the defendants, Sullenberger, executed and delivered a deed to the plaintiff, Mrs. Tommie O'Lee, fails to convey the land which

the court finds these parties sold and bought; that the deed fails to describe approximately six and one-half feet off the north side of said lot as described in the complaint; that the defendants, Ed Sullenberger and Ida Elizabeth Sullenberger, have never owned any portion of lot 300, and all that part of said lot east of lot 301 is owned by the St. Louis Southwestern Railway Company and Berryman Henwood, trustee; that lot 301 extends from Monroe Street east only 110 feet; that the Sullenbergers could not convey title to approximately forty feet of the east part of the lot described in the complaint and that the distance from the rear of the house to the east end of lot 301, which is the west side of the railroad company's property, is only 22 feet.

"That the plaintiff, Mrs. Tommie O'Lee, is entitled to recision as against the defendants, Ed Sullenberger and Ida Elizabeth Sullenberger, because there has been a substantial failure of title and consideration from said defendants to the plaintiff; that plaintiff is entitled to a judgment against the defendants, Ed Sullenberger and Ida Elizabeth Sullenberger, and each of them, for ten thousand dollars, the purchase price paid by plaintiff, together with interest at six per cent. per annum from November 15, 1944, until paid and all costs of this action, and that said judgment should be fixed as a lien upon all of the right, title and interest of Ed Sullenberger and Ida Elizazbeth Sullenberger in and to the property described in the complaint; that the plaintiff, Mrs. Tommie O'Lee, is indebted to the First Federal Savings & Loan Association under a note secured by mortgage on the property involved and that the loan association should be subrogated to the extent of its debt under this judgment."

The court further found that appellee was not entitled to damages.

From a decree in accordance with these findings, this appeal is prosecuted.

There appears to be little, if any, dispute as to the material facts presented.

Mrs. O'Lee came from Knoxville, Tennessee, to Camden to purchase property suitable for a rooming house. Appellants showed her the property in question, which was known as the "Sullenberger Home Place" on Monroe Street. She at once became interested, and after appellants had pointed out to her the clearly defined boundaries of the property which included a three car garage and other valuable improvements, appellee agreed to purchase, a contract of sale was entered into by the parties and shortly thereafter, appellee paid the purchase price of $10,000 in cash and received a deed from appellants. A few days after the execution of the deed, appellants caused a survey to be made of the property by which it developed that they had conveyed substantially more property than they owned. The boundary lines, which appellants had pointed out to appellee as inclosing the property which they claimed to own, extended approximately 40 feet east of lot 301 owned by appellants, on to lot 300 owned by the St. Louis Southwestern Railway Company. The contract and deed described lot 301, which appellants owned, as extending in depth from Monroe Street east a distance of 124¼ feet, when as a matter of fact appellants' lot 301 extended from Monroe Street east a distance of only 110 feet. The deed, therefore, included 14¼ feet which appellants did not, and do not now, own and could not convey. The width of lot 301 as described in the deed appeared also to be short approximately 6½ feet. The garage and other improvements were on property which appellants did not own and could not convey.

Appellants' excuse for the erroneous description and conveyance was that they did not know where the boundary lines were.

In these circumstances, the law appears to be well settled. There were three remedies open to appellee, any one of which she might pursue. (1) . . . "Rescind the contract and by returning or offering to return the property purchased within a reasonable time entitle himself to recover whatever he had paid upon the contract." (2) . . . "retain the property and sue for the dam-

ages . . . sustained by reason of the false and fraudulent representations, and in this event the measure of his damages would be the difference between the real value of the property in its true condition and the price at which he purchased it." (3) Lastly, to avoid circuity of action and a multiplicity of suits, . . . plead such damages in an action for the purchase money and is entitled to have the same recouped from the price he agreed to pay. *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546; *Ft. Smith Lumber Co.* v. *Baker,* 123 Ark. 275, 185 S. W. 277; *Danielson et al.* v. *Skidmore et al.,* 125 Ark. 572, 189 S. W. 57. See, also, the more recent case of *First National Bank of Wynne* v. *Coffin,* 184 Ark. 396, 42 S. W. 2d 402, which is directly in point.

In the present case, appellee adopted the first remedy, *supra,* and brought suit to rescind. The only issue presented is whether the findings of fact made by the trial court are sustained by the evidence. The rule is well settled that findings of fact made by the court will not be disturbed on appeal unless against the preponderance of the testimony. Tested by this rule, we think the findings of the lower court amply supported by the evidence and should be upheld. Most, if not all, of the testimony shows that appellee was led by appellants to believe that she was buying the "Sullenberger Home Place" on Monroe Street, located upon property, the boundaries of which were clearly defined by an established hedge row, sidewalk, driveway, and other definite boundary line marks. Appellants attempted to convey more property than they owned either mistakenly or intentionally, and as a result the value of the property was materially and substantially less than that which appellants attempted to convey and which appellee was led to believe she was buying.

Appellants rely for reversal upon the case of *Hervey* v. *College of the Ozarks,* 196 Ark. 481, 118 S. W. 2d 576. That case is clearly distinguishable on facts. There, a suit was instituted to reform a deed to include additional property which the grantor owned and by mistake had failed to describe and include in the deed.

Having reached the conclusion that the findings of the trial court are not contrary to the preponderance of the testimony, the decree is accordingly affirmed.

CROWELL *v.* PARKS.

4-7811 193 S. W. 2d 483

Opinion delivered February 25, 1946.

Rehearing denied April 22, 1946.

Mark E. Woolsey, for appellant.

J. F. Quillin, for appellee.

McHANEY, J. Mrs. Anna B. Phillips died testate in Mena, Polk county, Arkansas, on November 30, 1944. Her will which was probated December 20, 1944, left all her property to appellant, including lot 51 in Highland Addition to Mena.

Appellee brought this action against appellant and the four heirs at law of Mrs. Phillips, William, Balfour

and Waldron Ker and Mrs. Lothrop M. Weld, who are nephews and a niece of the testatrix, in which he alleged that during the year 1937 he entered into an oral agreement with the testatrix by which she agreed to devise or convey to him, at her death, the fee simple title to said lot 51 in consideration of services rendered and to be rendered by him to her during the remainder of her lifetime, "said services consisting of the management of her business affairs, the running of errands, looking after her when she was ill, and such other personal services as might be necessary." He alleged that, although he had fully performed said contract, she had failed to perform by executing a will or deed conveying said property to him. He prayed that the title to said property be decreed and quieted in him, and that appellant be dispossessed thereof.

Appellant answered with a general denial, and particularly denied that appellee had any kind of contract with the testatrix or that he performed any kind of services for her for which he was not fully paid. Three of the heirs at law were served with summons, but neither of them answered. As to William Ker the court found that he is in the military service, was not served with summons and did not enter his appearance in the action. His rights, if any, are not herein adjudicated.

Trial resulted in a decree for appellee sustaining the alleged oral contract to convey to him said lot, and quieting and confirming the title thereto in him. This appeal followed.

It has long been the rule in this court that a valid oral contract to make a will or a deed to land may be made, but that the testimony to establish such a contract must be clear, cogent, satisfactory and convincing. One of the latest cases so holding is *Jensen* v. *Housley, Admr.,* 207 Ark. 742, 182 S. W. 2d 758, where a number of our former cases are cited. Among the cases so cited is *Kranz* v. *Kranz,* 203 Ark. 1147, 158 S. W. 2d 926, in which we said, "it is not sufficient that he establish it (the oral contract) by a preponderance of the testimony,

but that he must go further and establish the contract by evidence so clear, satisfactory and convincing as to be substantially beyond a reasonable doubt."

The parties here are not in disagreement about the rule, but only as to whether the evidence is sufficient to measure up to it. We agree with appellant that it does not and that the learned trial court erred in holding that it does.

Appellee is a clerk in a grocery store in Mena. As such he delivered groceries to the testatrix from his employer and perhaps from others. He got her mail at the post office and delivered that to her. He ran certain errands for her. He began doing this in 1937 and he says without any agreement until 1940, when she proposed to him that if he continued to look after her business and run her errands she would give him her property after her death; that he did continue to do so and accepted her proposal; that the errands he did for her increased after 1940, as she grew older; that during that time she gave him some books and paid him some money —at Christmas in 1939, $5, and $10 each at Christmas in 1941 and 1943. On cross-examination he was asked: "Q. What did you do besides running errands? A. That is all." He also said he cut some wood for her shortly before her death, but that appellant paid him for that after he asked her to, by check for $5.50.

Other witnesses testified to facts tending to corroborate appellee as to the services rendered by him and to statements made to them by her that she intended to leave the property to appellee, but no one testified that there was a contract or agreement between them to do so other than the appellee. On the other hand, a witness for appellant said that from April, 1937, to February, 1938, she lived in the cottage on testatrix's place and knew appellee was her grocery boy, but did not know of his performing other errands for her, but that testatrix told her about two or three years ago that she was paying appellee to get her mail, bring her groceries and other things for her, she said $10, but did not say whether it

was by the month or the year. A carpenter who did some work for testatrix shortly before her death, and was paid by her, testified she told him she was paying appellee $50 per year to look after the place. Another witness testified she told him she always paid appellee for what he did. In addition to this, the appellee admits she paid him certain amounts, from $20 to $25, but claims they were Christmas presents.

Considering the testimony for appellee alone, we think it very unsatisfactory and entirely insufficient under the rule stated to justify a decree for appellee in this case. In most of the cases, if not all of them, sustaining oral contracts to devise or convey lands upon performance of the consideration therefor, the plaintiffs have performed usually at sacrifices to themselves and performed services not easily compensated in money. For instance in our case of *Hinkle* v. *Hinkle,* 55 Ark. 583, 18 S. W. 1049, the plaintiff gave up his residence and employment in Louisville, Ky., moved to Van Buren, cared for his mother, managed the business, etc. See, also, *Fred* v. *Asbury,* 105 Ark. 494, 152 S. W. 155 and *Speck* v. *Dodson,* 178 Ark. 549, 11 S. W. 2d 456. In *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82, it was said that the evidence "clearly establishes the fact that plaintiff went to live with his uncle under an agreement that the latter was to convey the property to him in consideration of the care and attention to be bestowed during the latter's lifetime, and that plaintiff occupied the premises pursuant to that agreement and made substantial improvements," and further said, "In order to assume the obligations imposed upon him by the contract, he made an entire change in his surroundings and changed his occupation and place of residence." In the Speck-Dodson case, similar facts were shown relative to plaintiff's change of residence and occupation.

Here, there was no such change in appellee's residence and occupation. He continued in his old job of grocery clerk and delivery boy, and there was no change in the character of services rendered by him to the testatrix. Nor are the facts in the case of *Naylor* v. *Shelton,*

102 Ark. 30, 143 S. W. 117, Ann. Cas. 1914A, 394, cited and relied on by appellee, comparable to the facts here. There the father, Trundle, lived with his daughter, Mrs. Shelton, and agreed to convey certain property to her by will or deed effective at his death, in consideration that she and her husband would take care of him the rest of his life. He executed a will giving the property to her, but, a few months before his death, he got the will and destroyed it. Mrs. Shelton performed the contract by taking care of her father until his death.

We are, therefore, of the opinion that the evidence was insufficient under the clear and convincing rule to establish a contract to convey; and that the decree should be and is reversed and the cause remanded with directions to dismiss the complaint for want of equity.

PREWITT, TRUSTEE, *v.* CHAMBERS.

4-7804 194 S. W. 2d 186

Opinion delivered January 28, 1946.

Donham, Fulk & Mehaffy, U. A. Gentry and *Leffel Gentry*, for appellant.

McDaniel, Crow & Ward, for appellee.

McHaney, Justice. On October 28, 1941, appellants and appellee entered into a written mineral lease agreement whereby appellee leased to appellants 318 acres of land in Saline county for the purpose of mining bauxite ore, upon the terms therein set out, and in which appellee was designated as party of the first part, and Roy Prewitt, trustee, as party of the second part. Appellant Joe Hardin was not mentioned in the lease, but it is undisputed that he was the sole beneficial owner of the rights conveyed, paid all the consideration, and assumed all the obligations mentioned therein. It granted him the right to prospect and mine for bauxite ore, and other minerals, for a period of five years on the lands therein described, and as long thereafter as bauxite is found in paying quantities. It recited a consideration of $1 "and the covenants and undertakings hereinafter provided." It then reads as follows: "The party of the second part shall have the exclusive right, for a period of 12 months, from date hereof, to enter upon said land for the purpose of drilling or otherwise prospecting or testing for bauxite ore, or other minerals, and to do any necessary work for determining the existence of bauxite ore, or other miner-

als, on the surface or beneath the surface, during said 12 months period, and shall have the right to mine any and all of such ore found throughout the life of this lease, for which the party of the first part shall receive .50c per long ton (2,240 pounds) green ore weight, based on bills of lading, or other legal evidence of weight. Payments for such ores to be made to party of first part on or before the 15th day of each month for all ores taken and sold during the preceding month.

"Should the party of the second part desire, at the expiration of the 12 months period above set out, to proceed to mine said ores on royalty basis, as provided, then it shall have the right so to do by commencing to mine, and to mine continuously and to pay royalties of .50c per ton, as set out, which, in the aggregate, shall never be less than $3,000 per year. In lieu of royalties, should unavoidable conditions or circumstances prevent continuous mining, party of the second part agrees to pay party of the first part the sum of $3,000 per year as a minimum royalty and said sum is to be deducted from royalty due first party from the proceeds of tonnage royalty when and if mining is resumed.

"On July 1st of each year an account of all monthly royalties paid shall be rendered to party of first part, which total shall be not less than a minimum of $3,000, and the party of second part shall therefore pay an amount which will, together with royalties paid on monthly basis, equal not less than a minimum of $3,000 for the preceding year.

"In further consideration of payment by party of second part of $2,500, receipt of which is hereby acknowledged, said payment being in lieu of delayed royalties based on .50c per ton, said party of second part shall have the right to delay operations hereunder for a period of 12 months, and for like subsequent periods, from date hereof, and shall have credit for said payment, or payments, on first subsequent tonnage mined, otherwise said payment shall not affect terms of this lease."

Hardin began prospecting for ore on the lease and caused 10 holes to be drilled on one 40 acre tract, but found commercial bauxite in only one of them. At the end of one year, October 28, 1942, the parties disagreed as to the meaning of the lease agreement and certain correspondence between them was had. Appellee took the position that, to delay further operations for a year after October 28, 1942, appellant Hardin should pay an additional $2,500. The latter took the position that, under the last paragraph of the lease, as above quoted, he had the right to delay operations until October 28, 1943, and that the $2,500 already paid covered delay rental for that period, and so the parties could not agree as to what the lease meant.

On March 27, 1943, appellee served a written notice on appellants that the lease agreement had been forfeited and requested them to execute a release to same or otherwise satisfy the record of the lease, as provided by law.

Thereafter, on August 13, 1943, appellants brought this action, alleging that appellee, at the expiration of one year from the date of the lease, had repudiated same and refused further to comply with its terms, and that they elected to rescind same and were entitled to recover the $2,500 already paid. Appellee answered with a general denial and filed a cross-complaint alleging a breach of the lease by appellants and praying judgment for $5,000, two annual delay rentals, for failure of appellants to release same of record after notice so to do.

Trial resulted in a decree dismissing the complaint for want of equity and entering judgment for appellee on his cross-complaint against appellant Hardin only for $5,000, as a statutory penalty for failure to satisfy the record of said lease, and this appeal followed.

We do not undertake an analysis of the terms of the lease agreement above quoted. They speak quite ambiguously for themselves. That they are ambiguous seems to be admitted by both parties. Under date of November 5, 1942, Hardin wrote appellee a letter in which, after

quoting the last paragraph of the lease as above set out, he said: "I take the position that under the paragraph of the lease mentioned, I have the right to delay operations for a further 12-month period from October 28, 1942; that is, that I have the right to delay operation until October 28, 1943. I have been advised by counsel that this interpretation of the contract and of the paragraph mentioned is correct." We think this shows he was acting in good faith and on the advice of counsel, and that this interpretation of the lease was possible.

Our statutes, §§ 10505, 10506 and 10507 of Pope's Digest, relate to the satisfaction or release of oil, gas, or mineral leases of record. Section 10505 makes it the duty of the person holding such a lease, after forfeiting same by failure to pay any rental or to perform any condition in the lease imposed on the lessee, upon a prescribed notice to him by the lessor, to execute a release to the grantor, or otherwise satisfy the record as therein set out. By § 10506, the lessee's failure to satisfy such forfeited lease, after said notice, makes him liable to the lessor or owner in double damages in whatever sum the owner may sustain by reason theerof, "not less than two annual rentals as fixed by the original lease and all costs, including a reasonable attorney's fee to be fixed by the court." Section 10507 provides a method of cancellation of such lease by the lessor by marginal indorsement.

Section 10506 is highly penal, and the general rule, as stated in *K. C. S. Ry. Co.* v. *State,* 194 Ark. 80, 106 S. W. 2d 163, is "that a penal statute must be strictly construed and all questions of doubt resolved in favor of those from whom the penalty is sought." The general rule with reference to the recovery of the statutory penalty for failure of the mortgagee to satisfy the record of the mortgage on payment is stated in 41 C. J., p. 819, § 982, as follows: "While it has been said that the withholding of satisfaction of the mortgage in good faith is not a good defense, the better rule appears to be that, where there are honest, disputed, or doubtful questions,

defendant is not liable if his refusal is made in good faith;—." Cases from a number of other jurisdictions are cited to support the text. While we do not here have the question of a penalty for the failure to satisfy a mortgage, we think the same general principle should apply.

We think also that the facts here do not justify the imposition of the penalty provisions of said § 10506, especially in a court of equity, as here. Such courts do not favor penalties and forfeitures and should not enforce them except upon strict compliance with the statute. We do not think the statutes here involved were intended to apply to a lessee who, in good faith and under a reasonable construction of the lease, contends that his lease is not forfeited. Section 10505 makes it the duty of the owner of the lease to satisfy same only "upon forfeiting the rights to further prospect on such lands by failure to pay any rental or to perform any condition," etc. The only claim here is that Hardin failed to pay the rental that appellee claims was due from October 28, 1942, to October 28, 1943. Hardin claims just as strongly and with some reason that the $2,500 paid by him was to pay delay rental for that same period of time.

We conclude that the statute does not apply to the facts here involved, or that there was no forfeiture of the lease by Hardin by refusal or failure to pay rental within the meaning of said statutes.

Also it appears certain that a release executed by Hardin alone, or a satisfaction entered by him on the margin of the record would not have cleared the record title, for the reason that his name nowhere appeared in the lease. Roy Prewitt, trustee, was the lessee, a so-called "naked trustee," in whom the legal title vested and a conveyance by him would have passed the title. Section 1813, Pope's Digest.

The decree will be affirmed, insofar as it denied Hardin a recovery of the $2,500 paid by him, but will be reversed and the cause remanded with directions to dis-

miss the action for penalty on the cross-complaint and to cancel the lease in question. Costs of this appeal will be adjudged against appellee.

The Chief Justice and Mr. Justice McFaddin dissent as to the reversal.

Ed. F. McFaddin, Justice (dissenting). I dissent as to the reversal.

The majority holds that the lease was forfeited: yet fails to enforce the statute (§ 10505, *et seq.*, Pope's Digest), which requires a lessee to satisfy the lease of record, or be liable for the penalty. The statute is unambiguous. Courts should enforce the applicable statutes, rather than hold that the penalty is too severe.

The majority assigns three reasons for the refusal to enforce the statute. These are: (1) the statute is highly penal, and must be strictly construed; (2) the facts do not justify the imposition of the penalty; and (3) a release by Hardin would not have cleared the record. Let us examine these reasons:

(1) It is true that a statute allowing a penalty is in some instances to be strictly construed; but the rule is also well established, as stated in 59 C. J. 1119: "The rule of strict construction is relaxed in the interpretation of an act designed to declare and enforce a principle of public policy, and a penal statute enacted for the benefit of the public generally should receive a fair and reasonable construction." The statute here (§ 10505, *et seq.*, Pope's Digest) is Act 170 of the Acts of 1923, which strengthened an earlier act (Act 192 of 1921), in order that a landowner would not have his title clouded, and thereby be deprived of his ability to obtain a good lease contract when leasing was in progress. This Act 170 of 1923 declares a sound public policy for the benefit of the public generally. The statute provides for liquidated damages, rather than a penalty. The Legislature made the damages sufficiently large to give the public *full* protection against lease clouding. The act provides for liquidated damages—not a penalty, and should receive a

fair and reasonable construction, rather than a narrow and strict construction.

(2) It is no answer to this statute to say that the facts here presented do not justify the imposition of "the penalty." The statute is plain and unambiguous; the second section reads:

"*Damages for Failure to Release After Forfeiture and Notice*: Any owner of lands upon which a lease for the development of oil or gas, or other minerals has been given, and the lessee forfeits his rights at any time to further prospect for such minerals upon said lands, by reason of a failure to pay periodical rentals, or to perform other conditions that nullify the lease as to lessee's rights therein, may give written notice, served in the manner of a legal summons upon the lessee, demanding that said lessee execute and place on record a release which in effect will remove any cloud existing upon the title of such lands as provided in § 10505: and upon failure of said lessee to comply with said notice, he shall be liable to the lessor or owner of said lands in double damages in whatever sum the owner of such lands may sustain by reason of said cloud or incumbrances upon said lands, after thirty days from the service of said notice, not less than two annual rentals as fixed by the original lease and all costs, including a reasonable attorney's fee to be fixed by the court."

The appellant, Hardin, is clearly within the letter and the spirit of this statute, and I submit that the courts should enforce the applicable statute and award the damages fixed by the Legislature, rather than grant relief from the statute under some theory of "abhorring a penalty."

(3) Finally, the majority says that the release by Hardin would not have cleared Chambers' title of record. The answer to that contention is found in the facts. Hardin initiated this proceeding in the chancery court, claiming as lessee under the lease. He thus brought himself within the statute, and should have executed the re-

lease, or been subjected to the penalty. Hardin filed this suit on October 13, 1943, alleging, *inter alia,* "the said Roy Prewitt, trustee, was acting for the benefit of the plaintiff, Joe Hardin, and the said Joe Hardin is a beneficial owner of said lease and the real party in interest herein." In that complaint Hardin prayed that he recover $2,500 and interest. He made no offer to do equity. To that complaint Chambers filed an answer and cross-complaint, and in the cross-complaint Chambers said: "After it became obvious to the lessor that the lessees had abandoned and forfeited said lease agreement, the lessor attempted to procure a release from the lessees and on March 27, 1943, proper notice of forfeiture and a request for release was prepared and same placed in the hands of the sheriffs and served on Roy Prewitt, trustee, and Joe Hardin, by the sheriffs of their respective counties, as required by law."

Chambers prayed for the damages allowed by the statute, and Hardin filed answer to the cross-complaint denying every allegation. It is thus clear that Hardin by his complaint brought himself within the exact letter of the statute as lessee. I submit that this court should award damages according to the statute. Courts do well to apply the law as made by the Legislature, rather than to allow judicial process to become a means of escape from the plain letter of the law. I, therefore, respectfully dissent.

FAIRBANKS-MORSE & COMPANY *v.* TOW.

4-7817 192 S. W. 2d 545

Opinion delivered February 25, 1946.

Buzbee, Harrison & Wright, for appellant.

M. F. Elms and *W. A. Leach,* for appellee.

GRIFFIN SMITH, Chief Justice. Harvey Tow, employed by Fairbanks-Morse & Co., filed claim with Workmen's Compensation Commission alleging disability because of "arsenic poisoning and breathing silica dust [resulting from] the operation of a lathe." Other allegations were sufficient to require consideration of the claim under Act 319 of 1939.

An award of $2,000 was made on the ground that disability through inhalation of silica dust occurred June 26, 1943. The Commission's conclusions of law were that aggregate compensation payable an employee or dependent ". . . for disability and death from uncomplicated silicosis shall be limited to $500 as of the effective date of the Act (December 5, 1940), and increase thereafter at the rate of $50 per month until the limit of such benefits fixed in the Act is reached, and thereafter the total aggregate of such compensation and benefits shall be the total compensation and benefits otherwise provided [by § 14(b) (3) of Act 319]."

It was then said that, disability having occurred during June, 1943, the total sum due was $2,000. This result appears to have been arrived at by taking the 30 months following December, 1940, and including June, 1943, counting June as a whole month. This total of

thirty months was multiplied by $50, and to the $1,500 so ascertained was added to the item of $500 mentioned in the Act.

On Tow's cross-appeal Circuit Court affirmed the $2,000, but added $5,000 to the judgment, saying: "Compensation [is] payable according to § 13 of Act 319 . . . at the rate of $20 per week from . . . June 26, 1943. The accumulated payments . . . to this date, amounting to $2,117.10, shall be paid forthwith, and thereafter [payments shall be] at the rate of $20 per week so long as permanent disability shall continue or until the total award shall be paid in full if such disability should continue."

We dispose of the Company's first objection—that is, to the payment of *any* sum—by holding that a question of fact was presented for the Commission's determination. Section 14(d) (1) authorizes the Commission to appoint a Medical Board composed of three members, "who shall be qualified to diagnose and report on occupational diseases." Preceding the section authorizing creation of such a board, there are references to it and to its functions. The question before us is not whether the Legislative intent was to permit the Commission to appoint a permanent board, as distinguished from temporary boards composed of specialists who might be thought best qualified to diagnose a particular ailment or claim embraced within the list mentioned by the Act. There is no contention that the Board was not composed of competent men, although it is insisted that failure to make examinations, or take testimony considered by appellants as essential, prejudiced the result. The Medical Board made two reports: one August 14, 1944, stating the claimant was suffering from silicosis "and his impairment is permanent."

On review the Board (May 10, 1945) affirmed its former findings. It is now objected that the record does not affirmatively show that the Board made independent investigations. It is also contended that language in the testimony of physicians who gave evidence before the

Compensation Commission before the Medical Board acted does not justify the determination that Tow was afflicted with silicosis, hence the argument that a final opinion predicated upon a record devoid of the character of proof discussed should not be accepted. Section 14(a) (9) of Act 319 provides that an employer shall not be liable for any compensation ". . . unless such [occupational] disease shall be due to the nature of an employment in which the hazards of such disease actually exist, and are characteristic thereof and peculiar to the trade, occupation, process, or employment. . . ."

A judge, reading the Medical Board's report, might conclude that he would have handled the matter in a different way. At least the unpronounceable words employed would no doubt refer to possible obscurities of a legal character rather than of a medical nature; but the Board as such was authorized by the General Assembly, and it was appointed by the Commission. To a very considerable extent the methods it employs (unless expressly or by necessary implication set out by statute) must be those best suited to the immediate situation, or to the subject of inquiry. We must assume—and there is nothing in the record detracting from this assumption—that the Board considered Tow's case from all of the angles competent men so entrusted would be expected to adopt; and, since the matters it determines are essentially professional, and the legislative intent was to entrust fine distinctions to the Board's judgment, we cannot say that the evidence was deficient.

The next question is, Was Circuit Court's action in adding $5,000 to the Commission's award justified?

Under the heading, "Special Provisions Relating to Particular Diseases," Act 319, § 14(b) (3), compensation for uncomplicated silicosis is payable as provided by § 13 of the Act, ". . . provided that during a transitory period the aggregate compensation . . . shall be limited as follows: If disablement occurs . . . in the calendar month in which this section becomes effective, the total compensation and death benefits payable

shall not exceed $500. If disablement occurs . . . during the next calendar month, the total compensation and death benefits payable shall not exceed $550. Thereafter the total amount of the compensation and death benefits payable for disability and death shall increase at the rate of $50 per month, the aggregate payable in each case to be limited to the foregoing formula for the month in which disability occurs. . . . Such progressive increase in the limits to the aggregate compensation and benefits . . . shall continue until the limit upon such benefits fixed in the Workmen's Compensation Law is reached, and thereafter the total aggregate of such compensation and benefits shall be the total compensation and benefits otherwise provided in this section."

Appellee argues in support of the Circuit Court judgment for $7,000 that ". . . if we construe and define 'transitory period' as being that stage of silicosis wherein periods of disablement arise, and the period between the inception of the disease and total and permanent disablement, and if we construe 'If disablement occurs,' as if it were written 'if disablement occurs, and in case of no claim of prior disablement if death occurs' and limit the application of the formula to those cases only arising during a transitory period, where death has occurred, the proviso would take on some semblance of meaning and its application would not offend against the humane purpose of the Act."

What appears to have been in the legislative mind was that when the Act became effective many (or at least some) employees working under adverse conditions might be affected, or infected, with silicosis, but not to an extent discernible, or causing physical impairment. But the disease, being progressive, would, if the infection continued to prevail, assert itself within a few months, or a few years, depending upon the extent of exposure; hence it seems to have been thought proper to establish compensation of $500 as of the Act's effective date, with a "transitory" period—a status changing with the addition of $50 monthly to the amount payable in

compensation as time moved from December 5, 1940, and gradually supplemented the original item until disability occurs or a maximum of $7,000 compensation is reached. This construction relieved industry from paying compensation for certain indeterminate periods of time before the Act became a law, and during which silicosis was present in modified form, but had not reached a stage where diagnosis was possible, nor accompanied by conscious disability. Whatever the purpose may have been, it is certain that but $500 was payable December 5, 1940, and that the amount due claimant increased $50 per month thereafter.

The judgment of the Circuit Court increasing the award by $5,000 is reversed and the cause is remanded with directions that Circuit Court reinstate the Commission's award as limited by it.

STROUD *v.* CROW.

4-7834 192 S. W. 2d 548

Opinion delivered February 25, 1946.

Sam Robinson and *Thomas E. Downie,* for appellant.

Joe H. Schneider and *Wm. J. Kirby,* for appellee.

SMITH, J. A motion has been filed in this court by the Prosecuting Attorney of the Sixth Judicial District of Arkansas asking for the enforcement, in manner set forth in the motion, of a judgment rendered on January 15, 1940, by us in the case of *Stroud* v. *Crow,* 199 Ark. 814, 136 S. W. 2d 1025. Appellees have responded that the order, enforcement of which is asked in the motion, is essentially different from the order originally made by this court. This contention of appellees presents the issue to be decided by us.

Appellants, regular practicing physicians, acting on behalf of the Arkansas Medical Society, brought suit in the chancery court of Pulaski county to enjoin appellees, members of the State Board of Chiropractic Examiners, from granting licenses to practice chiropractic without requiring applicants for such licenses to present certificates of ability in the so-called "basic sciences" (anatomy, physiology, chemistry, bacteriology and pathology) issued by the State Board of Examiners in the basic sciences, in accordance with the provisions of the "Basic Sciences Act," §§ 10795 to 10814, inclusive, Pope's Digest. An injunction to prevent two named defendants, alleged to have been licensed by the Chiropractic Board without the presentation of the said certificate from the State Board of Examiners in basic sciences, from practicing chiropractic was also asked.

Decision of the chancery court in the original case was in favor of appellees. The representatives of the Medical Society prosecuted an appeal to this court, where it was held that the lower court had erred. The ordering part of the judgment of this court was as follows: "It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to grant the relief prayed, and for such further proceedings as may be necessary to be therein had according to the

principles of equity, and not inconsistent with the opinion herein delivered.''.

No mandate of this court was ever filed in the lower court.

The motion under consideration sets up that the effect of our former judgment is to prohibit the Chiropractic Board from issuing a license under any circumstances unless the applicant has a certificate of ability from the Basic Sciences Board. In the brief in support of the motion it is stated that it has been brought to the attention of the prosecuting attorney, who filed the motion, that the Arkansas State Board of Chiropractic Examiners, asserting authority to do so under the provisions of § 10778 of Pope's Digest, was issuing licenses to practice chiropractic in Arkansas by reciprocity to applicants licensed by other states, who had not obtained the certificate of ability from the Arkansas Basic Sciences Board. It is further stated in the prosecuting attorney's brief that because this practice had been followed under authority of an opinion by the Attorney General ''it is felt that rather than press criminal charges, the fairest procedure to follow is to ask this court to enforce its judgment'' (rendered on January 15, 1940).

In the motion we are asked to make an order by which the Arkansas State Board of Chiropractic Examiners and their successors in office would be ''enjoined from issuing licenses to practice chiropractic *by reciprocity or otherwise,* until a certificate from the State Board of Examiners in the Basic Sciences of this state, . . . has been issued to the applicant'' in accordance with the Basic Sciences Act. (Italics supplied.)

An examination of the pleadings and briefs and of the opinion of this court in the original proceeding discloses that the question of the right of the State Board of Chiropractic Examiners to grant licenses *by reciprocity* without the certificate from the Basic Sciences Board was not therein presented, argued or decided. The sole issue in the original proceeding was whether the law re-

quired an applicant desiring to take the examination for license to practice chiropractic to present a certificate of ability from the Basic Sciences Board. The question of the necessity of such a certificate, where a license was being granted under reciprocity, was not mentioned in any of the pleadings or briefs or in the opinion delivered by this court.

We are now asked, after lapse of the term at which our former judgment was rendered, to make a substantial change in this judgment by disposing of a question not presented or decided. In *Milsap* v. *Holland,* 186 Ark. 895, 56 S. W. 2d 578, it was held that the Supreme Court could not review or reform its opinion after lapse of the term in which it was handed down.

Furthermore, this is a court of appellate jurisdiction, and we do not decide issues not directly or indirectly presented in or decided by the trial court. "The constitution vests in this court only appellate and supervisory jurisdiction, and not original jurisdiction, in controversies between individuals." *May* v. *Ausley,* 103 Ark. 306, 146 S. W. 139; *Missouri Pacific Railroad Company* v. *J. W. Myers Commission Company,* 196 Ark. 976, 120 S. W. 2d 693.

The judgment of this court, despite the fact that no mandate was ever issued thereon, is nevertheless in force; *Robeson* v. *Kempner,* 189 Ark. 27, 70 S. W. 2d 39. The declarations of law as set forth in the opinion are binding on all persons affected; and nothing in this opinion should be construed as deciding the question as to whether the Chiropractic Board of Examiners, in issuing licenses by reciprocity, may dispense with the requirement of the certificate from the Basic Sciences Board. It is our conclusion however, that this question is not properly brought before us in the instant proceeding. Accordingly, the motion is denied.

COOK, COMMISSIONER OF REVENUES, *v.* WOFFORD, CHANCELLOR.

4-7879 192 S. W. 2d 550

Opinion delivered February 25, 1946.

R. S. Wilson, for appellant.

Daily & Woods, for appellee.

ROBINS, J. The Coca-Cola Bottling Company, hereinafter referred to as the Company, is a domestic corporation with its principal place of business in the city of Ft. Smith. Pursuant to the requirements of the 1929 income tax act (Act 118 of the Acts of 1929, p. 573 *et seq.*) the Company filed its income tax return for the year 1943, and paid the taxes shown to be due on said return. In 1945, the Commissioner of Revenues made an examination and audit of said return and on October 19, 1945, issued to the Company a deficiency letter setting up a deficiency of $4,974.59 in the payment of taxes due by the Company. This letter granted the Company 30 days from its date to file written protest and request for a hearing, and within the time allowed, to-wit, on October 23, 1945, the Company filed its written protest and requested a hearing, which was accorded and had on November 13, 1945, and on November 14th the Commissioner wrote the Company that its protest was disallowed. Within 30 days from the date of that letter, suit was brought in the Sebastian chancery court to review the action of the Commissioner. It was alleged that this action was taken pursuant to § 14055, Pope's Digest, which was enacted as § 32 of said Act 118, and that the Commissioner had erroneously set up the deficiency to satisfy which, he claims a lien upon the real and personal property of the Company.

It was conceded by the Company that through an unintentional error, there was a deficiency for the year 1943, of $1,240.96 which the Company tendered at the hearing had on November 13, 1945, and that tender, with accrued interest, was renewed, and the Company offered also, if the Commissioner required, to pay into the registry of the court the full amount of the deficiency claimed by the Commissioner, with accrued interest, the same to be held pending review by the court and the final determination of the case. Wherefore, it was prayed by the Company that the action of the Commissioner be reviewed.

The Commissioner filed a motion to dismiss the proceeding upon the ground that the chancery court of Se-

bastian county did not have the jurisdiction to hear it, and when that motion was overruled the Commissioner applied here for an order prohibiting the Sebastian chancery court from further proceeding, and states in his brief that the sole issue for our determination is, whether the Sebastian chancery court has jurisdiction to review the Commissioner's action herein recited. The decision of this question involves the construction of §§ 26, 31 and 32 of Act 118.

In imposing this additional tax assessment, the Commissioner proceeded under § 26 of Act 118, now appearing as § 14049, Pope's Digest, which section reads as follows:

"If the Commissioner discovers from the examination of the return or otherwise that the income of any taxpayer, or any portion thereof, has not been assessed, he may at any time within two (2) years after the time when the return was due assess the same and give notice to the taxpayer of such assessment, and such taxpayer shall thereupon have an opportunity, within thirty days, to confer with the Commissioner as to the proposed assessment.

"The limitation of two (2) years to the assessment of such tax or additional tax shall not apply to the assessment of additional taxes upon fraudulent returns. After the expiration of thirty days from such notification the Commissioner shall assess the income of such taxpayer or any portion thereof which he believes has not theretofore been assessed and shall give notice to the taxpayer so assessed, of the amount of the tax and interest and penalties, if any, and the amount thereof shall be due and payable within ten days from the date of such notice.

"The provisions of this Act with respect to revision and appeal shall apply to a tax assessed. No additional tax amounting to less than one dollar shall be assessed. *Ib.* § 26." This section was amended by § 4 of Act 140 of the Acts of 1939, to allow the Commissioner 3 years in which to make this examination and reassessment.

Section 31 of Act 118, now appearing as § 14054, Pope's Digest, reads as follows:

"A taxpayer may apply to the Commissioner for revision of the tax assessed against him, at any time within one year from the time of the filing of the return from the date of the notice of the assessment of any additional tax. The Commissioner shall grant a hearing thereon and if, upon such hearing, he shall determine that the tax is excessive or incorrect, he shall resettle the same accordingly and adjust the computation of the tax accordingly.

"The Commissioner shall notify the taxpayer of his determination and shall refund the taxpayer the amount, if any, paid in excess of the tax found by him to be due. *Ib.* § 31."

It is conceded that following the word "return" and preceding the word "from" in this § 31, the word "or" should be inserted, as having been omitted from the act as passed. This would be authorized and required even though the word "or" had not been omitted, to give the act its manifest and intelligent meaning. *State ex rel.* v. *Chicago Mill & Lbr. Corp.*, 184 Ark. 1011, 43 S. W. 2d 26.

Section 32 of Act 118, now appearing as § 14055, Pope's Digest, reads as follows:

"The determination of the Commissioner upon any application made by a taxpayer for revision of any tax, may be reviewed in any court of competent jurisdiction by a complaint filed by the taxpayer against the Commissioner in the county in which the taxpayer resides or has his principal place of business, within thirty days after notice by the Commissioner of his determination, given as provided in § 31 of this act. Thereupon appropriate proceedings shall be had and the relief, if any to which the taxpayer may be found entitled, may be granted, and any taxes, interest or penalties paid found by the court to be in excess of those legally assessed, shall be ordered refunded to the taxpayer, with interest from time of payment.

"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 collecting 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.

"In all cases in which any income taxes are now or shall be hereafter charged by the Commissioner against any person or corporation, and the Commissioner shall claim the payment of the taxes so charged, or shall take any steps or proceedings to collect same, the person against whom such taxes are charged, or against whom proceedings shall be taken, shall if he conceives the same to be illegal or unjust, pay the said taxes including the penalties notwithstanding under protest in writing such funds as the Commissioner shall be authorized to receive; and upon such payment being made, the Commissioner shall pay over the taxes and penalties if any, so collected into the State Treasury, giving notice at the time to the State Treasurer that the payment was made under protest, whereupon the State Treasurer shall credit all such receipt to a special fund entitled 'Income Tax Protest Funds.'

"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; and if it be determined in said action that such taxes and penalties, if any, were wrongfully or illegally collected for any reasons going to the merits, then the court before whom the case is tried shall certify that same were wrongfully collected and ought to be refunded, and thereupon the Commissioner shall issue his order to the State Treasurer to refund the said taxes and penalties, if any, to be repaid in conformity with the order of the

court, and in preference to other claims against the State Treasurer.

"There shall be no other remedy in any case of the illegal wrongful collection of income taxes or the attempt to collect same than that provided in this act. *Ib.* § 32."

It is the contention of the Commissioner that this legislation, when properly construed, confers upon the taxpayer only one remedy and method of obtaining redress, and that is, to pay the tax imposed, and thereafter bring suit in the Pulaski chancery court for its recovery, or for the recovery of so much thereof as was wrongfully assessed and paid, but that the taxpayer must first pay before he will be accorded any hearing or relief. On the other hand, the taxpayer insists that this is not his only remedy but that he has another remedy, provided he acts within the time and manner required by the act.

Unquestionably the third and fourth paragraphs of § 4, above quoted, give the taxpayer the remedy which the Commissioner says the taxpayer must pursue. If the taxpayer elects to rely upon this remedy, he is not required to ask a review of the assessment within 30 days after receipt of the notice of the Commissioner's final determination. He may, if he so elects, wait until the Commissioner has issued a warrant to the Sheriff in the nature of the execution, as authorized by § 27 of Act 118, and until a copy thereof has been filed by the Sheriff "with the clerk of the county" to have the effect of a judgment, and then pay the additional taxes to the Commissioner under protest, and thereafter, within 30 days, after such payment, bring suit in the Pulaski chancery court to recover the payment. When the payment under protest has been made, the Commissioner is required by § 32 of the act to ". . . pay over the taxes and penalties, if any, so collected into the state treasury, giving notice at the time to the State Treasurer that the payment was made under protest, whereupon the State Treasurer shall credit all such receipt to a special fund entitled 'Income Tax Protest Fund.' "

If the taxpayer has not otherwise proceeded, but has relied upon this remedy, he encounters the hazards, which we need not here discuss, of recovering money which he erroneously paid.

But we think the taxpayer has another remedy which is conferred by § 32, read in connection with § 26. Under § 32 the taxpayer has the right, after making application for a revision of the assessment of the taxes against him, and after the Commissioner has made his "determination" that the taxpayer is not entitled to the relief prayed, to have that determination reviewed in any court of competent jurisdiction, by a complaint filed in the county in which the taxpayer resides or has his principal place of business, but this he must do within 30 days after having been given notice of the Commissioner's determination.

The Commissioner insists, however, that these provisions apply only to the case of a taxpayer who claims he has paid too much taxes, and seeks to recover the excess. But we think this remedial provision may not be thus restricted as the act provides that "upon *any* application . . . for the revision of *any* taxes" suit to review the assessment may be brought, etc. Certainly here the taxpayer is asking for a revision of his taxes which the Commissioner seeks to collect.

It is not contended that the Company has not strictly and exactly complied with the provisions of §§ 26, 31 and 32 of Act 118, to secure a revision of its assessments, but it is contended that its suit offends against two of the provisions of § 32, of Act 118.

The first of these is that "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 re-

quired to pay the same, and thereupon shall have his remedy as hereinafter provided."

It may be answered that the Company has not sought to enjoin the Commissioner from any proceeding he is authorized by law to take, nor is there any attempt to defeat or delay the collection of any taxes with which the Company stands charged.

The Company offered to tender in the court the full amount of taxes which the Commissioner seeks to collect, and that money will be available to satisfy any demand the Commissioner may establish. But for this tender a different situation might exist, as it might have been contended and shown that but for the tender the collection of the taxes may have been defeated or delayed, in which event the court would have the power to make any necessary and appropriate order to prevent jeopardizing the collection of the taxes. It may be further said that the Company is not seeking to defeat or delay the collection of a tax with which it stands charged, as it will not be charged with any taxes, which it is legally required to pay, until its protest has been heard and reviewed in the manner provided by law.

The second provision of § 32, which it is contended this proceeding offends against, is that found in the last paragraph of that section reading as follows: "There shall be no other remedy in any case of the illegal or wrongful collection of income taxes or the attempt to collect same than that provided in this Act." But that is the question we are considering, whether the taxpayer is pursuing a remedy provided by the Act. We think he is, although the question may not be free from doubt, but in such cases where it is sought to impose and collect a tax, any existing doubt must be resolved in favor of the taxpayer. Among the numerous and latest cases so holding are: *McLeod, Com. of Rev.*, v. *Commercial Nat. Bank, Exec.*, 206 Ark. 1086, 178 S. W. 2d 496; *Moses, Exec.*, v. *McLeod, Com. of Rev.*, 207 Ark. 252, 180 S. W. 2d 110.

It follows from what we have said that the relief prayed by the Commissioner should not be granted and it is so ordered.

Chief Justice GRIFFIN SMITH dissents.

GAMMON *v.* MILLS.

4-7841 192 S. W. 2d 554

Opinion delivered February 25, 1946.

Botts & Botts, for appellant.

George E. Pike, for appellee.

MILLWEE, J. On January 3, 1930, Olivia L. Ticknor of Rockford, Illinois, through her representatives in this state, entered into a contract of sale with J. A. Gammon whereby she agreed to sell, and Gammon to buy, an 80 acre tract of land described as the north half of the northeast quarter of section 18, township 3 south, range 2 west, in the Southern District of Arkansas county. J. A. Gammon agreed to pay $1,600 for the land and executed nine notes of $150 each payable January 3, 1931 to 1939 inclusive, and one note of $250 due and payable January 3, 1940, each note bearing six per cent. interest from date. Under the terms of the contract a warranty deed was executed by Olivia L. Ticknor and her husband, Frank A.

Ticknor, which was deposited in escrow in the First National Bank of DeWitt, Arkansas. The deed recites that it was executed in accordance with the contract of sale, and that it was to be delivered by the bank upon payment of the purchase price. The deed also recites: "This deed being a 'purchase money mortgage' and the rights being hereby so retained by the seller."

Frank A. Ticknor died in April, 1932, and Olivia L. Ticknor died in June, 1937, leaving appellee Ruth Ticknor Mills, a daughter, as their only heir at law. J. A. Gammon died in February, 1932, without making any of the payments under the contract.

On June 10, 1941, appellee filed this suit in chancery court against the widow and heirs of J. A. Gammon alleging execution of the contract, notes and deed, and offer of performance of the contract on the part of Olivia L. Ticknor, prior to her death, and appellee thereafter. She also alleged that she had tendered the warranty deed to the heirs at law of J. A. Gammon and had made demand for payment of the amount due under the contract which was refused. Judgment was prayed for $2,697.87, the amount of the purchase money, and interest, alleged to be due, and for foreclosure of the lien against the lands.

Appellants, Luther Gammon and Earl Gammon, are the sons of J. A. Gammon and filed their separate answer in which they denied any knowledge of the contract and notes executed by their father, and admitted they had never performed any of the terms thereof. They further alleged that they were joint owners in fee simple of the lands by adverse possession for more than seven years prior to the filing of the suit and had made valuable improvements on the property. They asked that title to the property be quieted in them. The widow of J. A. Gammon filed her separate answer in which she alleged abandonment of the contract by the parties and surrender of the possession of the lands to the Ticknors in 1930. She also disclaimed any right or interest in the lands and admitted that no part of the alleged purchase price had been paid by her husband or his heirs. Answer was

also filed by two other children and heirs of J. A. Gammon, and a tenant who had been in possession of the lands for several years immediately prior to the filing of the suit.

The trial court found the issues in favor of appellee and a decree was entered May 21, 1945, ordering the foreclosure of a lien under the contract of sale in satisfaction of the unpaid purchase money, interest, and court costs. The court also found that the rents received by appellants, Luther Gammon and Earl Gammon, were offset by improvements made by them. A commissioner was appointed to conduct a sale and the clerk was directed to issue a writ of assistance to the purchaser at such sale. Appellants have appealed from this decree.

J. A. Gammon moved on the lands in controversy in January, 1930, when the contract and notes were executed. The drouth of that year resulted in a crop failure and in November or December, 1930, he moved with his family to another farm nearby where he resided until his death in February, 1932. The two sons, Luther and Earl Gammon, were members of his household at that time and moved with the family, Luther being 19 years of age, and Earl being 21 years of age. It is uncertain from the testimony whether the lands were occupied in 1931. In January, 1932, and prior to the death of their father, the two sons moved some household goods back to the lands in controversy and Luther "batched" there for a time. Taxes which J. A. Gammon had agreed to pay under his contract with the Ticknors became delinquent. On September 28, 1933, Luther Gammon redeemed the lands from the state for taxes for the years 1930, 1931 and 1932. Apparently the only interest which permitted his redemption of the lands at that time was his status as an heir of his deceased father and as agent for his father's estate. Earl testified that they thought they were getting a tax title to the property by redemption. He has resided with his mother on other lands owned by her since the death of his father. Luther Gammon moved to Nashville, Tennessee, in 1935 where he married and resided until his induction into the army in 1943. It is undisputed,

however, that they have been in possession of the property through their tenants since 1932. They have paid the taxes and collected the rents each year and have received the landlord's share of government parity payments.

The only question before the chancellor, and which it is necessary for us to consider on this appeal, is the nature of the possession of the appellants, Luther and Earl Gammon, and whether or not their holding of the lands for more than seven years was adverse and hostile to appellee and her parents. Unless the holding of the chancellor on this issue is against the preponderance of the evidence, the decree must be affirmed.

Several witnesses who had lived near the lands testified on behalf of the appellants that the Gammon boys moved on the property in 1931 or 1932, claimed the property as their own, and that the lands were generally known in the community as the Gammon boys' place. Earl Gammon testified that he and his brother went on the place in January, 1932, and that his brother "batched" in the house on the place until it was rented to a tenant in 1933. The place was in bad repair and they rebuilt the fence in places, covered the house and dug a well. While he testified that it was their plan to live on the property and that they claimed it as their own, he gave the following testimony on cross-examination: "Q. You didn't go on this place in January, 1932, for the purpose of defeating the rights of the people who sold to your father? A. No, sir. Q. You didn't have any intention of holding the property against these people who sold the place to your father, and you and Luther went on that property in 1932 for the purpose of getting it for yourselves against local people who might move in ahead of you? A. Well, yes, it was our intention to buy it from the state. Q. But your intention wasn't to defeat the rights of these people who had sold to your father? A. Well, no, we thought it sold for taxes."

At the time appellee was threatening institution of the present suit, she received certain letters from appel-

lant, Earl Gammon, two of which were attached to the deposition of appellee. In these letters Earl Gammon was apparently seeking information as to the nature of appellee's claim, and we quote from the letter of February 3, 1941, as follows: "I am writing you in regards to the property we are trying to get settled. We have no reason to try to take the place or cause you any extra expense. There has been three or four different parties that have tried to claim the place before now, and your lawyer hasn't furnished me enough information to convince me you are the right party. Until you do furnish me better evidence I cannot afford to sign the place over to Mr. Pike. Mrs. Mills, any information you can send me will be appreciated and it might save you extra expense."

While the statements in these letters may not be considered for the purpose of divesting a title that had already ripened by adverse possession, they may, nevertheless, be considered to show the character of possession prior to the lapse of time necessary to give title, and bear on the question whether the possession of the Gammon boys was in fact hostile. *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456; *Hutt* v. *Smith,* 118 Ark. 10, 175 S. W. 399; *DeWeese* v. *Logue,* 208 Ark. 79, 185 S. W. 2d 85; *Sloan* v. *Ayres, ante,* p. 119, 189 S. W. 2d 653.

Earl Gammon was living in the family household when he and his brother took possession of the place. At that time, he was over the age of 21 and his father knew of the occupation of the property by his sons. The effect of Earl's testimony is that he and his brother were not claiming an interest in the lands hostile to that of the Ticknors as late as September, 1933, when redemption of the property from delinquent taxes for 1930, 1931 and 1932 was effected. It is true, he testified that he and his brother were wholly ignorant of the contract between their father and the Ticknors, but the chancellor evidently did not consider such testimony as being undisputed in view of the interest of the witness as a party to the suit, the close family relationship, and other sur-

rounding circumstances. The letters written in July, 1940, and February, 1941, tend in some measure to corroborate his testimony to the effect that possession of the lands by the witness and his brother was permissive and not hostile to the title and interest of appellee, or her parents. There was also testimony by the widow of J. A. Gammon tending to show an abandonment or repudiation of the contract of sale by the Ticknors in consideration of the surrender of the premises by J. A. Gammon. However, the purchase money notes executed by J. A. Gammon were in Olivia Ticknor's possession at the time of her death in 1937, and have been held by appellee since. The other papers have remained with the bank at DeWitt, Arkansas, as escrow agent.

The chancellor found the evidence insufficient to show adverse possession of the lands by the sons of J. A. Gammon for the statutory period, and we are unwilling to say that his holding on this issue is contrary to a preponderance of the evidence. The decree is, therefore, affirmed.

O'KEEFE *v.* O'KEEFE.

4-7837 192 S. W. 2d 556

Opinion delivered February 25, 1946.

H. S. Grant, for appellant.

McFaddin, J. The question at issue in this appeal is whether appellant, Frank O'Keefe, proved a legal residence in the State of Arkansas.

On February 8, 1945, Frank O'Keefe filed this suit for divorce against Pearl O'Keefe; and the complaint contained legally sufficient allegations. The defendant was constructively summoned, but made no appearance. On June 27, 1945, evidence was heard in open court. Frank O'Keefe testified that the parties were married and separated in Pennsylvania; that he was living in Pennsylvania when he joined the armed forces of the United States; that, at the time of testifying, he was a private first class in the U. S. Marine Corps, and stationed at the Marine camp near Newport; that his duties were the maintenance of telephone lines at the Newport Air Base; that he was not required to sleep at the base, and that he maintained a room elsewhere. The witness answered the court's questions as follows: "Q. You are a member of the U. S. Army? A. The Marine Corps, sir. Q. Did you select Jackson county for your residence and place to train, or were you sent here? A. Well, sir, I was sent here, but after I got here I saw what kind of country it is, and I decided that after the war is over, if I am still here, I will just stay, and if I have been moved I will come back here and make my home and go into the cattle business. I intend to make this my permanent residence."

The only attempted corroboration of residence was the testimony of the tax assessor of Jackson county, who stated that just a few days prior to June 27, 1945, the date of the hearing, Frank O'Keefe had assessed a poll tax in Jackson county. The court observed that this occurred after the filing of the suit. Without any other evidence being offered on the question of the residence of the plaintiff, the trial court ruled that the plaintiff had not proved a legal residence in Arkansas. From that decree there is this appeal. We affirm the chancery court. Several points present themselves.

I. *Residence of Person in the Armed Forces.* We have several recent cases on the question of residence of one in the armed forces. Some of these cases are: *Kennedy* v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876, and *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502. There is an exhaustive annotation on "Domicile or Residence of Person in the Armed Forces" in 148 A. L. R. 1413. This annotation is supplemented in 157 A. L. R. 1462, where the intervening supplementary annotations are listed. In *Mohr* v. *Mohr, supra,* we said: "There are cases which hold that a person in the service of the United States may acquire residence in a state where he is in service sufficiently to invoke the jurisdiction of the courts of that state in divorce matters. Some of the more recent of such cases are *Gipson* v. *Gipson,* 151 Fla. 587, 10 So. 2d 82; *St. John* v. *St. John,* 291 Ky. 363, 163 S. W. 2d 820; *Hawkins* v. *Winstead,* (Idaho) 138 Pac. 2d 972. But in each of these cases there was something more than mere presence at a military post in the state. Without lengthening this opinion to analyze the holdings of other courts we hold that there must be overt acts sufficient to demonstrate a real and *bona fide* intent to acquire residence here before the State of Arkansas—as a silent third party to every divorce suit here—will allow its courts to be used as the haven of the transient and dissatisfied spouse."

It is legally possible for a person in the armed forces to acquire a residence in Arkansas, but it is a question of fact in each case.

II. *Proof of Residence Is Required.* But, even giving the plaintiff's testimony, as above referred to, its full force and effect, still the plaintiff did not sufficiently prove a legal residence in Arkansas for the time required under our statute. Section 4386 of Pope's Digest says, in part: "The plaintiff, to obtain a divorce, must prove, . . . in addition to a legal cause of divorce: . . . a residence in the state . . . . for two months next before the commencement of the action." The evidence in this case fails to show when the plaintiff came to Arkansas, so, even under his own testimony, he did not prove residence as required by the statute, *supra.*

III. *Proof of Residence Must Be Corroborated, the Same as Every Other Fact in a Divorce Case.* Section 4386, Pope's Digest, as quoted, *supra,* says that residence must be proved "in addition to a legal cause of divorce." Section 4385, Pope's Digest, says: "The statements of the complaint for a divorce shall not be taken as true because of the defendant's failure to answer, . . ."

In numerous cases, we have discussed the necessity of corroborative evidence in divorce actions. Some of these cases are: *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098; *Sisk* v. *Sisk,* 99 Ark. 94, 136 S. W. 987; *Johnson* v. *Johnson,* 122 Ark. 276, 182 S. W. 897; *Pryor* v. *Pryor,* 151 Ark. 150, 235 S. W. 419. In 19 C. J. 136, as well as in 27 C. J. S., Divorce, § 138, 736, the rule is stated in regard to proof of residence of plaintiff in a divorce action: ". . . as a rule the testimony of complainant, if controverted, will not be accepted as sufficient to establish residence, until it is corroborated." By force of §§ 4385-6 of Pope's Digest, all essential facts are considered as controverted in divorce actions, and it is therefore clear that proof of residence must be corroborated the same as any other essential fact.

In the case at bar there was no corroboration of plaintiff's claim of residence. The only proffered corroboration was the testimony of the tax assessor, which related to a poll tax assessment made a few days before

the trial. Certainly, such assessment did not tend to show that plaintiff had established a *bona fide* residence in Arkansas sixty days before February 8, 1945, the filing date of the cause. We might adopt as our own the language used by the California court in *Bragg* v. *Bragg,* 32 Cal. App. 2d 611, 90 Pac. 2d 329, where, in discussing the necessity of corroboration of residence, the court said: ". . . the testimony of the respondent as to his 'intentions' is without semblance of any corroboration either direct or circumstantial . . . Such proof of *bona fide* residence and corroboration thereof is necessary in proceedings of this nature."

The decree of the chancery court is, therefore, affirmed, but without prejudice to the plaintiff's right to file a new suit, if and when he establishes *bona fide* residence in Arkansas.

MARTIN *v.* GRAY.

4-7819 193 S. W. 2d 485

Opinion delivered March 4, 1946.

[redacted]

Scott Wood, for appellant.

C. T. Cotham, for appellee.

SMITH, J. Daniel C. Cole lived with his wife, Susie, in the city of Hot Springs for many years, and through his industry, and their frugality, had acquired valuable real estate in that city. Daniel died testate in 1931. By his will dated August 21, 1930, which was duly probated, he left his entire estate to Susie, his wife, who died testate in 1943.

No child, or descendant of a child, survived Susie, whose will was duly probated, and reads as follows:

"State of Arkansas,

"County of Garland.

"That I, Susie Cole, of the state and county aforesaid, being possessed of fair health, and of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

"First. I direct that all my just debts be paid. I bequeath to my daughter, Alice Bell, all of my personal estate of every nature and kind, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, to have to hold the same to her, the said Alice Bell, her heirs and assigns, to her and their use and behoof forever.

"Second. I devise to my said daughter Alice Bell, my residence, situated at No. 412 Pleasant Street, Hot Springs National Park, to have and to hold the same to her use and behoof forever, in the event the administrator do not find her then said property will to her to revert to sisters and brothers of myself and husbands.

"Third. I bequeath to Jennie Bolden the sum of ($1), one dollar only.

"Fourth. I devise the residue of my estate to my sisters and brothers and those of my deceased husband, D. C. Cole, respectively, to share and share alike, to have, to hold the same to their use and behoof forever.

(1)

"In testimony whereof, I hereunto set my hand and seal and publish and declare this instrument to be my last will and testament, in the presence of the witnesses hereto named, G. H. Green, attorney, and Jesse Jackson, who attest the same at my request this the 19th day of June, 1931.

her
"Susie X Cole
mark
"Testatrix."

CODICIL TO ABOVE WILL

"Whereas, I, Susie Cole, did on the 19th day of June, 1931, make my last will and testament, I do now by this writing add this codicil to my said will, to be taken as part thereof.

"Whereas, I made no appointment for an executrix to my will, I hereby appoint Laura J. Peakes executrix of this my last will and testament. She is to have charge in settling all my affairs, which I may have at the time of my decease, taking care of my funeral charges, as I have no other debts whatsoever, as I take care of my debts as soon as they are due. I do not owe anyone anything.

"IN WITNESS WHEREOF, I hereunto place my hand and seal, this fourth day of May, one thousand nine hundred and thirty-seven.

her
"Susie X Cole
mark

"Witness to mark
Allen Hotchkiss."

CODICIL TO THE ABOVE WILL

"Whereas, I, Susie Cole, did on the 19th day of June, 1931, make my last will and testament, I do now by this writing add this codicil to my said will to be taken as part thereof. I give and bequeath to my son-in-law, Clemmie Johnson, the husband of my daughter, Jessa Cole Johnson, who had died, my house at 416 Pleasant Street.

"IN WITNESS WHEREOF, I hereunto place my hand and seal this 10th day of April, one thousand nine hundred and forty-three.

(SEAL)

her
"Susie X Cole"
mark

This will and the codicils were duly attested.

When Susie made her will, she had two brothers and two sisters, all of whom died in her lifetime, but were survived by children. Daniel, her husband, had a brother, named Coleman, and a sister, named Millie Martin, who were alive at the time of Susie's death and still survive.

In August, 1944, Millie filed this suit against Coleman, her brother, and the heirs known, and unknown, of Susie, her sister-in-law, in which she alleged ownership of the entire estate of which Susie died possessed. She alleged that she was induced to leave the state of Georgia, where she and Daniel and Coleman, her brothers, had all been reared, to come to Hot Springs, by the promise of Susie that if she would do so, and live with Susie as her companion, Susie would, upon her death, leave her entire estate to her. Upon this allegation she prayed that the title to Susie's property be divested out of the devisees named in Susie's will and be vested in her, excepting a cottage, designated as No. 416 Pleasant Street, Hot Springs, Arkansas, which, by Susie's will, had been devised to Clemmie Johnson, who had married Susie's daughter who died in Susie's lifetime.

An answer was filed by Daniel's brother, Coleman, and numerous nephews and nieces of Susie, which denied that the alleged agreement had ever been made, or had

been performed, if made. They prayed the settlement of the estate, and the division thereof, and the nephews and nieces of Susie prayed that they be allotted the shares which their parents would have taken under Susie's will, had their parents survived Susie.

The court specifically found the fact to be that the testimony was insufficient to prove the agreement alleged, and further found that Susie had devised her property, with the exception of certain specific devises, not here involved, to a class, that class being the brothers and sisters of Daniel and Susie, and that only those members of that class who survived Susie, to-wit: Millie, herself, and Daniel's brother, Coleman, took any interest in the property under the will. By an appeal and cross-appeal, the correctness of both these findings is questioned.

The principal question in the case is, of course, the one of fact, whether Millie had a contract with Susie, whereby Susie agreed to devise her estate to Millie, and if so, whether Millie had so far performed the obligations inducing the contract as to require its enforcement.

Millie's testimony was to the following effect: She was living in Commerce, Georgia, when her brother, Daniel, died. But Daniel had written her before his death that she could come to Hot Springs and live with him and his wife, but she did not accept the invitation. She testified that she received three letters from Susie, the first of which she had lost. Another letter contained in an envelope postmarked August 10, 1933, reads as follows: "July 8, 1933. Dear Sister Millie. I received your letter and was glad to hear from you. Now if you can't come now it is no use to come at all. If you can't come before August, don't come. If you can't come see what I got for you now, you won't get nothing. I made you good offer. Anyone would accept it. There are others who want it." Evidently this letter refers to a prior letter on the same subject, but it does not state what the offer was, except that it was a good one which anyone would accept, and which others would accept.

The correspondence between Millie and Susie was conducted by others for them, as neither could read or write.

In reply to this letter Millie wrote that she could not come at that time, but would let her (Susie) know whether she would come later, and advised that if she came she would need money to pay the expenses of her journey to Hot Springs. In response to this letter Susie sent Millie money for the trip. Millie further testified that when she arrived in Hot Springs, Susie showed her the houses and lots which she owned in Hot Springs, and promised that they would all be Millie's if she remained with Susie until she died, and that in consideration of this promise she lived in the house with Susie and became her nurse and attendant, and in addition did the scrubbing and sweeping and that she was paid nothing for these services. Several witnesses gave testimony in corroboration, consisting principally of remarks by Susie to the effect that she intended for Millie to have her property when she died.

But there was much testimony tending to contradict, consisting in particular of statements made by Susie to the effect that she wanted and expected her kinfolks to have what she left. Testimony of one Cecelia Metayer is strongly adverse to the existence of the agreement upon which Millie relies.

This witness was a professional nurse, who had lived in the house with Susie, and for many years lived within a half block of her. It was this witness who wrote for Susie the letter which Millie received. She testified that when Susie was sick she attended her as a nurse, and that she performed many services for her, and that Susie had no other nurse. This witness testified as to the first letter written to Millie, which Millie had lost, which she wrote for Susie, which stated in substance, "if you will come here and stay with me, as I am all alone, I have five brick houses and I got all the money I need, and you can live with me and spend my money." She testified that Millie lived in the house with Susie, but that Millie did work for witness and other people; that both Susie and Millie kept house and each did their own

cooking and that in speaking of her property she had heard Susie say, "the only ones I would give it to would be my sisters and brothers and their children. They can have it."

Unquestionably Millie performed many services about the house for Susie, but so also did other members of Susie's family, notably a great niece named Mattie Gray, who testified that upon Susie's promise that she should have a home as long as she lived, she came from her home in Chicago, and lived with Susie for about two years, and that "Millie was doing laundry work for other people in the house and outside, washing and ironing, and I would clean up and wait on aunt Susie and help Millie, too," and that Susie paid her nothing for her services except her room and board.

No useful purpose would be served by reciting the testimony of several witnesses for or against Millie's claim, and it must suffice to say that we concur in the finding of the chancellor that the testimony to support Millie's claim does not meet the requirement of the law, which, as learned counsel representing Susie concedes, must be so clear as to be substantially beyond doubt. The law of the case is reviewed and restated in our opinion in the case of *Crowell* v. *Parks, ante,* p. 803, 193 S. W. 2d 483.

Any doubt which we might otherwise entertain about the insufficiency of the testimony is removed when we recall that Susie's will was written before Millie came to Hot Springs, and, except for two codicils, remained unchanged at the time of her death. These codicils, which are copied above, are themselves highly significant, as both were executed after Millie came to Hot Springs, in the first of which she named a woman other than Millie as her executrix, and in the second she devised a portion of her property to another person, although Millie testified that she came to Hot Springs pursuant to an agreement that she would have all of Susie's property by performing the conditions of the agreement which she testified she had done. Millie testified that this second codicil was executed with her consent.

Of course, if there was such an agreement and Millie had performed the obligations thereof, which formed the consideration therefor, her right to its enforcement would not be defeated by any will which Susie had made or might make, as this would be a fraud in derogation of a contractual right, but the testimony does not leave the impression that any fraud was practiced, and it falls far short of convincing us beyond substantial doubt that this was done.

It is not questioned that an agreement to will property in consideration of a service rendered is valid and binding, even when the agreement is oral and relates to real property. *Speck* v. *Dodson,* 178 Ark. 549, 11 S. W. 2d 456. But we find the testimony insufficient to support the contention that there was such an agreement.

The cross-appeal questions the finding of the chancellor that the fourth paragraph of Susie's will, which covers the property here in litigation, was a devise to a class, and that only those members of the class who survived Susie would take under its provisions, the insistence being that the nephews and nieces, the heirs at law of deceased brothers and sisters of Susie, take the share the ancestors would have taken had these ancestors survived Susie. It may first be said that the will devises to a class, and the law is that the membership of this class is to be determined as of the date on which the will became effective, that is, the date of the testator's death.

At § 127 of the chapter on Wills, 69 C. J. 249, it is said that: "Under the rule prevailing in the greater number of jurisdictions, the individuals composing the class are ordinarily ascertained at the time when the devise takes effect or vests and the gift is to those then in being." This statement comports with our holding in the case of *Morris* v. *Lynn,* 201 Ark. 310, 144 S. W. 2d 472. Annotated cases appearing in 49 A. L. R. 174; 30 A. L. R. 916; 20 A. L. R. 356; 13 A. L. R. 615, cite many cases which support the chancellor's finding.

The decree is correct and is affirmed.

4-7842 192 S. W. 2d 762

Opinion delivered March 4, 1946.

Fred A. Snodgress, for appellant.

Chas. A. Walls, Jr., for appellee.

HOLT, J. This is an action of unlawful detainer brought by appellees for possession of a 160-acre farm in Pulaski county, and for damages. The facts appear to be undisputed.

Appellants, by oral contract, rented the farm in question from C. A. Woosley and Paul M. Leird, the then owners, for the year 1944 for a cash rental, payable monthly, at the rate of $15 per month. They took possession in January, 1944, and occupied and farmed the land throughout that year. On December 20, 1944, Woosley and Leird sold the farm to appellees. Appellants had no knowledge of this sale or of an intended sale until

after its consummation. On December 28th, appellees demanded possession which appellants refused.

September 29, 1944, Mrs. Clements, at the instance of her husband, wrote Mr. C. A. Woosley: "Jacksonville, Ark., Sept. 29, 1944, Mr. C. A. Woosley: I am sending you the rent for Oct. and would like to rent the farm another year as Arthur is away and I don't have much way looking for a place. Please let me know about it soon. Yours truly, (Signed) Mrs. A. L. Clements." Mr. Woosley's answer of October 7th is as follows: "Little Rock, Arkansas, 7, October, 1944, Mrs. A. L. Clements, Jacksonville, Arkansas. Dear Mrs. Clements: This will acknowledge receipt of your letter dated 29th September enclosing $15 covering rent for month of October. In so far as we know, it will be satisfactory for you to rent the farm for another year. Thank you for remittance as above acknowledged. Yours very truly, (Signed) C. A. Woosley."

Appellants continued to occupy the farm and appellee, Fuller, accepted $15 as rental for the month of January, 1945, and on the 17th day of February thereafter served written notice on appellants demanding possession, which appellants refused.

The present suit was filed March 2, 1945. Appellees executed the required bond and appellants retained possession by filing a cross-bond.

Upon a trial, May 18, 1945, at the close of all the testimony, each side asked only for an instructed verdict, whereupon the court directed a verdict in favor of appellees, Marshall Fuller and wife, for possession and for damages in the amount of $60. This appeal followed.

We think the letters and the undisputed oral evidence, not in conflict, but in explanation thereof, constituted an enforceable contract between appellants as lessees and Woosley and Leird as lessors and owners of the farm at the time the letters were exchanged and that the court erred in not so holding. It was the duty of the trial court to construe the unambiguous contract and declare its terms. *Radford & Guise* v. *Practical Premium*

Company, 125 Ark. 199, 188 S. W. 562, and *Mann* v. *Urquhart,* 89 Ark. 239, 116 S. W. 219.

Under its terms, appellants, who were on the farm under an oral lease for the year 1944 at a cash, monthly rental of $15, wrote the then owners, enclosing $15 for the October rental, that they "would like to rent the farm another year." The answer, *supra,* of the owners acknowledging receipt of the $15 contained the statement "in so far as we know, it will be satisfactory for you to rent the farm for another year." Woosley testified that he and Leird intended when they wrote the letter, *supra,* for appellants to have the farm for 1945. We think, in the circumstances, these letters contained the necessary requisites of a binding contract for the year 1945, at the same rental of $15 cash each month, as for the previous year. At the time the letters were written, it is not contended that the owners had any prospect for a sale of the farm and appellants had no knowledge of their intention to sell. Appellants were in actual, visible possession, which was notice to appellees, the purchasers from appellants' lessors, of their (appellants') claim to possession.

The sale of the farm by Woosley and Leird to appellees was subject to appellants' rights under this lease contract.

In *Prince* v. *Alford,* 173 Ark. 633, 293 S. W. 36, this court said: "It is a general rule that the possession of a tenant is notice to a purchaser of the reversion of the actual interest of the tenant. . . . The syllabus in the case of *First National Bank of Paris* v. *Gray,* 168 Ark. 12, 268 S. W. 616, is as follows: 'The possession of a tenant or lessee is not only notice as against a subsequent mortgagee of all his rights and interest connected with or growing out of the tenancy or lease, but is also notice of all interests he may have acquired through subsequent or collateral agreements,' " and in an earlier case, *Hughes Brothers* v. *Redus,* 90 Ark. 149, 118 S. W. 414, it is said: "Because the defendant was in the actual and visible possession of the property when plaintiff purchased, if it did not seek the defendant to learn the nature of his claim and title, the law makes the plaintiff take

notice of that title. *Hamilton* v. *Fowlkes,* 16 Ark. 340; *Shinn* v. *Taylor,* 28 Ark. 523; *Rockafellow* v. *Oliver,* 41 Ark. 169; *Atkinson* v. *Ward,* 47 Ark. 533, 2 S. W. 77; *Strauss* v. *White,* 66 Ark. 167, 51 S. W. 64; *Thalheimer* v. *Lockert,* 76 Ark. 25, 88 S. W. 591; *Sproull* v. *Miles,* 82 Ark. 455, 102 S. W. 204."

We conclude, therefore, that the trial court erred in denying the appellants' request for a directed verdict in their favor, and accordingly the judgment is reversed and the cause remanded with directions to enter a judgment consistent with this opinion.

CHANDLER *v.* FURLOW.

4-7833 192 S. W. 2d 764

Opinion delivered March 4, 1946.

O. E. Williams, for appellant.

Wilson & Starbird, for appellee.

McFadden, J. This appeal questions the discretion exercised by the chancery court in dismissing the plaintiff's complaint for unreasonable delay. The appellant was the plaintiff below; and the appellee was the defendant below. We refer to the parties as plaintiff and defendant.

The dates are important for a full consideration:

(1) On December 17, 1943, plaintiff filed his suit in the chancery court to cancel a tax deed based on a tax sale for 1933 taxes.

(2) On February 3, 1944, summons was issued on the said complaint, and was served the next day.

(3) On February 15, 1944, plaintiff filed an amendment to the complaint.

(4) On March 23, 1944, defendant filed a motion to require the plaintiff to make the complaint and the amendment more definite and certain.

(5) On June 30, 1944, plaintiff filed his response to the motion to make more specific.

(6) On February 5, 1945, the court sustained the defendant's motion to make more definite and certain, and allowed the plaintiff ten days to file an amended complaint.

(7) On March 22, 1945 (one month and seven days after the ten days allowed), the plaintiff filed a second "response to motion to make more specific."

(8) On March 30, 1945, the court ruled that the response of March 22, 1945, did not make the plaintiff's pleadings sufficiently definite and certain, and allowed the plaintiff "until April 10, 1945, to file final amended complaint."

(9) On May 7, 1945, (twenty-seven days after the time limit of April 10, 1945) plaintiff attempted to file

his "amended complaint in equity"; but on May 7, 1945, the chancery court struck from the files the plaintiff's pleading filed that day, and dismissed the plaintiff's suit. This order reads in part as follows:

". . . the court having considered the whole record, doth find:

"That this cause was filed on the 17th day of December, 1943; that defendant filed a motion to require the plaintiff to make his complaint more definite and certain; that two amendments and an amended complaint have been filed; that on the 30th day of March, 1945, plaintiff was allowed until April 10, 1945, to file a final amended complaint; that said order was not complied with; that plaintiff now files on this date an amended complaint, without offering any reason for failure to comply with the previous order of the court; that . . . the defendant has been diligent in urging that this cause be brought to proper issue, and that the plaintiff has failed to exercise diligence in complying with the orders of the court.

"It is, therefore, by the court considered, ordered, adjudged, and decreed that plaintiff's complaint be dismissed for the reasons herein stated, and that defendant have judgment against the plaintiff for all her costs herein laid out and expended; to which findings and order of the court, the plaintiff excepts."

(10) On November 2, 1945, the plaintiff filed his appeal in this court, and seeks to reverse the said order of the chancery court of May 7, 1945.

We hold that the chancery court acted within its power, and we cannot say that there was any abuse of discretion, in dismissing the case, which had been pending one year, four months, and twenty days when the court made the order of dismissal. The plaintiff had twice delayed past the time allowed by the court for filing pleadings. Section 1485 of Pope's Digest provides:

"An action may be dismissed without prejudice to a future action:

"Fifth: By the court for disobedience by the plaintiff of an order concerning the proceedings in the action."

As early as *Trapnall* v. *Craig* (1857), 19 Ark. 243, this court upheld the power of the trial court to dismiss a cause where the plaintiff failed to comply with the order of the court. In *Thompson* v. *Foote,* 199 Ark. 474, 134 S. W. 2d 11, in passing on the question of whether the chancery court had abused its discretion in dismissing a case because of the lack of diligence on the part of the plaintiff, we quoted with approval from 17 Am. Juris. 88, as follows: "As a general rule, an action may be dismissed or a non-suit granted because of the plaintiff's failure to prosecute it diligently. The power of the courts to dismiss a case because of failure to prosecute with due diligence is said to be inherent and independent of any statute or rule of court."

In *Thompson* v. *Foote, supra,* Mr. Justice MEHAFFY, speaking for the court, quoted from *Chalkley* v. *Henley,* 178 Ark. 635, 12 S. W. 2d 18: " 'An order dismissing a case for want of prosecution, . . . will not be reversed by the Supreme Court unless there is a manifest abuse of discretion.' " See, also, *Ball* v. *Ball,* 193 Ark. 606, 101 S. W. 2d 431. In the case at bar, no explanation was offered by the plaintiff as to why he did not file his amended complaint by April 10, 1945—the date fixed by the court. In the record before us, no explanation of any kind appears for any delay. The language of this court in *Trapnall* v. *Craig, supra,* is apropos:

"We are bound to presume in favor of the correctness of the judgment of the court below, unless the plaintiff, . . . had put such facts upon the record as to make it appear that the court had erred."

Plaintiff argues, here, that his pleadings on file on March 30, 1945, were sufficiently definite, and that the chancery court was, therefore, in error in the order of March 30, 1945, in holding his pleadings insufficient. That argument is without merit because the plaintiff attempted to plead over (by his pleading of May 7, 1945), and he thereby waived his right to test the correctness of the order of March 30, 1945. Some cases involving the

effect of waiver by pleading over are: *Farmers' Exchange* v. *Drake,* 171 Ark. 1127, 287 S. W. 371; *Hite* v. *Kendall,* 2 Ark. 338; *Harrell* v. *Tenant,* 30 Ark. 684.

There is not before us at this time the question whether the plaintiff may file a new suit on his original cause of action, relying on such cases as *Floyd* v. *Skillern,* 121 Ark. 454, 181 S. W. 298, and *Jernigan* v. *Pfeifer Bros.,* 177 Ark. 145, 5 S. W. 2d 941.

We are concerned here *solely* with the question whether the chancery court abused its discretion in dismissing the plaintiff's complaint for lack of diligence, and for failure to comply with the order of the court. We find no abuse of discretion, and the order of dismissal is, therefore, affirmed.

TUCKER *v.* STEWART.

4-7781 192 S. W. 2d 766

Substituted opinion delivered March 4, 1946.

Jay M. Rowland, for appellant.

Murphy & Wood, for appellee.

McFaddin, J. This is the second appeal in this case. See *Stewart* v. *Tucker,* 208 Ark. 612, 188 S. W. 2d 125.

In the first appeal we awarded Mrs. Stewart the refrigerator, the bedroom suite in the front room of the house, and the title to the real estate; but all of the same:

"... subject, first, to a lien on the real estate in favor of appellees for the reasonable value of the improvements made on said property by appellees, plus the amount of all taxes on said property paid by appellees, less the reasonable value of the rent of said property during the time appellees have been in possession thereof, the value of said improvements, and amount of said taxes and rent to be determined from testimony already taken and such additional testimony as the parties may see fit to offer, and subject, second, to the right of the executor or administrator of the estate of Cordelia Wilson Tucker, deceased, to sell same, or such portion thereof as may be necessary, in the manner provided by law, for the payment of probated claims against her estate."

On remand the chancery court heard additional testimony and rendered a decree on June 27, 1945, awarding the real estate and refrigerator and bedroom suite, as directed, and also: (a) fixing the value of the improvements and taxes at $458.12 in favor of the Tuckers; (b) charging the Tuckers with rent at $20 per month from October 1, 1942, (date of death of Cordelia Wilson Tucker) to date of the decree below (June 27, 1945), totaling $696.50; and (c) charging the Tuckers with future rents

at $25 per month from the date of the said decree until possession be delivered to Mrs. Stewart. There was no proof of any debts against the estate of Cordelia Wilson Tucker. The Tuckers have appealed from this decree, and Mrs. Stewart has cross-appealed. We dispose of the issues as follows:

I. *Mrs. Stewart's cross-appeal* is because of her contention that the Tuckers are not entitled to recover anything for any improvements. The answer to that contention is "law of the case." In the first appeal we held that the Tuckers were entitled to recover for improvements: and that opinion has become final. It is too late on remand and second appeal to attempt to re-try an issue which was definitely settled in the first appeal. In *Holthoff* v. *State Bank & Trust Company,* 208 Ark. 307, 186 S. W. 2d 162, we said:

"The doctrine of 'law of the case' is stated in 3 Am. Juris. 541: 'that a court of review is precluded from agitating questions which were propounded, considered, and decided on previous review.' "

That is the exact situation here: we held on the first appeal—as we have quoted above—that the Tuckers were entitled to recover for improvements. Mrs. Stewart is precluded from agitating that question on this second appeal. So we decide against the cross-appeal of Mrs. Stewart; and the remainder of this opinion relates to the issues on the direct appeal of the Tuckers.

II. *Identity of the refrigerator.* The same answer—law of the case—is given to the Tuckers' contention about the refrigerator. On the first appeal we awarded the refrigerator to Mrs. Stewart. Appellant claims that the refrigerator was not a Frigidaire, but was a Servel Electrolux. The proof shows that Mrs. Cordelia Wilson Tucker owned only one refrigerator at the time of making her will on February 14, 1942. She bequeathed this refrigerator to Mrs. Stewart. On the first appeal no question was raised as to the trade name of the refrigerator, and we awarded it to Mrs. Stewart. It is too late on the second trial to seek to nullify the former decree by show-

ing the trade name of the refrigerator. By whatever name, it is still a refrigerator: and the ownership was settled on the first appeal.

III. *Money paid by Frank H. Tucker* for deed. The same answer—law of the case—is given to this contention now made by the Tuckers on this appeal. We held on the first appeal, as regards the money paid by Frank H. Tucker after the death of Mrs. Cordelia Wilson Tucker:

". . . and the payment made after her death was made by him as a volunteer—since upon the death of his wife testate he had no interest, by reason of his relationship with her, in her property. Sec. 4422 of Pope's Digest of the laws of Arkansas, as amended by Act 313 of the General Assembly of Arkansas, approved March 15, 1939, and by Act 69 of the General Assembly of 1943, approved February 19, 1943. A stranger to a title acquires no lien by way of subrogation, in making purchase-money payments. *Nichol* v. *Dunn,* 25 Ark. 129; *Turley* v. *Gorman,* 133 Ark. 473, 202 S. W. 822."

IV. *Value of the improvements.* The lower court allowed the Tuckers $458.12 for improvements and for taxes for 1942 and 1943. The tax items were $48.12, which leaves $410 allowed for improvements. This allowance is exactly what Garnett Tucker showed by itemized statement in the first trial. On the trial of June 27, 1945, Garnett Tucker claimed $1,350 as the amount he paid for improvements to the property. But his latest testimony was not substantiated, and was in conflict with his own former testimony. At the trial of June 27, 1945, he refused to file bills or to furnish any itemized statements; and merely contented himself with estimates and guesses as to the amount expended. When asked how much he had paid each of three artisans, he said:

"A. I wouldn't have any way of knowing exactly. At that time they charged me $1.50 an hour. Q. Do you know how much it cost you? A. Counting the materials and all, I imagine it all ran around twelve or thirteen hundred dollars."

This excerpt is typical of the indefinite nature of Garnett Tucker's testimony, and certainly would not

justify us in reversing the chancery court, which accepted his itemized statement as given at the first trial over his estimates and guesses as given at the second trial. We leave undisturbed the allowance of $410 as the value of the improvements. In fixing the value of improvements, it is not a question solely of the amount expended. For the correct rule, see *Greer* v. *Vaughan,* 96 Ark. 524, 132 S. W. 456; and *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88. The chancery court allowed $48.12 as taxes for 1942 and 1943. There is no proof of any other payments by appellants, so we leave undisturbed the figure of $458.12 allowed the Tuckers for improvements and taxes.

V. *Rents.* The chancery court charged the Tuckers with rent at the rate of $20 per month from the date of the death of Cordelia Wilson Tucker (August 1, 1942) to the date of the trial below; and this totaled $696.50. Complaint is made about the time and also the rate; but the testimony sustains the chancery court. Fred H. Tucker lived in the house from the date of the death of Mrs. Cordelia Wilson Tucker until his own death on October 6, 1942. Then Garnett Tucker began occupying the house. The latter testified:

"Q. When did you take possession of this house we are talking about, Mr. Tucker? A. About four or five days after my father passed away in October. . . . Q. When did you move into the house? A. I took out that furniture and had it (the house) all fixed on that one side, and I moved in there about a month after my father passed away. Then I would take a room and do each separately. Q. You occupied part of the house at the time? When did you get the whole thing ready to occupy? A. About two years ago. Q. About a year after he died? A. Yes, it took me that long. . . ."

Probably because of the time spent in repairing, the chancery court reduced the monthly rental to $20 up to the time of the trial. The testimony of a disinterested witness fixed the value at that rate during that period of time. We affirm the chancery court on the rental question.

Conclusion. The decree of the chancery court is affirmed on direct appeal and on cross-appeal, and the costs of this court are adjudged against the present appellants.

CAMDEN TRANSIT COMPANY *v.* OWEN.

4-7844 192 S. W. 2d 757

Opinion delivered March 4, 1946.

Miles & Amsler, for appellant.

J. Bruce Streett, for appellee.

ROBINS, J. This is a contest, originating before the State Corporation Commission (now the Public Service Commission), between owners of two bus lines, as to the right to operate passenger buses over certain routes lead-

ing to the naval ordnance plant near Camden, Arkansas. The northwestern boundary of this plant, which is located about four miles northeast of Camden, is traversed by U. S. Highway No. 79, State Highway No. 4 runs along the southern boundary of the plant, and U. S. Highway No. 167 along the eastern boundary.

On September 30, 1944, appellant, Camden Transit Company, a partnership, filed application with the commission asking permit to operate as a common carrier of passengers over the following routes: Highway No. 79, Magnolia to Fordyce *via* Camden and Thornton; Highway No. 7, El Dorado to Camden; Highway No. 167, El Dorado to Hampton; Highway No. 4, Hampton to Camden; with authority to serve naval ordnance plant at gates to be designated by officials of the plant, serving all intermediate points on said highways.

Three days later, on October 3, 1944, appellee, J. P. Owen, filed an application to operate passenger bus line over the following routes: Highway No. 79, Camden to Fordyce; Highway No. 7, Camden to El Dorado; and Highway No. 4, Camden to Hampton; with authority to serve gates of naval ordnance plant.

It will be observed that Owen asked permission to operate over all the routes proposed in the previous application of Camden Transit Company, except the route from Camden to Magnolia and the route from El Dorado to Hampton.

For some time prior to filing of the application of either of the parties to this litigation the Camden-Cullendale Bus Line had held a permit under which it was operating buses from Camden a short distance south to Elliott on Highway No. 7 and from Camden to the southwest gate of the naval ordnance plant on Highway No. 79, and from the "Y" east on Highway No. 4 to a gate of the plant; and also on certain routes not involved herein. An option to purchase the permit of the Camden-Cullendale Bus Line was acquired by appellee Owen on October 11, 1944, while the applications involved herein were pending, and the transfer thereof was approved by the

commission on November 21, 1944, as required by § 14 of Act 367 of the General Assembly of Arkansas, approved March 26, 1941.

Hearing was had on November 8, 1944, by the commission on the applications of appellant and appellee, which were considered along with applications and protests of certain other parties. On December 12, 1944, the commission made separate orders by which the application of appellant for a permit was granted and the application of appellee to operate over the routes herein involved was denied. The permit granted to appellant was, under the terms of the commission's order, limited to "the duration of the war and six months thereafter." The right of appellee to operate under the permit originally issued to the Camden-Cullendale Bus Line was not affected by the orders of the commission.

Appeals from these orders were prosecuted to the Pulaski circuit court, where the two proceedings were consolidated and heard on the record made before the commission. By the judgment of the Circuit Court the orders of the commission were reversed and the commission was directed to issue permit to appellee in accordance with his application, and was directed to cancel the permit issued to appellant, in so far as it applied to the routes covered in the permit ordered to be issued to appellee. The effect of this judgment was to permit appellant to operate buses only over two unconnected routes —the route from Magnolia to Camden and the route from El Dorado to Hampton—and to deny the vehicles of appellant any access whatever to the naval ordnance plant.

In considering a case of this kind two principles must be kept in mind:

First: Where a matter is heard and decided by an administrative body such as the Public Service Commission, an order made by it should be upheld by the court on appeal unless it is against the weight of the evidence. The rule is thus stated in 9 Am. Jur. 494: "There are manifestly practical reasons for giving peculiar weight

to the finding of a commission, for such a body from the nature of its organization and the duties imposed upon it by statute is peculiarly competent to pass upon questions of fact of the character arising in the determination of questions relating to the reasonableness of rates and regulations. In fact, the commission's findings are in case of conflict of testimony entitled to a probative force upon a consideration of the case on appeal to the courts, for the commission, in addition to knowledge of conditions of environment and of transportation relations, has had the advantage of the presence of the witnesses before it." See, also, 51 C. J. 77; *East Tennessee, Virginia & Georgia Railway Company, et al.,* v. *Interstate Commerce Commission,* 181 U. S. 1, 21 S. Ct. 516, 45 L. Ed. 719; *Louisville & Nashville Railroad Company, et al.,* v. *Behlmer,* 175 U. S. 648, 20 S. Ct. 209, 44 L. Ed. 309; and *Illinois Central Railroad Company* v. *Interstate Commerce Commission,* 206 U. S. 441, 27 S. Ct. 700, 51 L. Ed. 1128.

Second: The paramount consideration in a proceeding of this kind is how the safety and convenience of the public will be best served. In the case of *Santee* v. *Brady, ante,* p. 224, 189 S. W. 2d 907, we quoted with approval this extract from Pond on "Public Utilities," 4th Ed., § 913: " 'In granting certificates, the public convenience and necessity should be the first consideration, and the interest of public utilities already serving the territory secondary, while the desire of a new applicant for a certificate is relatively a minor matter for the consideration of the commission.' " And in the case of *Lienhart* v. *Bryant, ante,* p. 764, 192 S. W. 2d 530, in discussing a proceeding before the commission in which the rights of different applicants for permits to operate buses on the same highway were being considered, we said: "By clear implication the public is an interested party. This is true because its convenience and necessity are subjects of first concern."

In the case at bar it was conceded that the service sought to be afforded under appellant's application was needed, and no question as to the ability of either of the applicants to give the desired service was raised. Neither

applicant was serving the proposed routes. While the decision of the lower court seems to have been based on the theory that appellee was already operating over part of these routes, this is not borne out by the record. When appellant filed its application on September 30, 1944, and when appellee filed his application on October 3, 1944, neither one of these parties was operating any bus over any part of the routes embraced in either application. Appellee, by obtaining, after he had already filed application for the permit herein involved, an option on the Camden-Cullendale Bus Line, which was serving only a few miles of the proposed routes, did not obtain any preemptive right in the premises.

Nor would the fact that appellant filed its application before the application of appellee was filed create any controlling priority in favor of appellant. However, it was an element in the situation that might be properly considered by the commission in determining which applicant should receive the permit. 42 C. J. 686; *Chicago Motor Bus Co.* v. *Chicago Stage Co.*, 287 Ill. 320, 122 N. E. 477; *State ex rel.* v. *Department of Public Works of State of Washington, et al.*, 129 Wash. 5, 223 P. 1048.

So, when the matter came on for hearing before the commission it had before it the applications of two bus line operators, both of whom were qualified to give the needed service and neither of whom had a superior right to operate buses over the routes described in their respective proposals.

But appellant offered a service that appeared (and doubtless was by the commission found to be) more advantageous to the general public than that proposed by appellee. Appellant proposed (in addition to other service) to operate buses from Magnolia to Camden and Fordyce, and from El Dorado to Hampton. This relatively important service was not offered in the application of appellee. The commission therefore had good reason to conclude that public convenience would be better served by the more extensive service proffered by appellant than the limited service proposed by appellee. It does not appear that the commission incorrectly ap-

praised the situation or that its order was against the preponderance of the evidence.

The judgment of the circuit court is accordingly reversed, and the lower court is directed to enter a judgment reinstating and affirming the orders of the commission.

H. N. RODGERS & SONS COMPANY *v.* NELSON.

4-7793 192 S. W. 2d 972

Opinion delivered March 4, 1946.

Rehearing denied April 1, 1946.

Buzbee, Harrison & Wright, for appellant.

K. T. Sutton, for appellee.

GRIFFIN SMITH, Chief Justice. Circuit Court affirmed Workmen's Compensation Commission in awarding $7.55 per week during dependency (and certain incidental sums). The appeal questions Gracy Nelson's right to collect any sum, contention being that she was supported by her husband. Will, seventeen years of age, was burned to death in December, 1943, while engaged in the Company's service, etc.

There was testimony that McKinley Nelson, the decedent's step-father, supported his wife, and efforts were made to show that any money given Gracy by her

son was a gratuity. On the other hand, there was evidence that Will had for some time made material contributions to his mother and that to a certain extent she relied upon his efforts. The Commission found that necessary elements of support existed. We are not able to say there was no substantial testimony to support this factual finding.

In its conclusions of law the Commission employed these expressions: "At the time of [Will Curley's] accidental death his mother was dependent upon him within the meaning of the Workmen's Compensation Act, as no distinction is made as to total or partial dependency."

In *Arthur Murray Company, Inc.,* v. *Cole, ante,* p. 61, 189 S. W. 2d 614, we said:

"The appeal is controlled by *Crossett Lumber Company* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161. It was there held that 'dependent,' within the meaning of Act 319, is to be distinguished from 'wholly dependent.' One is dependent if he or she relies partially upon contributions of a person whose aid contributes a material element in the claimant's support."

Affirmed.

GATLING *v.* GOODGAME.

4-7846 192 S. W. 2d 878

Opinion delivered March 4, 1946.

Gaughan, McClellan & Gaughan, for appellant.

MINOR W. MILLWEE, Justice. Appellant, H. B. Gatling, as plaintiff in the circuit court, brought this action in unlawful detainer against appellees, Fred Goodgame and his wife, Ruth Goodgame, for possession of a dwelling house in the town of Bearden, Arkansas. The complaint alleged that the right of appellees to occupy the premises expired in January, 1945, and that they were guilty of unlawful detainer in refusing to vacate the premises after service of a written notice of February 19, 1945, to vacate the property within 10 days. Judgment was prayed for possession of the property, accrued rents since January 12, 1945, and damages.

The answer of appellees contained a general denial of the allegations of the complaint, and specific denial that their right to occupy the property expired in January, 1945, or that they were in unlawful possession of the property. Trial to a jury resulted in a verdict and judgment for appellees for possession of the property and in favor of appellant for the sum of $75 which represented rents accrued from January 12, 1945, to June 12, 1945, the date of trial.

Appellees rented the house from appellant in May, 1942, and the Goodgame family occupied the property as tenants from month to month at a monthly rental of $15. Mrs. Gatling, wife of appellant, and Mrs. Goodgame were the principal witnesses in the case, and they conducted most of the negotiations respecting the rental of the property. The two families were neighbors and such differences as arose between them on account of some pigs and a cow kept on the premises by appellees do not appear to have become serious until the fall of 1944 when it was announced that a large naval ordnance plant was to be constructed in the vicinity. Property values and rents began to soar as the result of this announcement, and rent control was established by the OPA in October or November, 1944.

The monthly rental was frozen at $15 and Mrs. Gatling was advised by OPA authorities that the rent could not be raised unless the house was converted into apartments. She was also advised that OPA regulations prohibited repossession of the property so long as appellees continued to pay rent unless the tenants were abusing the property. On the theory that appellees were abusing the property by keeping the cow and pigs on the premises, Mrs. Gatling secured a "release" from OPA to proceed under state law for recovery of possession of the house. A notice was caused to be served on appellees on or about December 29, 1944, demanding that they vacate the property on or before January 10, 1945. However, having accepted payment of rent to January 12, 1945, appellant caused another notice to be served on February 22, 1945, demanding possession within 10 days. Appellees failed to surrender possession and this action was filed on March 10, 1945. Appellees gave a cross-bond and remained in possession of the property.

It is undisputed that appellees made tender of the rents each month which was refused, and that they offered to pay $25 per month, or any increased rental which OPA might allow. Rents were payable on the 12th of each month. Appellees do not seem to have questioned the sufficiency of the notice to quit.

A request for a directed verdict for appellant for possession of the property at the conclusion of the testimony was refused. The court gave appellees' requested instruction No. 1 over the objections of appellant. This instruction required the jury to return a verdict for appellees for possession of the property if they found a new oral contract was entered into by the parties whereby appellees were given the right of occupancy for a period of a year from October, 1944, at the same monthly rental of $15. Appellees did not plead an oral lease for a year in their answer, but in the course of her examination as a witness, Mrs. Goodgame testified about a conversation with Mrs. Gatling in October, 1944, in which the latter was asked if she wanted possession of the house and replied in the negative, saying: "I want you to keep it this year." Mrs. Goodgame was examined at length on this phase of the conversation. The gist of her testimony on the question of a new contract for a year is set out in her final answers to questions of her counsel on that point on redirect examination, as follows: "Q. Where were you at the time this conversation took place? A. Mrs. Gatling stopped at my house. Q. Where you are living now? A. Yes, sir. Q. And (Mrs. Gatling) said that you could stay there that year? A. Yes, sir; that is what she said. Q. She said 'you may stay in the house a year'? A. I says, 'If you want the house, tell me about it,' and she says, 'I don't want the house; I want you to stay there this year.' Q. She wanted you to stay there this year? A. She said they didn't know what they were going to do, 'we don't know what the plans would call for.' "

We agree with appellant that this testimony was insufficient to establish an oral contract for the lease of the property for one year from October, 1944, to October, 1945, at a monthly rental of $15. It must be remembered that Mrs. Goodgame was testifying in June, 1945, about a conversation that occurred in October, 1944. Each time the witness was asked to give the exact language used by Mrs. Gatling, she answered by quoting Mrs. Gatling as saying, "I want you to stay there this year." We think it is clear from the testimony of Mrs. Goodgame that the statements attributed to Mrs. Gatling

had reference to the calendar year of 1944, and not to a period of one year from October, 1944. Even if the answer of Mrs. Gatling amounted to an offer to rent the premises for an additional year, Mrs. Goodgame does not testify that it was accepted by any promise or agreement on her part to stay in the house another year. The amount of the monthly rentals was not mentioned in the conversation, and there were later negotiations between the parties in attempts to adjust the matter of rents which tend to show that no agreement was reached on that point.

The burden was upon appellees to prove the oral lease for one year. *Dunn* v. *Turner Hardware Company,* 166 Ark. 520, 266 S. W. 954. In the case of *Southern Surety Company* v. *Phillips,* 181 Ark. 14, 24 S. W. 2d 870, this court said: "A contract is an agreement which creates an obligation. There must be competent parties, a subject-matter, a legal consideration, mutuality of agreement and mutuality of obligation. Agreement is the expression by two or more persons of a common intention to affect their legal relations. It consists in their being of the same mind and intention concerning the matter agreed on."

In the case of *Keating* v. *Michael,* 154 Ark. 267, 242 S. W. 563, this court had under consideration a written lease which provided for a renewal, but there was no provision fixing the rental under the renewal clause. In that case it was said: "Here no provision was fixed in the contract except such rental value as the parties might agree upon. They might never agree, and so the case falls squarely within the general rule announced above and the contract is too uncertain and indefinite to be enforced."

It is well settled that in order to make a contract, there must be a meeting of the minds as to all terms. *Dodson* v. *Wade,* 193 Ark. 534, 101 S. W. 2d 182. In *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184, 131 S. W. 460, it was held (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."

When the testimony relating to the alleged agreement for an oral lease for a year is considered in the light most favorable to appellees, as we must in testing its sufficiency, we find a lack of substantial evidence to establish the necessary elements of a binding contract by the parties. It follows that the trial court erred in giving instruction No. 1 requested by appellees. The complaint of appellant alleged damages, but we find the proof on this, and other issues, insufficiently developed. For the error in giving appellees' requested instruction No. 1, the judgment is reversed, and the cause remanded for a new trial. It is so ordered.

JOHNSON *v.* COOK, COMMISSIONER OF REVENUES.

4-7888 192 S. W. 2d 975

Opinion delivered March 4, 1946.

Rehearing denied April 1, 1946.

Heartsill Ragon and *DuVal Johnston*, for appellant.

O. T. Ward, for appellee.

McHaney, J. Appellant is a retail florist in Ft. Smith, Arkansas, and is a member of the Florists' Telegraph Delivery Association. Appellee made an order assessing certain sales taxes, and penalties, the amount not being in dispute, against appellant, from which he appealed to the Pulaski chancery court where a decree was entered for appellee and from which is this appeal.

The sales transactions, upon which appellee's order assessing sales taxes and penalties against appellant, are those originating in states other than Arkansas. The orders for flowers were telegraphed to appellant by florists in other states. For example, one of such telegrams in the record is dated April 4, 1945, addressed to Quality Flower Store, Ft. Smith, and reading: "Apr. 10—Mrs. Walter Callahan, 319 N. 6th St. Dozen red roses, six dollars, Card. Happy Birthday, darling—All my love. Walt," and signed, "Newton Florist F. T. D., Norfolk, Va." We interpret this to mean that, on April 10, appellant was to deliver to Mrs. Walter Callahan, 319 N. 6th St., Ft. Smith, one dozen red roses, with a card saying "Happy birthday, darling," and signed Walt, for which "Walt" had paid "Newton," florist in Norfolk, Va., $6. The "F. T. D." meant that florist Newton is a member of the Florist Telegraph Delivery Service, mentioned above. Under the rules of the F. T. D. the forwarding member receives 20 per cent. and the member filling the order 80 per cent. of the gross sale. The tax here involved was levied under "Supplemental Regulation 32.

Telegraphic Orders," and reads as follows: "All receipts derived from 'incoming' telegraphic orders for delivery of flowers or other merchandise to points within the state by florists or other vendors doing business within Arkansas are taxable transactions and are required to be reported as taxable receipts under the Arkansas Gross Receipts Tax Law. Receipts or fees derived from 'outgoing' telegraphic orders placed with florists or other vendors outside the state of Arkansas to a point outside this state are not subject to the tax and may be deducted from the gross receipts in computing the tax.

"Witness my hand and seal this 21st day of January, 1944.

"(Signed) Murray M. McLeod,

"Commissioner of Revenues."

The Arkansas Gross Receipts Act of 1941, being Act 386 of 1941, p. 1056, in § 2(c), defines the term "sale" in part as follows: "The term 'sale' is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished . . ." This language, we think, furnishes the basis for regulation No. 32, above quoted, and that it is a valid regulation. Undoubtedly either the "title" or the "possession," and we think both, to the flowers delivered by appellant, on telegraphic orders from out this state, was transferred in this state for a valuable consideration. In other words, that it was a "sale" in this state, because there was a "transfer of either the title or possession for a valuable consideration of tangible personal property" in this state.

So, it appears to us that the florists, in other states, who sent orders to appellant to deliver flowers in this state, were merely the agents of appellant in all these transactions, to receive and transmit the orders and to collect the charges for the flowers to be sold and delivered by appellant, for which service they were to receive and did receive a 20 per cent. commission on the sale

price of the flowers. The F. T. D. had nothing to do with these orders and knew nothing about them at the time.

In the recent case of *State, ex rel. Commissioner of Revenues,* v. *Hollis & Company, ante,* p. 455, 180 S. W. 2d 986, we said that, "The tax is laid upon the sales and not upon the company or person making the sales." And again, in the same case, "The citizenship of the seller is not controlling in determining whether a sale is taxable. It is the situs of the sale that controls. If the sale as here is consummated in Louisiana by a citizen of Arkansas to an Arkansas citizen, it is not taxable in Arkansas under our sales tax law. . . ." But here the situation is entirely different. The flowers sold by appellant were largely grown by him in Arkansas, while others were acquired and kept in storage. The title to them and their possession passed in Arkansas to the person he was directed to deliver them. So the sale was here.

It is also contended that the sales involved were sales in interstate commerce and that to tax them in Arkansas would be an unconstitutional burden on such commerce.

We think the transactions here involved are not interstate in character. The flowers were not shipped out of the state. Only the telegraphic communications from originating florists crossed state lines and there is no tax sought to be collected on the charges for these messages.

Counsel for appellant say there are twenty-three states that have sales tax laws in one form or another, and that the rules and regulations pertaining to the sale of flowers in at least nineteen of them provide that no tax is payable on incoming orders, such as are here involved, but that sales originating in the taxing state are subject to the tax. Assuming that this is correct, and we have not sought to verify it, perhaps it is because of a difference in the wording of the statutes. Our statute, above cited, appears to us to make the sales here involved taxable.

The decree is correct, and is accordingly affirmed.

MARSHALL *v.* CASPER.

4-7805 193 S. W. 2d 479

Opinion delivered March 11, 1946.

Rehearing denied April 22, 1946.

[redacted]

Appellant *pro se.*

J. Bruce Streett, for appellee.

GRIFFIN SMITH, Chief Justice. For many years Mrs. L. Marshall has taught shorthand and typing at Camden. She sued Sarah Bird Casper for $185, alleging that as a student work had been done at irregular periods aggregating thirty-seven weeks, and that the charge was $5 per week. On Mrs. Casper's contention that she did not attend school during any substantial portion of the time mentioned in the complaint, that whatever she owed had been paid, and that if not paid the claim was barred by limitation, the jury found against Mrs. Marshall, and she has appealed, and is acting for herself without aid of an attorney. An inappropriate reply brief has been filed which we disregard upon the assumption that Mrs. Marshall is not familiar with the Court's rules and that her intemperate expressions (unsustained by any proof) were made in the sense that the argument was personal rather than judicially informative.

The suit was filed August 16, 1941. An attached statement for the item of $185 heretofore mentioned was

that services began in 1936 and continued until September 1, 1938, and that the obligation was due October 1, 1938.

Whether Mrs. Casper did, or did not, attend school thirty-seven weeks is a matter we are not authorized to reëxamine. The jury found in favor of non-liability, and there is substantial evidence to sustain the verdict, except as to $30.

Appellee admitted she was a student in 1938, and that she (appellee) and her mother told Mrs. Marshall they were not then in a position to pay, ". . .. and [that] we didn't know when we would be able to pay her; and she said it was all right, we would go to work that day."

Mrs. Marshall testified the arrangement was that a fourth of the amount due as tuition would be payable when appellee procured a remunerative position, and the balance in installments.

Appellee's contention is not that the statute of limitation barred this particular item—although the statute was generally pleaded—but that the thirty dollars was paid appellant by appellee's mother. On cross-examination Mrs. Casper conceded she did not see the payment made, but had been told by her mother that the debt had been discharged. When Mrs. Casper testified to what her mother had repeated, the evidence was objected to as hearsay. Clearly it was, and this so-called evidence of payment should have been excluded. There is no substantiation of the $30 payment other than what Mrs. Casper says her mother told her; hence Mrs. Marshall's testimony could not be arbitrarily disregarded, even though (she being an interested party) it is not treated in law as undisputed.

The judgment must be affirmed in so far as it absolves Mrs. Casper from paying $155 of the $185 claim, but it is reversed and judgment is given here in favor of Mrs. Marshall for $30.

KINNEAR *v.* LANGLEY, EXECUTOR.

4-7840 192 S. W. 2d 978

Opinion delivered March 11, 1946.

[redacted]

Wootton, Land & Matthews, for appellant.

C. T. Cotham and *Scott Wood,* for appellee.

McFADDIN, J. Section 14525 of Pope's Digest is sometimes referred to as the "pretermitted child" statute. Appellant claimed to be the pretermitted child of Mrs. Helen Burdick, deceased, and, relying on that claim, filed suit in the Garland chancery court. From a decision

adverse to her claim, she brings this appeal. We will interchangeably refer to the appellant as Hazel Wade, Hazel Burdick, and Hazel Burdick Kinnear: the identity is the same.

Hazel Wade was born in April, 1892, in Labette county, Kansas, being a daughter of William Wade and Ida Wade. Mr. Wade worked for Mr. Burdick, and the families were friends. Mrs. Wade died in 1895, and the next day William Wade gave the three-year-old girl, Hazel Wade, to the Burdicks, who had no children of their own. They gave her the name of Hazel Burdick, and she was thereafter known by that name. The Burdicks delayed the adoption of Hazel Burdick until May, 1907, so that she would be old enough to comprehend it. Thus, when Hazel Burdick was 15 years of age, in May, 1907, George H. Burdick and his wife, Mrs. Helen Burdick, secured a court order in the county court of Labette county, Kansas, whereby each and both adopted Hazel Burdick as their child. The legality of that adoption was in dispute in the chancery court in the trial from which comes this appeal; but that issue will not be considered in the view we take of the case. We assume that Hazel Burdick was duly and legally adopted, and that the identity of Hazel Burdick and the appellant in this court is thoroughly established. There is no claim in this case that an adopted child is not entitled to the benefits of § 14525, Pope's Digest; so that question is not before us.

After the adoption, Hazel Burdick continued to live with her adoptive parents until she married Roy Whitsett in July, 1911. Even thereafter George Burdick continued to give her a monthly allowance for a few years. The Whitsett marriage proved an unhappy one and resulted in divorce; and in June, 1920, Hazel Burdick left Kansas and went to Oregon, where she has continued to reside, except for a few years' residence in California. In Oregon, she married Mr. Kinnear and has a family, and has been very happy. After leaving Kansas in 1920, Hazel Burdick lost all contact with the Burdicks. She is not positive that she ever wrote them from Oregon; and if

she did, she only wrote one letter and received no answer. She said that her marriage in Kansas had failed, and her experiences around Parsons and Oswego had been very unhappy, and: ". . . when I went west I decided to put everything in the past behind me and start out again and forget it." Shortly after Hazel Burdick went to Oregon her adoptive parents, George and Helen Burdick, moved from Kansas to Hot Springs, Arkansas, where they had visited when Hazel was still in Kansas. George and Helen Burdick continued to reside in Hot Springs for the entire remaining life of each. George Burdick died in 1937 at about 76 years of age; Helen Burdick died in May, 1941, being over 70 years of age. That the Burdicks thought Hazel was dead is shown by a letter written in 1928 by Mrs. Burdick to a cousin, which letter reads in part: "I have not heard from Hazel for years. She must be surely dead or we would hear of her some time." In 1943, Hazel Burdick Kinnear contacted some people in Oswego, Kansas, to see if anyone could help her secure a needed birth certificate. In this way, she learned of the death of George and Helen Burdick; and then on June 23, 1943, filed this suit to obtain the entire estate of Mrs. Helen Burdick on the claim that Hazel Burdick was a pretermitted heir. Appellant's claim as a beneficiary in the George Burdick estate is not before us. This appeal involves the claim of Hazel Burdick Kinnear to the entire estate of Mrs. Helen Burdick, but for reasons that presently appear, it is necessary that we mention a portion of the will of George H. Burdick. As previously stated, he died in 1937. His last will and testament dated December 28, 1931, was duly probated in Garland county, Arkansas. Hazel Burdick was mentioned in two places in his will. Item 3 said: "I give and bequeath unto my adopted daughter, Hazel Burdick, . . . the sum of $1.00." Item 5 of the will set up a trust estate, naming J. O. Langley as trustee and Mrs. Helen Burdick as the sole life beneficiary of the trust; and provided, so far as Hazel Burdick was concerned, that after the death of Mrs. Helen Burdick: "(d) The trustee shall pay unto my adopted daughter, Hazel Burdick, the sum of $1,000,

provided my said adopted daughter be living, and if she be deceased, then said payment shall be made unto her issue, if any, and if none, said legacy shall lapse." J. O. Langley was sole executor of the will and sole trustee of the estate of George Burdick. The administration of the estate was closed; and Langley continued to act as trustee. This legacy for Hazel Burdick Kinnear appears to have been paid into court in other proceedings.

So much for the will of George Burdick. Mrs. Helen Burdick made her will on November 18, 1938; and in it she did not mention Hazel Burdick by name. The only possible reference to Hazel Burdick is in section 9 of the will, which section reads: "9. All other property of which I may die seized, either real or personal, shall revert back to the estate of my deceased husband, George H. Burdick, and shall be distributed as provided in his last will and testament." Mrs. Helen Burdick executed two codicils to her will: the first being dated January 30, 1939; and the second, October 21, 1940. The first codicil is immaterial to a disposition of this case. The second codicil recited: "I hereby revoke section 9 of my last will and testament and substitute the following: . . . the balance of my estate I bequeath unto J. O. Langley . . ." As previously stated, Mrs. Helen Burdick died in May, 1941, at Hot Springs. Her will and the two codicils were duly probated, and the estate administered and closed. Then the appellant, Hazel Burdick Kinnear, filed this suit on June 23, 1943, claiming to be the pretermitted child of Mrs. Helen Burdick, and therefore entitled to her estate.

Many interesting questions are presented in the excellent briefs filed by learned counsel on each side; but we find it necessary to discuss only three questions, to-wit: I. Did Mrs. Burdick's will incorporate her husband's will into her own will by such reference? II. Did the reference in section 9 of Mrs. Burdick's will to the will of her husband sufficiently mention Hazel Burdick so as to prevent her from claiming the rights of a pretermitted child under § 14525, Pope's Digest? III. Did the

revocation of section 9 of Mrs. Burdick's will by the second codicil constitute an omission to name Hazel Burdick, so as to give her the status of a pretermitted child?

We proceed to decide these questions.

I. *Incorporation by Reference.* In section 9 of her will, Mrs. Burdick made reference to the will of Mr. Burdick, in that she said: "9. All other property of which I may die seized, either real or personal, shall revert back to the estate of my deceased husband, George H. Burdick, and shall be distributed as provided in his last will and testament." The question is whether that reference by Mrs. Burdick was sufficient to incorporate (*i. e.,* include) Mr. Burdick's will in her will.

The general rule, as stated in 28 R. C. L. 112, is as follows: "Incorporation of other papers by reference thereto.—If a will, duly executed and witnessed according to statutory requirements, incorporates into itself by reference any document or paper not so executed and witnessed, whether such paper referred to is in the form of a will, codicil, deed, or a mere list or schedule, or other written paper or document, such paper if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to, takes effect as a part of the will, and is entitled to probate as such." The same general rule is stated in somewhat similar language in 68 C. J. 640.

Mrs. Burdick's will was dated November 18, 1938. At that time Mr. Burdick's will was already duly probated and of record in Garland county. So, Mr. Burdick's will was (1) in existence and (2) duly identified in Mrs. Burdick's will; and the two requirements of the rule, stated in R. C. L. as above, have been met. The rule of incorporation by reference is supported by the great weight of authority. In 37 A. L. R. 1476, there is an annotation entitled "Incorporation into will of provisions of the will of another person by reference thereto." This annotation follows the reported case of *Bemis* v. *Fletcher,* decided by the Supreme Judicial Court of Massachusetts

in 1925, 251 Mass. 178, 146 N. E. 277, 37 A. L. R. 1471. In that case Mrs. Estabrook stated in her will that the residue of her property should go to those persons named in her husband's will, and the question for decision by the court was whether her husband's will was incorporated in her will by such reference. The Massachusetts court said: "The will of Mr. Estabrook was in existence in 1910 when the testatrix' will was executed. His will was sufficiently identified, and it could be incorporated into her will. 'A testator may refer expressly to a paper already executed, and describe it with such particularity as to incorporate it virtually into the will.' " In 144 A. L. R. 714 there is an annotation on the subject, "Incorporation of extrinsic writings in will by reference."

In *Gerrish* v. *Gerrish,* 8 Ore. 351, 34 Am. Rep. 585, Mrs. Gerrish stated in her will that her property should be distributed "in accordance with the provisions made in the last will of my said husband concerning the same." On the question of whether this quoted reference incorporated her husband's will into Mrs. Gerrish's will, the Oregon Supreme Court said: ". . . where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt as to its identity, such paper, it seems, makes part of the will, although the paper be not subscribed or even attached. In this case there can be no doubt as to the identity of the instrument referred to. The husband of the testatrix had been dead and his will admitted to probate several years before her will was written." This Oregon case was cited with approval by the Arkansas Supreme Court in *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373, and will be further discussed in part II of this opinion.

We may summarize the authorities and texts thus far discussed by the statement that the great weight of authority is to the effect that a will may, by definite reference, incorporate into its four corners a document already in existence and sufficiently identified.

The question remains, whether this weight of authority is the rule in Arkansas. The appellant cites and relies on *O'Leary* v. *Lane,* 149 Ark. 393, 232 S. W. 432, as holding *against* incorporation by reference. Appellees cite and rely on *Rogers* v. *Agricola,* 176 Ark. 287, 3 S. W. 2d 26, as holding *for* incorporation by reference. We are thus brought to a consideration of our own cases.

In *O'Leary* v. *Lane, supra,* the will under consideration stated: "It is my will and desire that the deeds heretofore by me executed to the heirs of my estate, deeding to them real property that I desire each to have at my death, which are now in my safety deposit box in the Farmers' & Merchants' Bank at Des Arc, Arkansas, be by my executor and executrix, hereinafter named, delivered to said heirs mentioned in said deeds, which property I give and bequeath to each of said heirs as conveyed in said deeds." The contest arose over whether the deeds were incorporated into the will by the quoted references, and this court said: "Independent instruments, though testamentary in character, cannot be incorporated in wills as a part thereof by reference only in this State, for the statutes here require that the entire will shall be authenticated in the manner specified in the statutes. In the case of *Bryan* v. *Bigelow,* 77 Conn. 604, 60 Atl. 266, 107 Am. St. Rep. 64, a sealed letter, testamentary in character, found in the same receptacle with the will, referred to in the will and otherwise identified, was treated as ineffective as a part of the will, not being executed in the manner required for the execution of wills. Under the rule thus announced, the separate deeds referred to in the will now under construction are ineffective as testamentary dispositions of lands described therein—not being testamentary in character and authenticated as required by the laws of this state."

Whether the above quoted language was necessary to the conclusion reached in the case is a question we need not decide, for that quoted language was overruled by the holding of this court in *Rogers* v. *Agricola, supra,* where we held that a holographic codicil was sufficient

to incorporate by reference a then existing typewritten document, which latter was ineffectual as a will because not legally attested. There is no escape from the conclusion that the holding in *Rogers* v. *Agricola* constituted an adherence of this court to the weight of authority allowing instruments definitely identified and then in existence to be incorporated into a will by reference. In *Rogers* v. *Agricola* we said: "We are of the opinion therefore that the two instruments constituted the will of Carl Rogers, . . ."

We, therefore, conclude that Mrs. Burdick's will, by the reference in section 9 thereof, incorporated into it the will of George H. Burdick as effectively as if said will of George Burdick had been written out in full in Mrs. Burdick's will.

II. *Did the Reference in Section 9 of Mrs. Burdick's Will to the Will of Her Husband Sufficiently Mention Hazel Burdick So as to Prevent Her From Claiming the Rights of a Pretermitted Child Under § 14525 of Pope's Digest?* This section of our digest was § 12 of chapter 157 of the Revised Statutes of 1837, and has remained without legislative change. The part essential to consideration here reads: "When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate; . . ."

In the University of Arkansas Bulletin, Vol. 34, No. 4 (Law School Bulletin, Vol. 8, No. 2) under date of May 15, 1940, there is an article by Prof. Edward B. Meriwether, entitled, "Pretermitted Child Statutes," which reviews the Arkansas cases on this statute, as well as on § 14524, Pope's Digest. In Columbia Law Review, Vol. 29, p. 748, there is an analysis of the statutes of various states concerning pretermitted children.

The case of *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373, was decided by this court in 1908, and has become a landmark in the application of our pretermitted child statute. That case clearly holds that the testator need not name each child individually, but he may refer to all of his children as a class. In the reported case, the testator had four children. He did not name them individually: the will merely provided, "I give my wife one-half of my property, and one-half to my children." This provision was held to be a substantial compliance with our pretermitted child statute. Mr. Justice McCulloch, speaking for this court, said (l. c. 385): "We think it is manifest that what was intended by the statute was to declare intestacy as to children of a testator, and thus provide compulsory provisions for them, unless the testator expresses a contrary intention in the will toward the children. Such an intention may be expressed by the testator in his will by providing for them as a class without naming them separately, or by naming them without providing for them. Either method is equivalent to the other, and either the one or the other clearly excludes any intention on the part of the testator to omit his children from the testament. It would, we think, be disregarding entirely the purpose of the statute, and would be putting form over substance, to say that the names of children must be individually mentioned in a will which provides substantially for each and all of them."

We expressly follow *Brown* v. *Nelms,* and give the above quotation to show the reason that this court assigned for its holding on the statute. See, also, *Culp* v. *Culp,* 206 Ark. 875, 178 S. W. 2d 52, and authorities there cited; and see, also, 26 C. J. S. 1050. There is nothing in *Yeates* v. *Yeates,* 179 Ark. 543, 16 S. W. 2d 996, 65 A. L. R. 466, in conflict with the holding in the present case. The Yeates case was peculiar in its facts, but clearly recognized the general principles concerning pretermitted children.

In *Brown* v. *Nelms,* this court cited *Gerrish* v. *Gerrish, supra,* as follows (l. c. 388): "The Supreme Court

of Oregon in *Gerrish* v. *Gerrish,* 8 Ore. 351, 34 Am. Rep. 585, construing a statute of the State which was copied from the Missouri statute quoted herein, followed the construction laid down by the Missouri court, and held that the mention in a will of children as a class was sufficient naming of them within the meaning of the statute." The Gerrish case has been previously mentioned in this present opinion, and is "on all fours" with the facts in the case at bar. The claim was made in the Oregon case that some children were pretermitted because not individually named in the will of Mrs. Gerrish. But it was shown that Mrs. Gerrish in her will had adopted by reference the will of her husband, Mr. Gerrish, and that in his will he had named all of the children of Mrs. Gerrish. Therefore, the Oregon court held that the children of Mrs. Gerrish were not pretermitted heirs.

When we held, as we did, in the first section of this opinion, that the reference by Mrs. Burdick in her will to the will of Mr. Burdick constituted an incorporation of his will into her will by such reference with the same force and effect as if written in her will, and when it was shown that Mr. Burdick named Hazel Burdick in his will, then it would seem reasonably clear that Hazel Burdick was not pretermitted from Mrs. Burdick's will. But that conclusion is strengthened and made positive by the holding in the Gerrish case, which was cited by this court as previously mentioned.

We, therefore, hold that Mrs. Hazel Burdick Kinnear cannot claim to have been pretermitted from the will of her adoptive mother, Mrs. Helen Burdick, since the latter adopted into her own will by reference the will of Mr. Burdick, and since Mr. Burdick's will named Hazel Burdick in at least two places.

III. *Did the Revocation of Section 9 of Mrs. Burdick's Will by the Second Codicil Constitute an Omission to Name Hazel Burdick So as to Give Her the Status of a Pretermitted Child?* It will be recalled that in the will of Mrs. Burdick (dated November 18, 1938) the only reference to Hazel Burdick was by section 9 thereof, which

section incorporated therein by reference the will of Mr. Burdick. The second codicil of Mrs. Burdick's will was dated October 21, 1940, and in that codicil Mrs. Burdick specifically revoked section 9 of her will. Appellant claims that the effect of this second codicil was to expunge section 9 from Mrs. Burdick's will, thereby omitting the only reference to Hazel Burdick, and leaving her pretermitted. The answer to this contention necessitates a discussion of the nature and effect of a codicil.

Some of our cases involving codicils are: *Rogers* v. *Agricola,* 176 Ark. 287, 3 S. W. 2d 26; *Little Rock* v. *Lenon,* 186 Ark. 460, 54 S. W. 2d 287; *Driver* v. *Driver,* 187 Ark. 875, 63 S. W. 2d 274; *Gibbons* v. *Ward,* 115 Ark. 184, 171 S. W. 90; *United States of America* v. *Moore,* 197 Ark. 664, 124 S. W. 2d 807. General statements on the definition and effect of codicils may be found in: 68 C. J., pp. 412, 868, and 886; 28 R. C. L. 197; *Page on Wills* (Lifetime Ed.), §§ 439, 466, and 528; *Schouler on Wills, Executors and Administrators* (Sixth Ed.), §§ 8, 9, 630, 753, and 904.

A codicil is not an entirely new will. A codicil is, rather, a postscript to the will showing something added by the testator to the original document. Just as a postscript to a letter may show a new idea of the writer or a change, or amendment to a thought, expressed in the letter: so a codicil may express a new bequest or a change or modification of a bequest in the will. Just as the postscript does not physically or literally erase or expunge whatever it affects in the letter: so, also, the codicil does not physically or literally erase or obliterate whatever it affects or changes in the original will. The will is probated along with the codicil; together they constitute the "last will and testament" of the testator or testatrix.

These statements are elementary to any practitioner; but sometimes the simple and elementary truths are overlooked, with resultant confusion and misunderstanding. A section of a will does not literally and physically cease to exist merely because the section is revoked in the codicil. The revoked section continues to be in ac-

tual existence, but is given no effect in construing or interpreting the will, since the codicil revokes the section. In some of the cases construing and interpreting wills, there may be found statements to the effect that, when a section in a will has been revoked by a codicil, the testament is construed as though the revoked section did not exist. Such statements are true in construing and interpreting wills and testaments, but these statements do not mean that the revoked section of the will does not exist in fact. The revoked section is not obliterated: it is merely rendered nugatory.

Applying these elementary principles to the case at bar, the result is this: Mrs. Burdick named Hazel Burdick (by reference) in section 9 of the will; and that fact prevents Hazel Burdick from being a pretermitted child. By the second codicil, Mrs. Burdick revoked section 9 of her will. The effect of such revocation is to leave Hazel Burdick without a bequest. But the effect is not to erase or obliterate Hazel Burdick's name from the will. Section 9 remains in the will, although, by the codicil, it is to be given no effect. The situation here is the same as if Mrs. Burdick had said, "I name my adopted daughter, Hazel Burdick, but I leave her nothing." In such a case, Hazel Burdick is mentioned and therefore is not pretermitted. *Culp* v. *Culp, supra,* bears on this point. In *Phillips* v. *Phillips,* 193 Wash. 194, 74 Pac. 2d 1015 (decided by the Supreme Court of the State of Washington in 1938), the testatrix stated in her will: "I have in mind my five children," and she named each of the five: "and make no provision as to them, knowing that my said husband, who is their father, will deal justly with them." It was argued that the children were pretermitted, because they received nothing, but the Supreme Court of Washington (in which state the pretermitted child statute is similar to ours) held that the children were not pretermitted.

Faucher v. *Bouchard,* 47 R. I. 150, 131 Atl. 556, was decided by the Supreme Court of Rhode Island in 1926. In that case the testator made a specific bequest of a cer-

tain house and lot to the heirs of a deceased son. That was the only mention of the heirs of such deceased son in the will. After the making of the will the testator disposed of the specific house and lot, so that at the time the will was probated there was no property to go to the heirs of the deceased son. These grandchildren claimed that they were pretermitted under the Rhode Island statute similar to our statute. The Rhode Island court held against such contention of the grandchildren, stating that the statute did not require the testator to leave any property to such grandchildren, but merely required that they not be omitted. The court said, of the grandchildren: "The latter received nothing, not because of an omission in the will, but by a failure of the devise due to the subsequent act of the testator. The only conclusion from the facts is, that testator intended that the grandchildren mentioned in his will should take nothing under the will." See, also, *In re* Fanning's Estate. 8 Calif. 2d 229, 64 Pac. 2d 951.

Such is the case here. Mrs. Hazel Burdick Kinnear was not pretermitted, because she was named by reference in the will. She takes nothing under the will of Mrs. Helen Burdick because the bequest to Hazel Burdick was revoked by the codicil. The decree of the chancery court is in all things affirmed.

REYNOLDS *v.* TASSIN.

4-7847 192 S. W. 2d 984

Opinion delivered March 11, 1946.

A. M. Coates, for appellant.

Dinning & Dinning, for appellee.

MILLWEE, J. This appeal involves the right to the custody of Bobby Joe Reynolds, the five-year-old son of appellant and appellee. The parties were married on May 13, 1934, immediately after appellant obtained a divorce from his first wife, with whom he had lived since 1916. Appellant became engaged in commercial fishing soon after the marriage and the couple resided in a small houseboat on the river until the death of their first child, a daughter. They then moved back to West Helena where Bobby Joe was born October 18, 1940.

The parties separated in May, 1941, and appellee obtained a decree of divorce on May 28, 1941, under the terms of which she was awarded custody of the child. In June, 1941, appellant remarried his first wife. The original divorce decree contained no provision for support of the child, but, upon application made by appellee, an order was entered November 22, 1941, requiring appellant to pay appellee $2.50 per week for the child's support. Appellee became employed at a hosiery mill earning $7 per week and placed the child in the home of relatives who lived in St. Francis county. On January 8, 1942, appellant filed his petition for modification of the

original decree which was heard on the date filed and custody of the child was changed from appellee to appellant. In May, 1942, appellee married A. J. Tassin of Marksville, Louisiana.

Appellant left Helena in the early part of 1943 for California where he obtained employment in a war plant, leaving the child with the stepmother. Appellee and her present husband visited in Helena in February, 1943, and advised the stepmother of their intention to make application for a change of custody of the child. On February 25, 1943, appellee wrote a letter to appellant in which she stated that such application would be made on March 22, 1943. On or about March 1, 1943, the child and stepmother went to appellant in California and resided in a hotel for two or three weeks until government housing became available.

Appellee filed petition for modification of the order of January 8, 1942, and an order was entered on March 22, 1943, restoring custody of Bobby Joe to her. This order recites that appellant "although duly notified, failed to appear." The order also directed appellee to give bond for $250, the condition of which required future submission to the jurisdiction and orders of the court. At the time of this order, appellant and the child were in California. In September, 1944, appellee and her husband, A. J. Tassin, went to California where she recovered custody of the child from appellant through *habeas corpus* proceedings. Mr. and Mrs. Tassin returned with the child to their home in Marksville, Louisiana.

On October 17, 1944, appellant filed his petition in the Phillips chancery court to vacate the order of March 22, 1943, alleging that he had no notice of the proceedings resulting in the order of that date, and that said order was obtained through misrepresentation and fraud practiced upon the court. He prayed that the order be vacated and the custody of the child restored to him. Appellee filed a response to this petition on October 18, 1944, and, at a hearing before the chancellor in vacation, the motion to vacate the order of March 22, 1943, was denied. How-

ever, the court treated the motion to vacate as one to modify the March 22nd order to such an extent as to restore custody of the child to appellant, and the parties were permitted to file further proof for a hearing upon such motion on its merits.

The parties proceeded to take testimony on the question of a modification of the order of March 22, 1943, and the decree appealed from was entered on September 15, 1945. This decree modified the order of March 22, 1943, by awarding custody of the child to appellee for the nine months school term of each year, and to appellant for the vacation period, on condition that he pay appellee $5 per week for the child's support while in the custody of the mother. Both parties were required to give bond to abide by orders of the court respecting the custody of the child. Both parties have appealed from this decree.

It is first insisted by appellant that the trial court erred in its refusal to vacate the order of March 22, 1943, which modified the order of January 8, 1942, because appellant had no notice of the hearing on appellee's petition for such modification. The record reflects that a hearing was had on appellant's motion to vacate the order of March 22, 1943, on October 18, 1944. This order, which denied appellant's motion to vacate, recites that all parties and their counsel were present and that the cause was submitted upon evidence heard in open court. This evidence was not preserved in this record, and under the well settled rules of this court, it must be presumed that the omitted evidence sustains the finding of the chancellor on this issue. *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096; *Hill* v. *Brittian,* 185 Ark. 1029, 50 S. W. 2d 974; *Wardlow* v. *McGhee,* 187 Ark. 955, 63 S. W. 2d 332; *McGowan, et al.,* v. *Burns, et al.,* 190 Ark. 1177, 77 S. W. 2d 970. If the court had sustained the motion of appellant to set aside the decree of March 22, 1943, this would not have resulted in a dismissal of appellee's petition for modification of the order of January 8, 1942, but it would have been the duty of the court to order a new trial of the cause. *Hunton* v. *Euper,* 63 Ark. 323, 38 S. W. 517.

All parties were before the court in the present proceedings, and the court had continuing jurisdiction acquired in the original divorce suit to make such orders pertaining to custody as the welfare of the child demanded.

After the chancellor denied the motion to vacate the decree of March 22, 1943, he treated the motion as one to modify said decree and permitted the parties to take proof by depositions on this motion. A large volume of testimony was taken, and both parties rely on the rule often announced by this court which is set out in *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450, as follows: "A decree fixing the custody of the child is, however, final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child." Appellant argues that the testimony fails to disclose a change in the conditions surrounding the welfare of the child since the order of January 8, 1942, when custody was awarded to him. Appellee contends, on the other hand, that there has been no change in such conditions since March 22, 1943, when she regained the right to custody of the child.

Regardless of whether the present proceeding be treated as one to modify the order of January 8, 1942, or the order of March 22, 1943, and, regardless of the regularity of prior proceedings, the first and paramount consideration of the court is the welfare of the child. The rule which this court has repeatedly announced is stated in *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817, as follows: "It is the well settled doctrine in this state that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity."

Without attempting a detailed recital of the testimony, it may be said that both parties in the past, by

reason of poverty or depravity, have failed to provide the physical care and moral training essential to the well being of their child. This was not true, however, at the time of the hearing herein, and for some time prior thereto. Both parties now have comfortable homes and have shown a proper interest in the welfare of the child. The interest also manifested by the stepmother and stepfather is to be commended. Several witnesses who resided near appellant, while the child was in his custody in California, testified to the splendid care and attention given the child by the stepmother. The stepfather is employed in the agricultural program of the government at a good salary and owns a comfortable farm home equipped with modern conveniences within four miles of churches and good schools to which regular bus transportation is furnished. The mother is no longer faced with the impoverished conditions which, she says, forced her to place the child in the care of relatives in 1942. Bobby Joe is only five years of age, and this court has always been reluctant to deprive a child of tender years of the care and affection of his mother. *Beene* v. *Beene,* 64 Ark. 518, 43 S. W. 968; *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1; *Gibson* v. *Gibson,* 156 Ark. 30, 245 S. W. 32; *Taylor* v. *Taylor,* 163 Ark. 229, 259 S. W. 395; *Blain* v. *Blain,* 205 Ark. 346, 168 S. W. 2d 807.

Appellant resides in Helena where he, too, maintains a suitable home for the proper care and training of the child. He is considerably handicapped in his right of visitation with his son by reason of the distance between Helena and Marksville, Louisiana, the home of appellee. The trial court awarded custody to the mother for the school term of nine months each year, and to the father for the vacation period of three months. When the testimony is viewed from the standpoint of the welfare and best interest of the child, we are unable to say that the decree is against the preponderance of the evidence. It follows that the decree will be affirmed, both on appeal and cross-appeal.

4403 192 S. W. 2d 977

Opinion delivered March 11, 1946.

[redacted]

Harry L. Ponder, Jr., Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellant.

R. W. Tucker, for appellee.

McHANEY, J. Appellee is the sheriff of Independence county, Arkansas. The grand jury of said county returned two indictments against him at the fall 1945 term of court, each charging him of the crime of misdemeanor in office, in one that he did, on the 5th day of February, 1945, "willfully and unlawfully fail, neglect and refuse to render his accounts to, and settle with the County Court for moneys by him received, to the use of Independence county in the manner and at the time provided by § 3534 of Pope's Digest and § 12 of Initiated Act No. 1, of Independence county." In the other, the date of the alleged failure, etc., was on the 5th day of January, 1945, and in the charging part the language is substantially the same as above quoted.

Trial resulted in an instructed verdict of not guilty for appellee, the two cases having been consolidated for trial, and judgment was entered discharging him. The

State has appealed under the provisions of §§ 4253 and 4254 of Pope's Digest to have said § 3534 construed by this court and, if so found, to have error of the trial court declared "to the end there may be correct and uniform administration of the criminal law."

At the outset appellant is confronted with the motion of appellee to affirm for failure to comply with rule 10 of this court which requires appellant in criminal cases to file with the clerk of this court a brief and abstract or abridgment of the transcript as in civil cases. Rule 9 (b) provides that the abstract shall contain the material parts of the pleadings, proceedings, facts and documents upon which appellant relies, together with such other matters from the record as are necessary to an understanding of all questions presented to this court for decision. These rules apply to the State in a misdemeanor case when it is the appellant just as they do to a defendant who appeals from a conviction in such a case.

Here, counsel for the State say they will set out such of the evidence, as they deem necessary to a decision of the question presented, in their argument. In the argument they say: "The court will notice from an examination of the record of the trial in the lower court that the testimony introduced on the part of the State, . . ., was directed solely to establishing" that appellee collected sums of money as fines due to said county during the last quarter of 1944, and that he failed and refused to account or settle therefor. It was the duty of counsel for the State to abstract or set out this testimony. We are not required to explore the transcript. Only one is filed here, and there are seven judges. If each of them had to read the transcript, it would impose an impossible burden on them. The only testimony attempted to be set out consists of a half dozen questions to and answers given by appellee, except a statement as to what counsel say is the effect of the testimony of Treasurer Stroud. Several other witnesses testified in the trial.

We conclude that appellant failed to comply with rule 10 by properly abstracting the testimony in the rec-

ord, and the judgment should be and is, accordingly, affirmed.

GARRETT *v.* MENDENHALL, EXECUTOR.

4-7853 192 S. W. 2d 972

Opinion delivered March 11, 1946.

Henry Stevens and *A. R. Cheatham,* for appellant.

Ezra Garner, for appellee.

HOLT, J. Miss Nannie Garrett died testate March 31, 1942. She left no bodily heirs. Her will, which was duly probated April 25, 1942, provided: "1. I desire that all my just debts, funeral expenses and doctor bills be paid as soon after my decease as can be conveniently done. 2. After the payment of my just debts, doctor bills, I give, devise and bequeath to each of my brother and sisters, the sum of one dollar ($1.00) and if either of them

be dead, then in that event, the one dollar ($1.00) willed to them, shall go to their heirs or estate. 3. I hereby authorize and direct my Executor hereinafter named to erect a Monument of White Marble, at my grave, as soon after my decease as can be conveniently done, and I direct that he is authorized to expend the sum not exceeding $1,000 for the cost of said monument. 4. It is my desire that my remains be interred in the cemetery at Antioch East and my Executor is hereby authorized and directed to expend the sum not exceeding $250 for my burial expenses. 5. All the rest, residue and remainder of my estate to be the same moneys, notes, accounts, personal property and real estate, I give, devise and bequeath to the Trustees of the Missionary Baptist Church at Antioch East, and to their successors in office for them to use as to them seemeth best, for the best interest of said church and community. That they see that my grave is cared for and kept in good condition forever. 6. For the purpose of carrying out the above provision of my last Will and Testament, I hereby constitute and appoint E. C. Mendenhall to be sole executor of this my last Will and Testament, and I hereby direct that he be permitted to serve as such executor without bonds.

"Having studied the matter of disposing of my property after my decease, which has been no little question for me to settle, I have made the above will without the persuasion or undue influence from anyone, and that last Will and Testament clearly speaks my mind as to the disposition of my property, and I have read and had the same read to me and I desire that it stand as written."

Appellants, the collateral kinsmen of Miss Garrett, filed the present suit in the Columbia chancery court August 1, 1944, in which they alleged: "First. Miss Nannie Garrett departed this life March 31, 1942, and she left no bodily heirs. Second. The above named plaintiffs are the heirs and only heirs of the said Miss Nannie Garrett. Third. Miss Nannie Garrett executed what she termed a Will the ..... day of April, 1939. The Will was filed for probate April 25, 1942, and the Will was pro-

bated on April 25, 1942. Fourth. Miss Nannie Garrett was declared mentally incompetent August 9, 1940. Fifth. On August 28, 1940, A. P. Garrett was appointed Guardian of her person and of her estate and after having given bond as provided by law, he took charge of the property of said estate and still has, after paying certain expenses of guardianship, said property in his possession under his bond, and further there are expenses of said guardianship unpaid. Sixth. Plaintiffs for their cause and grounds for this Bill further allege that as heretofore set out in this Bill, that A. P. Garrett took charge of the property on his giving a bond according to law; that he now holds said property and is entitled to the same by reason of said bond; that the alleged executor herein has no right to said property or any part of same for the reason said alleged will is void and the heirs of Miss Nannie Garrett, deceased, and her assigns are the owners of same. Seventh. They state as heretofore that the will under which E. C. Mendenhall claims the right to possession of said property and the right to administer same is void and for reasons state:

"The will itself: (a) Does not designate any beneficiary. (b) Does not designate any person or any interest as the object of her beneficence. (c) It does not designate any purpose whatever to which and for which this beneficence is to be used. (d) The will in itself is objectionable because it attempts to establish a perpetuity. (e) The will is inconsistent to the extent of a repugnancy in that it attempts to vest the title in trustee and then designates E. C. Mendenhall as the executor named 'for the purpose of carrying out the above provisions of my Last Will and Testament.' The plaintiffs filed a copy to the will herein referred to and mark it Exhibit 'A' to this bill. Wherefore, plaintiffs pray judgment declaring said will void and for all other and proper relief."

May 28th thereafter, the following amendment to this complaint was filed: "1st. Come the plaintiffs herein and ask the court to allow them to amend their second paragraph of their complaint so as to allege Henry Ste-

vens is an assignee instead of an heir. 2nd. To amend by making the trustees of the Missionary Baptist Church at Antioch East a party defendant. 3d. To amend the fifth paragraph of their complaint by adding thereto the property in his possession aggregates in value between $8,000 and $10,000 consisting of U. S. Bonds, deposits in banks and real estate."

Appellee, executor under the will, on September 25, 1944, filed a demurrer in which he alleged, among other things, that the court was without jurisdiction and that the complaint did not state facts sufficient to constitute a cause of action.

May 28, 1945, the trial court sustained the demurrer and dismissed the complaint and amendment thereto for want of equity. This appeal followed.

By the will, the testatrix gave to each of her brothers and sisters or their heirs or estates, one dollar. She authorized her executor to pay her debts, to erect a monument at her grave at a cost not to exceed one thousand dollars, to inter her remains in the Antioch East Cemetery at a cost not to exceed two hundred and fifty dollars, and the remainder of her estate "be the same moneys, notes, accounts, personal property and real estate," she devised and bequeathed "to the Trustees of the Missionary Baptist Church at Antioch East, and to their successors in office, for them to use as to them seemeth best for the church and community." It thus appears that definite disposition, to designated beneficiaries, was made of all the property the testatrix owned.

We find no ambiguity in its provisions and no doubt, in the meaning of the language used, that would require judicial interpretation or construction. *Quattlebaum* v. *The Simmons National Bank, Admr.*, 208 Ark. 66, 184 S. W. 2d 911.

The devise to the Trustees of the Missionary Baptist Church at Antioch East is clearly a definite devise creating a trust, for a charitable use, for the benefit of an indefinite number of persons, and does not fall within the

rule against perpetuities. The court had jurisdiction. See the recent case of *Jesseph* v. *Leveridge,* 205 Ark. 665, 170 S. W. 2d 71. The devise is good whether the church be an incorporated or an unincorporated religious body. Appellants do not allege in their complaint that the Missionary Baptist Church at Antioch East is not in existence or that there is no such organization.

In *Biscoe* v. *Thweatt,* 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136, this court held (headnote 1): "A devise to the vestrymen of a church, an unincorporated religious body, for the use and benefit of such church, is a good charitable devise, is not too indefinite for fulfillment, and is not within the rule against perpetuities," and in the body of the opinion, said: "By the law of England from before the statute of 43 Eliz., c. 4, and by the law of this country at the present day (except in those States in which it has been restricted by statute or judicial decision, as in Virginia, Maryland and more recently in New York) trusts for public charitable purposes are applied under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be construed so as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form and manner pointed out by him cannot be followed. They may, and, indeed, must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery. *Russell* v. *Allen,* 107 U. S. 163, 2 S. Ct. 327, 27 L. Ed. 397. The same case further held a devise to an unincorporated charity to be valid. . . . It is well settled that a devise for a charitable use to church wardens, although not

a corporation capable in law of holding and transmitting property, will be sustained."

Having reached the conclusion that the complaint and amendment thereto did not state a cause of action, the decree sustaining the demurrer was correct, and accordingly, it is affirmed.

BARTON *v.* MEEKS.

4-7848 193 S. W. 2d 138

Opinion delivered March 11, 1946.

Rehearing denied April 8, 1946.

P. L. Smith and *J. Clib Barton,* for appellant.

Alfred Featherston, for appellee.

ROBINS, J. Appellant, on March 5, 1945, brought ejectment suit against Charlie Price, one of the appellees, to recover a nineteen acre tract in Pike county, Arkansas. Price answered, denying appellant's right to the land and asserting that he (Price) held same as tenant of the owners, who, he alleged, were the widow and children of O. O. Meeks, deceased. An intervention was filed by appellees, Mrs. Pearl Meeks (O. O. Meeks' widow), and Harold E. Meeks, Wilma Jones and Lucille Meeks Frey, children of Mr. Meeks, in which they set up ownership of the land in themselves and two other children of said O. O. Meeks, by virtue of a deed executed by the county clerk to O. O. Meeks on August 8, 1929, conveying the land, as having been forfeited for nonpayment of state and county taxes of 1926, and appellees also set up as a defense adverse possession of the land by them and O. O. Meeks for more than seven years.

Appellant thereupon filed a plea of *res judicata,* in which he averred that in a suit in the chancery court of Pike county, wherein the said interveners, Mrs. Pearl Meeks, and the said children of O. O. Meeks, deceased, were plaintiffs and appellant, Ross J. Barton, was defendant, same being an action brought by interveners to quiet the title of the land herein involved, a decree was rendered on March 4, 1943, by which it was adjudged that the tax deed executed by the clerk to O. O. Meeks was void, and that the interveners had no title to the land by reason of adverse possession. The lower court did not pass upon this plea of *res judicata.*

On trial of the instant case the deed under which appellant claims title and also the complaint and the decree in the chancery suit were introduced in evidence, and several witnesses testified as to the possession of the land. The court, without objection from appellees, instructed the jury that appellant held the record title to the land and should recover, unless the interveners established their asserted title by adverse possession. The jury returned a verdict for the interveners and from the judgment entered in accordance with the verdict this appeal is prosecuted.

The view we take of the rights of the parties as disclosed by the record renders it unnecessary to discuss the question of the sufficiency of the testimony to support the verdict or the correctness of the instructions given the jury by the court.

It is undisputed that a decree, from which there was no appeal, was rendered by the chancery court on March 4, 1943, in an action begun on August 27, 1942, between the same parties who are before us now, in which it was adjudged that the appellees (interveners below) were not entitled to this land either by reason of adverse possession or by virtue of the tax deed to O. O. Meeks. The rights of the parties as of the date of the institution of the suit in the chancery court were fixed by this decree. It was a judicial pronouncement that on and before August 27, 1942, the interveners, if they were occupying the land, had no right or title thereto.

Manifestly, in the case at bar, appellees were permitted by the lower court to rely on the same claim of title that had been held insufficient in the chancery case. This was error. It is a fundamental rule that, when a question is settled adversely to a litigant by judgment of a court of competent jurisdiction, such judgment precludes the litigant from raising the same question in another suit. In the case of *Carvill* v. *Jacks,* 43 Ark. 439, it was held (headnote 1): "A party to a suit in equity is bound by the finding and decree of the court, and is estopped to deny in a subsequent suit a material fact

charged in the pleading and found by the court." To the same effect are the opinions in these cases: *National Surety Company* v. *Coates,* 83 Ark. 545, 104 S. W. 219; *Pemberton* v. *Barker,* 134 Ark. 571, 203 S. W. 9; *Toll* v. *Toll,* 156 Ark. 139, 245 S. W. 299; *Less* v. *Less,* 158 Ark. 255, 249 S. W. 583; *Jernigan, Bank Commissioner,* v. *Daughtry,* 194 Ark. 623, 109 S. W. 2d 126; *Maryland Casualty Company of Baltimore* v. *Sturgis,* 198 Ark. 574, 129 S. W. 2d 599; *Meyer* v. *Eichenbaum,* 202 Ark. 438, 150 S. W. 2d 958; *Fish* v. *McLeod, Commissioner of Revenues,* 206 Ark. 142, 174 S. W. 2d 236.

Since the instant suit was filed less than three years after the rendition of the chancery decree, appellees could not possibly have acquired title by adverse possession after the date of this decree. Appellees' occupancy of the land subsequent to the decree of the chancery court must be presumed, in the absence of proof of express notice to the true owner of a hostile claim asserted by appellees, to be in subordination of the title of such owner. 2 C. J. S., Adverse Possession, § 121, p. 672; *Green* v. *Strubbe,* 234 Ky. 380, 28 S. W. 2d 469, *Stewart* v. *Stewart,* 83 Wis. 364, 53 N. W. 686, 35 Am. St. Rep. 67. The lower court should have sustained appellant's plea of *res judicata.*

It is argued by appellees that the decree of the chancery court operates as a bar also to appellant's claim, because in the chancery action the court refused to confirm the title of appellant, who was defendant therein. But the decree recites that this refusal was based on the fact that appellant at that time apparently had only a contract to purchase the land; and a short time after the decree was rendered appellant obtained the conveyance, which it was conceded on trial below, vested record title in appellant. The title now relied on by appellant was not adjudicated adversely to him by the chancery court. *Wadly* v. *Leggitt,* 82 Ark. 262, 101 S. W. 720, 118 Am. St. Rep. 70.

It is not disputed that appellees have paid taxes on the land involved herein amounting, with interest, to

$172.65, which they are entitled to recover by reason of the provisions of Act 269 of the General Assembly of Arkansas of 1939, approved March 10, 1939. Appellant asked only an instruction directing the jury to award the land to him, and thereby waived claim for any rents due to him.

The judgment of the lower court is accordingly reversed and the cause remanded with directions to the lower court to enter judgment in favor of appellant for the land in controversy and to render judgment in favor of appellees, for the use and benefit of the widow and heirs of O. O. Meeks, deceased, with lien in conformity with said Act 269, for $172.65 and interest from May 21, 1945, at the rate of six per cent. per annum; the costs of both courts being adjudged against appellees.

PARKER *v.* CHERRY.

4-7857 193 S. W. 2d 127

Opinion delivered March 18, 1946.

J. H. Carmichael, for appellant.

Luke Arnett, for appellee.

MILLWEE, J. This suit was originally instituted in the Logan chancery court by M. B. Hardnicke, as guardian of Lena Parker, against appellees, as trustees of the estate of W. R. Cherry, deceased, to quiet title to a certain tract of land containing approximately three acres. It was alleged that Lena Parker had been in possession of the land three or four years through her tenant, and that it formerly belonged to her husband, R. C. Parker, who had by his will devised all the residue of his property to her. It was also alleged that appellees claimed title to the property by reason of an exception in the description of the land contained in a deed from R. C. Parker to appellees dated December 16, 1938. It was further alleged that the county surveyor had platted the lands and found that same were excepted in the deed and did not, therefore, pass to appellees by the deed of December 16, 1938. A copy of a plat of a survey alleged to have been made by the county surveyor on January 28, 1939, was attached as an exhibit to an amendment to the complaint.

In their answer, appellees denied generally the allegations of the complaint and claimed ownership of the disputed tract by virtue of the aforementioned deed, a copy of which was attached to and made a part of the answer. Appellees also alleged that it was the intention of R. C. Parker to convey the lands in controversy by this

deed. They prayed for a dismissal of the complaint and reformation of the deed, in the event it should be determined that the description of the disputed tract was ambiguous.

Lena Parker died February 22, 1944, and the cause was revived in the name of Arthur C. Parker, Juanita Ritchie, and Ruth Quigley, as her sole heirs at law.

The trial court entered a decree on September 6, 1945, dismissing the complaint for want of equity, and quieting the title of appellees to the tract in controversy. The decree recites that the cause was submitted on the complaint, amendment to complaint, the answer, and upon oral and documentary evidence. After the transcript was lodged in this court on appeal, appellees filed a motion to strike the testimony from the record, and dismiss the appeal, because such testimony was not properly preserved either by bill of exceptions or depositions. On January 21, 1946, an order was entered in this court sustaining the motion to strike the testimony, but denying the motion to dismiss the appeal. *Hardnicke, Guardian,* v. *Cherry, infra,* p. 1009, 190 S. W. 2d 521. While the cause is to be determined without consideration of the stricken evidence, we agree with the trial court that such testimony would be of little, if any, benefit in determination of the issue. We may, therefore, review the decree only for errors appearing on the face of the record which, in chancery cases, includes the pleadings and the exhibits attached thereto. *McMillan* v. *Morgan,* 90 Ark. 190, 118 S. W. 407; *Cummins Bros.* v. *Subiaco Coal Co.,* 150 Ark. 187, 233 S. W. 1075.

We agree with counsel for appellants that the only question presented is whether the three-acre tract was excepted in the deed from R. C. Parker to appellees on December 16, 1938. This deed was given in settlement of an indebtedness due from R. C. Parker to the W. R. Cherry estate which was evidenced by a mortgage executed to Cherry. The deed conveys certain lands lying in section 1, township 7 north, range 26 west, in Logan county. That part of the description contained in the

general grant of the deed before us for construction, reads as follows: "All of the northwest quarter of the southwest quarter except two acres in the southwest corner of said forty heretofore deeded to Jones, 38 acres: *also, all of the southwest quarter of the southwest quarter, except that platted and in blocks to the Town of Paris, west of this tract and a small plat heretofore deeded to Charlie Parker and north of public road, about three acres;* . . ."

A copy of the purported survey attached as an exhibit to the amendment to the complaint is not certified in the manner provided by § 2414 of Pope's Digest, which provides that a certified copy of the record of any county surveyor shall be admitted as *prima facie* evidence in any court of record. It was not shown that the survey was made by an order of court, or upon notice to appellees, and there is nothing in the record to identify the plat. Under similar circumstances this court, in *Mooney* v. *Cooledge,* 30 Ark. 640, held a survey incompetent as evidence for any purpose.

The exception in the above description as to that property platted and in blocks in the town of Paris is not in dispute and, therefore, not an issue here. Appellants seek to quiet title to the tract excepted in the deed and described as, "a small plat heretofore deeded to Charlie Parker and North of the Public road, about three acres." It is the contention of appellants that the tract involved in this controversy was excepted from the grant under the description employed, and did not pass with the execution of the deed by R. C. Parker. Appellees contend that the description of these three acres attempted to be excepted is insufficint and void and that title, therefore, passed to them in the deed from R. C. Parker.

The legal requirements to be met in excepting a tract of land from a deed are stated in 16 Am. Jur., p. 618 as follows: "Land embraced in an exception must be described with the same definiteness and certainty that is required when describing the property granted. Conversely, that which will pass by certain descriptive words in a grant will be excepted by the same descriptive words

in an exception. However, the office of the description in an exception is not to identify the land, but to furnish the means of identification, and parol evidence may be resorted to for this purpose. If the excepted part of the tract or lot described is insufficiently described, the deed will be operative and the exception will be void so that title to the whole tract or lot will pass to the grantee." And in 26 C. J. S., Deeds, p. 457, § 140, it is said: "Uncertainty of description will not render a reservation void where there is a method provided in the deed whereby it can be made sufficiently certain. If the language of the exception provides information which, when supplemented by competent extrinsic evidence, satisfactorily identifies the excepted parcel, it is sufficient."

In the case of *Mooney* v. *Cooledge, supra,* Mooney owned a tract of land containing 147 acres and, in a deed which properly described the whole tract, he undertook to except from the operation of the deed a one acre tract which was so imperfectly described that it could not be located. It was there held (to quote a headnote): "The same certainty of description is required in an exception out of a grant, as in the grant itself; and where a deed excepted out of the conveyance one acre of the land, and there was nothing in the exception, or evidence, to locate it upon any particular part of the tract, the exception was void for uncertainty, and the grantee took the entire tract."

The case of *Conolly* v. *Rosen,* 144 Ark. 442, 222 S. W. 716, involved the granting clause of a deed which contained the following exception: "Excepting also six acres in the southeast quarter of the northeast quarter of said section 18, township 3 south, of range 19 west, sold to C. C. Cooley, for a description of which reference is had to the record of the deed for the same in the office of the Recorder of Garland county, Arkansas." In that case the Cooley deed was offered in evidence and contained the following description: "The fractional southeast quarter of the northeast quarter in township 3, section 18, range 19, containing six acres, more or less, in the county of Garland and State of Arkansas." There, this court said:

"It is quite obvious that this description is void for uncertainty, and that uncertainty is not removed by reading the two deeds together."

If it were the intention of the grantor in the instant case to except three acres north of the road in the southwest quarter of the southwest quarter, there is nothing contained in the description employed to locate the three acres in the 40 acre tract. It would be impossible to identify the lands by construction of the description contained in the deed. It appears, however, that the grantor attempted to furnish a more particular means of identification by reference to a prior deed to Charlie Parker. There is neither allegation nor proof in the record as to the contents of a deed to Charlie Parker. Appellants have not seen fit to pursue the means of identification furnished by the grantor, nor has the uncertainty of the description employed in the attempted exception been made certain by any form of supplementary proof which renders the lands capable of identification. The exception being inoperative and void for uncertainty, title to the three acre tract in controversy passed by the grant to appellees as grantees in the deed from R. C. Parker. The chancellor was correct in so holding, and the decree is accordingly affirmed.

GARNER *v.* CLUCK.

4-7851 193 S. W. 2d 661

Opinion delivered March 18, 1946.

Rehearing denied April 29, 1946.

Hardin, Barton & Shaw, for appellant.

Howell & Howell, for appellee.

McHaney, Justice. On February 28, 1942, appellees, A. G. Cluck, Helen Maness and Marie Lincks, filed suit against J. *R.* Garner in the Crawford circuit court to recover damages for personal injuries sustained by them as a result of a collision between the automobile in which they were riding, traveling west, and which was owned and operated by appellee Cluck, and a car owned by said J. *R.* Garner, traveling east, and being driven by a girl, Wilma Adams, "at the instance, request and directions of said defendant, J. *R.* Garner, both of whom were highly intoxicated, in a careless, reckless and negligent manner and at an excessive rate of speed of sixty-five miles per hour," as alleged in the complaint. Summons was issued on the same date and served on March 2, 1942, the return of Deputy Sheriff C. Groves showing service on J. *R.* Garner, which was filed March 4, 1942. On July 6, 1942, the case was tried in the absence of defendant, J. *R.* Garner, he having defaulted, and resulted in judgments

against him as follows: Cluck $175, Maness $3,000, and Lincks $2,000.

No further action appears to have been taken until June 21, 1945, when appellees caused a writ of garnishment to issue against "J. *R.* or J. B. Garner" for the Merchants National Bank of Ft. Smith, which, being served on said bank, impounded the funds of appellant, J. B. Garner.

On June 28, 1945, J. B. Garner filed a verified motion to dissolve the writ of garnishment, alleging that his name is not J. *R.* Garner, but J. B. Garner; that no summons was ever issued for or served upon him; and that he had no notice of the pendency of said action, no knowledge or notice of the trial of the case or the judgment therein until June 22, 1945, when the writ of garnishment was served on said bank. He also asserted a meritorious defense to the action of appellees. The bank filed answer to the garnishment stating that it had funds to the credit of J. B. Garner and Mrs. J. B. Garner jointly.

Trial on the motion resulted in the overruling thereof, the court finding that J. B. Garner had been served with summons in the case and that he had knowledge of the pendency of the suit. This appeal followed. Appellant was allowed to give bond to release the garnishment, which he did.

We think the court erred in refusing to dissolve the garnishment and discharge the garnishee on appellant's motion.

It is undisputed that J. *R.* Garner was sued and not J. B. Garner, that service was on J. *R.* Garner as shown by the officer's return, and that the judgment was against J. *R.* Garner. That there was no service on J. B. Garner is vehemently asserted by him, and, in effect the deputy, Mr. Groves, who made the return showing service on J. *R.*, denies that he served J. B. He knew J. B. Garner, for on the night of the accident, February 15, 1942, he had arrested appellant on a disorderly charge at a night club in Ft. Smith known as 21 Club, and put him in jail.

We are of the opinion that the clerk of the court had no power or authority to issue a writ of garnishment against any person other than one who the "plaintiff shall have reason to believe—is indebted to the defendant, or has in his hands or possession goods, chattels, moneys —belonging to such defendant." Section 6119, Pope's Digest. The garnishment here was issued on a judgment against J. R. Garner and the clerk had no right to include therein a person other than the judgment debtor. The allegations to obtain the writ herein were first, that said bank was "indebted to the said defendant J. R. Garner, or J. B. Garner" in a named sum; and, second, that the bank or garnishee had in its hands goods, etc., "belonging to said defendants." There was only one defendant, only one person against whom appellees had a judgment, and that was J. R. Garner, and the clerk had no authority to name any one else as a judgment debtor in the writ. Before J. B. Garner's funds in the bank could lawfully be impounded, there would have to be a judgment against him, and there is no such judgment.

In the early case of *State* v. *Smith,* 12 Ark. 622, 56 Am. Dec. 287, the court, following the common law rule, said: "The law knows of but one christian name. The entire omission of a middle letter is not a misnomer or variance," and quoted from *Keene* v. *Meade,* 3 Peters 9, 7 L. Ed. 581, that: "The middle letter is immaterial, and a wrong letter may be stricken out or disregarded." This case was cited and followed in *Fincher* v. *Hanegan,* 59 Ark. 151, 26 S. W. 821, 24 L. R. A. 543, where it was held that the record of a crop mortgage executed by Henry *M.* Ward was constructive notice to a second mortgagee on the same crop executed by Henry *N.* Ward, under the rule stated in *State* v. *Smith, supra,* where it did not appear that there was more than one Henry Ward in the county. Chief Justice Bunn dissented from that holding. In the later case of *McReynolds* v. *First Nat'l Bank,* 156 Ark. 291, 245 S. W. 819, W. A. Hunter executed a crop mortgage to McReynolds but signed it "W. H. Hunter." Later he executed another mortgage on the same property to First Nat'l Bank and signed it

in his correct name, W. A. Hunter. This court held that "where initials only are used, they take the place of the christian name, and in such case the correct initials are necessary to give notice." Headnote 1. And so it was held that the record of the mortgage to McReynolds, under the name of W. H. Hunter, was not constructive notice to the bank on its subsequent mortgage executed by W. A. Hunter. The reason for the rule, said the late Mr. Justice HART for the court is that: "It has grown into such universal practice to sign one's name by using the initials instead of the full christian name that it would not do to hold that a mistake in the middle initial amounted to no more than such a mistake when the christian name is written in full. If such is the case the recording act will fall far short of its purpose."

The trend of modern authority is in accord with the holding in the McReynolds case and the general rule as to judgments, says 30 Am. Jur., § 92, p. 865, "is that the principle of *idem sonans* is not applicable to judgments entered in different initial letters from the usual form in which the name is written and spelled in the English language, although the pronunciation is the same. Where an initial is employed instead of the first name of the judgment debtor, an error therein is as fatal as it would be in the name itself. In regard to the middle initial, some authorities hold that if a middle initial is used, it must be the proper one, especially when there are other persons in the district who have a similar name." There is an annotation on the subject in 122 A. L. R. 916.

While our McReynolds case above cited relates to constructive notice of a recorded chattel mortgage, we think the rule would apply with even more force to a judgment with a wrong middle initial, since a judgment is a lien on the real property of a judgment debtor of the county where rendered from the time of its rendition. Section 8255, Pope's Digest. By Section 8238 judgments are required to be indexed and cross-indexed, and an examination of the record would not have disclosed a judgment against appellant, since there was no such judgment.

We are, therefore, of the opinion that the court erred in refusing to quash the writ of garnishment, which impounded appellant's account with said bank, but since a supersedeas bond, same being a cashier's check, was given in the trial court, and an order entered discharging the garnishee, the order of this court is that the judgment be reversed and the cashier's check be released and surrendered to appellant by the clerk of the lower court or to the issuing bank, whichever is the owner thereof.

We are asked to hold the original judgment against J. R. Garner void, but we think J. B. Garner has no right to set aside a judgment against J. R. Garner. Before it can be effective as to him a judgment will have to be had against him in some manner comformably to law.

A question not presented or decided is the right of appellees to garnish the joint account of J. B. Garner and Mrs. J. B. Garner on a valid judgment against J. B. Garner only.

RODGERS *v.* VAUGHN.

4-7838 193 S. W. 2d 652

Opinion delivered March 18, 1946.

Rehearing denied April 29, 1946.

Chas. A. Maze and *W. J. Morrow,* for appellant.

Bob Bailey, Jr., and *Bob Bailey,* for appellee.

SMITH, J. On December 12, 1940, W. V. Vaughn, the owner of a tract of land in Johnson county, entered into a contract with George F. Rodgers, to sell and convey the land to Rodgers for the sum of $2,550, with a down payment of $200, the balance to be paid in $200 payments, on or before the 12th day of each succeeding December, beginning in 1941, to and including the year 1952, which last payment would be $150, and all bearing interest at 6% from the date of the contract.

The contract recited there was no incumbrance on the land, whereas there was a mortgage dated September 17, 1940, given by Vaughn to his daughter, Mrs. Pearl Faucett, to secure a debt of $1,500 due three years after the date of the mortgage, and bearing interest at the rate of 8%, which had been recorded prior to the contract of sale.

Vaughn filed a suit in which he alleged that Rodgers had made default in the payment of installments of purchase money, required by the contract of sale, and alleged that he had elected to avail himself of the option, which the contract of sale gave him, to declare all payments due on account of the default. Vaughn prayed that a receiver be appointed to take charge of the land, that the amount of the debt due him be adjudged, including taxes and insurance, which Rodgers had agreed to pay, but had not paid; that he have judgment for his debt and that the land be sold in its satisfaction.

Rodgers filed an answer alleging his ability and desire to comply with the contract, and denied that he was in default. He admitted that he had not made payments

as provided by the contract, but averred he had not done so because of the outstanding mortgage of which he was unaware when he contracted to buy the land. He alleged that he entered into the possession of the land under contract, and had planted a peach orchard of 600 trees, and that there were credits from the sale of peaches and from other sources which, if allowed him, would satisfy any installments of payments which had matured.

We do not review the conflicting testimony on this question as its decision now is not required under the state of the record before us. The court granted the relief prayed, found that Rodgers had made default and was indebted to Vaughn in the sum of $2,320, "plus the expenses for 1944," and rendered judgment therefor, and appointed a commissioner to sell the land in satisfaction thereof.

Mrs. Faucett, the owner of the mortgage on the land, testified as a witness in the case, and stated that she expected the mortgage to her to be paid from the proceeds of the sale under the decree which Vaughn asked the court to render, but she was not made a party to the suit, and counsel for Vaughn declined to make her a party when he was asked if he would do so.

We think the testimony sufficient to support the finding that Rodgers had made a default which authorized Vaughn to exercise the option of declaring the entire debt due, the amount of which we do not consider, for the reason that Mrs. Faucett, the holder of the outstanding mortgage against the land, was not made a party to the suit. In our opinion she was a necessary party, and in her absence the equities of the parties cannot be adjudged.

The testimony is conflicting as to when Rodgers was advised of the existence of the mortgage, but whatever the fact may be Rodgers had the right to have this mortgage taken into account, and provision made for its payment. The decree should have given Rodgers the right to pay the mortgage, and credit for the payment upon any balance of purchase money found to be due, inasmuch as the decree gave judgment against Rodgers for the entire amount of purchase money then unpaid.

In any event it was error to render judgment against Rodgers for the payment due, and direct the sale of the land in satisfaction thereof, when any purchaser at such sale would have bought subject to the mortgage which was of course a prior lien on the land in existence when Vaughn contracted to sell it.

It was held in the case of *Johnson* v. *Douglass,* 60 Ark. 39, 28 S. W. 515, that, "The fact that the vendee, having a bond for title, is in possession of the land will not prevent him from resisting the payment of the purchase money when the title of the vendor has failed; but he must, in order to avail himself of this defense, offer to rescind and restore the premises to the vendor." Here all the credits claimed by Rodgers represent a small per cent of the value of the land, and he does not ask rescission, but demands the right to be allowed to perform the contract and complete the purchase of the land.

In no event should there have been any uncertainty as to whether the land would be sold subject to the mortgage, and in view of the fact that the mortgage dated, Sept. 17, 1940, was given to secure the payment of a debt now past due, and the further fact that Mrs. Faucett testified that she expected her mortgage to be satisfied out of the proceeds of the sale, the decree will be reversed and the cause remanded, with directions to make Mrs. Faucett a party, and to ascertain the balance of purchase money due, less all proper credits, and to ascertain the amount due on the mortgage and the sale of the land will be ordered with directions to apply the proceeds of the sale as follows: First to the satisfaction of the mortgage, next to the payment of any balance of purchase money, after allowing Rodgers credit for the payment of the mortgage, and third, any excess remaining should be paid Rodgers.

At § 551, Chapter on Mortgages, 37 Am. Jur. p. 47, the law is stated to be that persons holding prior mortgages or liens are not only not necessary parties, but according to some authorities, not even proper parties to a suit to foreclose a mortgage, where the decree sought only for a foreclosure of the equity of redemption from

the prior lien or mortgage, and not all of the entire property, and that the decree can have no effect on the rights of parties having priority, whether they are made parties to the action or not. It was there further said: "However, a prior encumbrancer is a necessary party where a sale of the entire property and estate, and not merely the equity of redemption, is desired upon the foreclosure of a mortgage; this is requisite in order that the amount of the prior encumbrance may be ascertained and paid out of the proceeds of the sale and in order that the purchaser may be thus protected. But such a purpose must be specifically indicated, and the prior claim set forth in full in the complaint. The prior lien holder should not be made a party to the suit unless he previously indicates a willingness to have the whole title sold under the foreclosure and to have all encumbrances paid out of the proceeds in the order of their priority. He cannot be compelled to accept payment from the proceeds of the sale, unless his lien has matured and is due and payable. Furthermore, a court will not ordinarily decree the payment of a prior lien from the proceeds of the sale, unless the prior lien holder has appeared and consented to the decree. He must be willing to receive payment, and to have a sale of the whole title; although, if a prior mortgagee consents to a sale, he cannot afterward commence a foreclosure of his own mortgage."

Here the debt secured by the mortgage to Mrs. Faucett is not only due, but she expressed her anticipation of having it paid from the proceeds of the sale of the land under the decree in Vaughn's favor. She should therefore be made a party to the suit to the end that the equities of all parties may be protected and the decree is therefore reversed, and the cause remanded for further proceedings in accordance with this opinion.

KAVANAUGH *v.* KAVANAUGH.

4-7852 193 S. W. 2d 129

Opinion delivered March 18, 1946.

Rowell, Rowell & Dickey, for appellant.

E. W. Brockman, for appellee.

HOLT, J. Appellant, Lula Kavanaugh, was granted a divorce from appellee April 29, 1937. The decree contained the following provisions: "It is further considered, ordered, adjudged and decreed that the plaintiff is hereby awarded lot eight (8) in block thirty (30) of Woodruff's Addition West and South to the City of Pine Bluff, Jefferson county, Arkansas, and the defendant is hereby ordered and directed to pay off and discharge the indebtedness against said property, which is secured by vendor's lien in favor of the Tri-State Savings & Loan Company, in the sum of $614, and the further sum of $140 for repairs to the roof of said building, and upon the payment of said sums, and extinguishment of said indebtedness against said property, it shall be in full of all sums due by the defendant to the plaintiff for alimony, or otherwise. . . . The court doth retain control of this cause to see that the judgment as to the indebtedness due on the property awarded the plaintiff is paid, and attorney's fee and court costs are paid."

Appellee failed to pay the $140 indebtedness as directed in the decree and on May 4, 1941, a suit was filed against him in United States District Court, but before trial, on May 27, 1942, he paid the claim in the total sum of $288.76, which included interest due and court costs.

July 1, 1938, on a citation as for contempt for failure to comply with the decree, appellee was ordered "to begin the monthly payment to the said Tri-States Savings & Loan Association, the holder of the mortgage on the home place of the plaintiff as set out in the original decree; . . . the first payment to be made between August 1st and August 10th, 1938, and to continue such monthly payments until the loan is paid off or until the further orders of this court in the sum of $9.70 each. . . . It is further ordered and decreed that the defendant (appellee) do reimburse the plaintiff (appellant) for such sums as she may have paid out to said loan association since October 1st, 1937, and that such payments shall be made as reasonably expeditious as possible."

Thereafter, on October 25, 1944, appellee was again cited to appear and show cause why he had failed to comply with the previous orders of the court. Upon hearing June 19, 1945, the court made this finding: "The only thing that he (appellee) owed according to the decree was $614, plus $140, plus six per cent interest until those amounts were paid; and I think that he has paid more than that. I am going to hold that that's all he owed." The decree recites: "That the defendant, A. G. Kavanaugh, had paid off and discharged the total sum adjudged to be paid by him in lieu of dower and alimony as set out in the original decree rendered in said cause April 29, 1937, and that he should be released and discharged from any further liability thereunder," and accordingly ordered that appellee be discharged from further liability under the 1937 decree. From this final order comes this appeal.

We think the court erred in holding that appellee was not required, under the provisions of the 1937 decree set out above, to pay interest on the two items of indebted-

ness therein set out. The decree is against the preponderance of the testimony.

The material facts are practically undisputed and are to the following effect: It was agreed that appellant assumed the payment of all taxes and assessments against the property in question. The $614 indebtedness referred to in the decree represented the balance due on a joint note in the amount of $800 with 8% interest, executed by appellant and appellee on November 16, 1934, in favor of the Tri-State Savings & Loan Association, payable in monthly payments of $9.70. Appellee failed to make the payments due for five months in 1938, in the amount of $48.50 and appellant made these payments. The $140 item was paid by appellee May 27, 1942, with interest and court costs added, in the total sum of $288.76 as above noted.

Appellee testified that he had paid a total of $1,005.80 on the two items of indebtedness, and the trial court so found. This amount included the $288.76 paid by appellee in extinguishment of the $140 item.

It appears to be undisputed that appellant was required to pay to the assignee of the Tri-State Savings & Loan Association December 15, 1944, $439.03, in addition to the payment made by her of $48.50 in 1938, or a total of $487.53. She paid this loan company $162.62 taxes which it was her duty to pay and which the loan company had paid for her, but the record is not clear whether this tax payment was included in the $487.53, total just noted.

Under the plain terms of the decree, appellee was "ordered and directed to pay off and discharge the indebtedness against said property . . ., and upon the payment of said sums, and extinguishment of said indebtedness against said property, it shall be in full of all sums due, etc."

The meaning appears clear that appellee was to pay the indebtedness when it became due, together with all accumulated interest. There is nothing said in the decree that would indicate that he was to be relieved of any interest on the indebtedness. In other words, he was required,

under the decree, to discharge the indebtedness along with all accrued interest at the time of the discharge, and this he has failed to do.

Appellee is due appellant all money that appellant has been required to pay on the indebtedness against the property with 6% interest from date of the payments, except what she had paid out in taxes.

As has been noted, we are unable to determine from the record here whether the taxes which appellant paid were included in the two payments above, totalling $487.53, and upon remand, the court is directed to permit the parties to develop the testimony further on this point.

For the error indicated, the decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

BROWN *v.* MARSHALL ICE & ELECTRIC COMPANY.

4-7839 193 S. W. 2d 135

Opinion delivered March 18, 1946.

[redacted]

N. J. Henley, for appellant.

W. F. Reeves and *T. J. Gentry,* for appellee.

GRIFFIN SMITH, Chief Justice. W. E. Brown was awakened about two o'clock the morning of March 15, 1945. His explanation of the cause was: "I heard something that sounded like the Frigidaire running in the room where I was sleeping. . . . The light [fixture] in that room had a three-way connection, [with] the globe in the bottom, and it was cut off by the door in that switch; and I raised out [of bed] and couldn't tell whether it was in that; and fire was shooting out of those holes. I also heard this noise in the radio, and went outside and pulled the [main] switch, like I always did—and [as the folks do, too, when we have trouble] like an electrical storm."

The switch was left "off" during the remainder of the night; but the next morning at 9 o'clock Brown went to Marshall Ice & Electric Company's office and talked with Herbert Wright, a repair man, asking that the trouble be adjusted. About five hours later Wright went to Brown's home, worked on the so-called "three-way" drop and remarked, "I think that is your trouble." The Brown family went to a neighbor's home after a lapse of twenty or thirty minutes following Wright's leave-taking, and soon observed smoke or fire coming from the roof or "upper part" of the house.

Brown's testimony is that he heard a "hissing" or "crackling" noise in the attic. While the switch was in position to disengage the flow of current, Mrs. Thelma Cypert (Brown's daughter) climbed into the attic. She testified her father turned the switch on and "I heard the wire over the front room 'crackle' and 'fry'."

Brown says he told Wright about the "hissing" sound in the attic and asked him (Wright) if he didn't intend to go up there, but was assured the trouble was with the socket or its connections in the room where Brown saw the fire.

It was shown that although Wright was regularly employed by Marshall Ice & Electric Company as "trouble shooter," he was permitted to do repair work on his own account and was allowed to retain charges for such. There is an absence of substantial testimony showing that Wright, in working for Brown or for anyone in similar circumstances, was accountable to the Electric Company. On the contrary, there is proof of non-participation. The jury was instructed to return a verdict for the Company, but it was permitted to determine whether the fire was occasioned because wiring or fixtures became unreliable, and whether Wright was guilty of negligence in failing to inspect the attic wiring. By its verdict the jury found in effect that the fire was caused from a short circuit, and that Wright was negligent.

It is not necessary to pass upon sufficiency of the evidence tending to show employer and employe relationship between the Company and Wright. When we decide, as we do, that the verdict against Wright for $900 was based upon speculation, other matters become unimportant.

Wright concedes that Brown mentioned to him what was thought to be a "crackling" sound in the attic; but the fact remains that the "drop" to which the three-way light socket was connected came through the ceiling, and Brown's definite testimony is that when he awoke during the electric storm fire was coming from the three apertures, indicating that each was faulty, or that the "drop" connection or receptacle wiring was broken or loose. But Brown goes further and says there was noise in his radio, and that "fire was shooting out of it."

The terms "crackling," "frying," "hissing," etc., are clearly intended to convey the impression that a short circuit of considerable proportions had occurred, from which fire could, and naturally would, spread. The evidence, as abstracted, does not show how the radio and Frigidaire were connected. The latter operates from a motor and requires appreciably more current than an ordinary incandescent light bulb. Such installations are

frequently wired for 220 volts as distinguished from 110 volts usually utilized for incandescent lighting. Neither Wright nor Marshall Ice & Electric Company had anything to do with original installation of the wiring system.

Brown's assertion that the only thing Wright did was to examine "the light socket in the front room" was supported by his wife's testimony. The latter, on cross-examination, made the statement that ". . . during the time Mr. Wright was [at our house] we heard no sparkling in the attic."

The evidence shows that when Wright arrived the main control switch was "off" and it was not turned on again until Brown, at Wright's direction, closed it after certain repairs had been made on the drop or connections in the living room where fire was seen to come from the fixture openings.

The defendants requested instructed verdicts on the ground that there was no substantial evidence to show that the fire originated because of faulty wiring and that Wright was not negligent. Brown's testimony that after Wright adjusted the main-room "drop" and the current was turned on, he did not thereafter hear the attic noise is significant. He contends, however, that in spite of the admitted adjustment of the drop and at least temporary elimination of the noise complained of, Wright and the Electric Company should be held liable for the consequent loss—Wright because he failed to go into the attic, and the Company as Wright's principal.

It has been consistently held that speculation may not be substituted for fact or reasonable inferences, and that a judgment so predicated cannot stand. In the instant case it is not shown that Wright held himself out as an expert, or as a guarantor of results. But this would not be necessary if the fire resulted from his negligence. In its final aspect the situation is that Brown, his wife, and his daughter, thought they heard a "crackling" sound in the attic. Other expressions from the same witness are that the noise appeared to come from a point near where the main-room drop came through the ceiling. Admittedly

there was trouble with this drop, and admittedly it was ostensibly repaired, for Mrs. Brown testified that while Wright was in their home and presumptively after he had worked with the "drop" and fixture the "crackling" could not be heard. The system functioned efficiently after the "drop" was repaired. There was no further "fire," "crackling" or "frying."

Did Wright, as a reasonably prudent man, have a right to think that the difficulty had been overcome? While the answer to that question would seemingly absolve him, it is not necessarily reached in the determination of this case because origin of the fire was purely speculative. That being true, the defendants were entitled to directed verdicts. *Williams, Administrator,* v. *Lauderdale, ante,* p. 418, 191 S. W. 2d 455.

The judgment against Wright is reversed and the cause is dismissed. The instructed verdict in favor of Marshall Ice & Electric Company is affirmed.

SMITH, J. (dissenting). Under the direction of the court a verdict was returned in favor of the Electric Company, but the liability of Wright, who designated himself as the Company's "trouble shooter," was submitted to the jury, under instructions which were not only not objected to, but are not abstracted in either brief. There is a conclusive presumption, therefore, that the case was submitted to the jury under correct instructions.

The majority do not distinguish between the liability of the trouble shooter, and that of the company, and I shall not do so, as the majority hold that neither is liable.

It confuses the issue in this case to consider whether the company or its employee were insurers, as no such contention was made or submitted to the jury. Divested of all extraneous issues the question for decision is whether the testimony is sufficient to sustain the finding that the fire was occasioned by Wright's negligence, or would have been averted had Wright not been negligent, and this, I think, was a question of fact which should have been, and was, submitted to the jury.

In this, as in all other cases, we give the testimony tending to sustain the judgment in favor of appellee its highest probative value in testing its legal sufficiency to sustain the verdict, but here Wright's own testimony, in my opinion, made a case for the jury. It was to the following effect. He is a salaried employee of the Electric Company, and his duties are to maintain and repair the machinery, lines and equipment of the company. Other work done by him is done on his own account, and the company has no interest in it, as the responsibility of the company ceases at the meter. We copy from Wright's testimony the following statement: "I examined the trouble as I saw it. Brown told me about his daughter going up into the attic and hearing noises. By my experience of 15 or 20 years I did not suppose there would be any trouble. After I had examined the light socket and fixed it I told Brown that there was no other danger. I didn't think there was any other danger. He didn't ask me to go in the attic, but asked me what I thought about it. I heard no noises. It would have blown a fuse if there had been a short sufficient to cause trouble, if the fuse were proper size. I made the best inspection under the information that was given me which was possible. I made a reasonable and honest investigation."

But other testimony supports the finding that Wright did not make a reasonable or intelligent investigation, and certainly not a sufficient investigation. Brown was awakened in the middle of the night by flashes of light, from the socket in his bedroom, and by a cracking noise in the attic, and he disconnected the switch which conducted the electric current into his house, and it was not reconnected until after Wright arrived at Brown's home. Wright came to Brown's home in pursuance of his employment, to repair known defects, and was told where they were, one in the light socket, the other in the attic. Wright repaired one defect but made no examination of the other, because in his opinion the trouble which he found in the light socket would account for the trouble in the attic. It is certain, however, that the trouble in the light socket, which was repaired, did

not account for the trouble in the attic, where the fire originated. We think this testimony warranted the jury in finding that Wright did not exercise the care which a reasonably prudent man would have exercised and we think the finding was warranted, indeed is inescapable, that the failure to ascertain and remedy the trouble in the attic was the cause of the fire.

The law of the case is stated in § 100 of the Chapter on Electricity, 18 Am. Jur. 496, as follows: "The negligence of an employee of an electric company in reporting that a defect which he had been sent to repair had been remedied when in fact it had not been is imputable to the company, rendering it liable for an injury caused by such defect." We do not inquire whether Wright was acting for himself alone, and not for the company, as the majority hold that there is no liability in either case. But it appears to be an elementary statement of the law that Wright is responsible for the consequence of his own negligence, whether that negligence is imputed to the company or not.

Of course, to sustain the verdict in this case the testimony must show not only that Wright was negligent, but also that this negligence was the proximate cause of the injury, and the testimony to support that finding must not be based upon mere speculation or conjecture. Now no one saw the fire start, which burned Brown's house, but if that requirement is to be imposed, electric companies have been granted immunity for all practical purposes from the negligence of their employees.

But is it mere speculation to say that the defect in the attic to which Wright's attention was specifically called caused the fire? We think the jury was warranted in finding that the defect in the attic caused the fire, and that it is not a matter of conjecture and speculation to so find. We have here a cause and an effect, which logically followed. After the socket had been repaired, the switch was restored so that the electric current would enter the house. Brown and his wife went to the home of a neighbor to get some shrubs to plant, and in from 20 to 30 min-

utes after leaving their house, they discovered it was burning. The fire was in the attic. The defect which Wright did not repair was a known cause and no other cause was shown or suggested, and if there is any speculation about the origin of the fire, the speculation is that it was not caused by the known defect, but might have originated from some other cause of which there was no evidence. The sequence of events refutes the speculative theory that there was any cause other than the defective wiring in the attic, and in my opinion, the case should not be dismissed, and I therefore dissent and am authorized to say that Justices McFaddin and Millwee concur in that view.

Baker *v.* Fraser.

4-7856 193 S. W. 2d 131

Opinion delivered March 18, 1946.

R. W. Tucker, for appellant.

Guy E. Williams, Attorney General and *Oscar E. Ellis* and *J. F. Koone,* Assistant Attorneys General, for appellee.

ED. F. MCFADDIN, Justice. Venue is the only issue in this appeal. Appellant filed action in the circuit court of Independence county against Bruce Fraser, Kelley Carnett, Homer Howell, and the Maryland Casualty Company. The complaint alleged that the plaintiff, Baker, was sheriff of Independence county for the years 1943-44-45; "that the defendants, Bruce Fraser, Kelley Carnett and Homer Howell, were duly appointed, qualified and acted during all the times hereinafter set out, as accountants with the State Auditorial Department or State Comptroller's office, of the State of Arkansas . . ."; "that as such accountants they made or purported to make an audit of the affairs and conditions of the Office of Sheriff of Independence county, Arkansas, for the years of 1943 and 1944, as made and provided by § 1723 of Pope's Digest of the Statutes of the State of Arkansas . . ."; that said audit was filed in Independence county as provided by law; "that in said audit or purported audit the defendants, Bruce Fraser, Kelley Carnett, and Homer Howell, knowingly, willfully, and falsely reported that the plaintiff owed the County General Fund of Independence county, Arkansas, the sum of $786.68, . . . owed the County Salary Fund of Independence county, Arkansas, the sum of $4,039.90 . . ."; and owed various other funds and accounts various amounts; "that the defendants, Bruce Fraser, Kelley Carnett, and Homer Howell, well knew, when they made, certified and published said audit, that it did not show the true conditions of the Office of Sheriff for the years of 1943 and 1944;

and that plaintiff verily believes that said report was made with malice and with intent to injure this plaintiff . . .''; that the report damaged plaintiff in the sum of $50,000, for which he prayed judgment.

The complaint as originally filed alleged that the Maryland Casualty Company ''did furnish bonds to the defendants, Bruce Fraser, Kelley Carnett, and Homer Howell in the sum of $5,000 each, covering liabilities as made and provided by § 1723, Pope's Digest''; but the Circuit Court dismissed the Maryland Casualty Company from the action when a showing was made that such casualty company was never a surety on the bonds of any of the defendants. No objections were saved by the plaintiff to so much of the order as dismissed the Maryland Casualty Company from the action; and no claim is urged here in regard to the dismissal of the Maryland Casualty Company. So we treat the action as one against the three individual defendants, and refer to them as ''the defendants.''

Fraser and Howell were served with summons in Pulaski county. Carnett was served with summons in Washington county. The defendants appeared specially and moved to quash the service and dismiss the action, alleging: that no one of the three defendants resided or was served in Independence county, that Fraser and Howell resided in and were served in Pulaski county, that Carnett resided in and was served in Washington county; that ''the official residence'' of each of the three defendants was Pulaski county.

The Circuit Court sustained the motion, and rendered judgment, quashing the service and dismissing the cause. By this appeal, the plaintiff challenges not only the correctness of that judgment, but also the right and power of the Attorney General of Arkansas to appear for the defendants.

I. *This is a Personal Action.* When the Maryland Casualty Company was dismissed, the plaintiff's claim ceased to partake of the nature of an action on an official bond; and became a civil action for libel against the three named defendants.

II. *We Have No Statute that Localizes a Civil Action for Libel.* The absence of such a statute is significant. In the excellent volume published in 1934 by the late T. D. Crawford, and entitled "Civil Code of Arkansas," it is stated that our Civil Code of 1869 was patterned after the Kentucky Code of 1854. In the Kentucky Code there was a section (No. 74) concerning the venue in a civil action for libel. This section reads in part: ". . . every action for an injury to the character of the plaintiff, against a defendant residing in this State, must be brought in the county in which the defendant resides, or in which the injury is done." This section was construed by the Court of Appeals of Kentucky in the case of *Bright* v. *Hammond,* 105 Ky. 761, 49 S. W. 773; and the Kentucky court said: "It may be conceded that prior to the adoption of the Code the action would have had to have been prosecuted either in the county of the defendant's residence, or in some county in which he was served with process."

Our Code omits entirely the section quoted above from the Kentucky Code. Therefore, the inference is plain, that venue in civil actions for libel is governed by general principles rather than by statutory provisions specifically naming the venue for civil actions for libel. The omission in the copy of a provision found in the prototype necessarily raises the presumption that the omission was deliberate.

We turn, then, to the general rules. In 33 Am. Juris. 208, this statement appears: "Since actions for libel and slander are of a transitory nature, it is generally held, in the absence of any statutory provision to the contrary, that they may be brought in any jurisdiction or county in which the defendant is found." In 37 C. J. 19, the rule is stated: "Actions for defamation are generally considered as transitory, and may be brought in any jurisdiction or county in which the defendant may be found." We have held that actions for libel and slander must be brought in circuit court (*Axley* v. *Hammock,* 185 Ark. 939, 50 S. W. 2d 608; and *Southern Lumber Co.* v. *Axley,* 187 Ark. 292, 59 S. W. 2d 591); but the venue issue was not presented in

these cases. *McGill* v. *Miller*, 183 Ark. 585, 37 S. W. 2d 689 was a civil action for damages for libel. Miller sued McGill and the *Arkansas Gazette* in the circuit court of Lafayette county. The *Gazette* objected to venue, since it was domiciled in Pulaski county. McGill objected to venue on the claim that his "usual place of abode" was Pulaski county. This court sustained the venue contentions of the defendants, and dismissed the cause. While the reported case is not entirely in point, it nevertheless indicates rather clearly that a civil action for libel is transitory rather than local, and must be brought in the county where one of the defendants resides or is served.

Act 314 of 1939 refers only to venue in "actions for damages for personal injury or death by wrongful act," and therefore does not concern or localize actions for libel. Furthermore, since libel is not a localized action, Act 21 of 1941 does not apply. We conclude that we have no statute in Arkansas that localizes a civil action for libel, and venue should be determined by general principles.

III. *Venue.* Three statutes on venue are cited; and the question is which one applies to this case. The plaintiff claims that § 1387, Pope's Digest, governs. So far as is here concerned, that section says:

"Actions for the following causes must be brought in the county where the cause, or some part thereof, arose: . . .

"Second. An action against a public officer for an act done by him in virtue or under color of his office, . . ."

The appellant argues (1) that the defendants were accountants appointed by the State Comptroller to make county audits under the provisions of Act 41 of 1931 (§§ 1719-1729, Pope's Digest), and were therefore public officers; and (2) that the defendants filed the audit in Independence county (as required by § 1726, Pope's Digest), and therefore the cause of action arose in Independence county.

The appellees claim that, if they are in fact public officers, then they are certainly state officers, and that

in such event, venue is governed by § 1397, Pope's Digest, which, insofar as is here concerned, reads:

". . . and all actions against such . . . state officer, for or on account of any official act done or omitted to be done, shall be brought and prosecuted in the county where the defendant resides."

There is merit in the contention of the appellees. A review of the statutory provisions under which the defendants performed their duties is apropos: Section 1720, Pope's Digest, says that the State Comptroller shall be Director of County Audits, and shall prescribe the system of bookkeeping, etc., for all county offices; and "is authorized to employ . . . such other assistants as he deems necessary for the enforcement and administration of this Act." Section 1723 says that the Director shall make a complete audit of the books of all county officers annually, "and it shall be the duty of the Director to appoint one or more accountants for the making thereof. Such accountants shall be required to furnish bonds . . ." Section 1724 empowers the accountants to administer oaths, and says: "They shall also have the authority to examine or audit the accounts of any business concern . . . within . . . the State of Arkansas insofar as such accounts relate to the business transactions within the scope of their audit." Every provision of the statutes, involved in this suit concerning the power and duties of the accountants, shows that they operate over the entire state, going into whatsoever counties the State Director of Audits may send them. There is nothing in the law to indicate that the accountants have local districts or residences. The act prescribes their duties on a state-wide basis; they reside "officially" at the seat of State government. In short, if the accountants are "public officers" rather than only "public employees"—which question we do not decide—they are certainly "state" officers, rather than "local" officers.

In *Leonard* v. *Henry,* 187 Ark. 75, 58 S. W. 2d 430, an action was brought in Bradley county against Leonard, State Treasurer, and Lee, Sheriff of Bradley county,

charging they were joint tort feasors. Lee was served in Bradley county, and Leonard was served in Pulaski county. Leonard duly objected to the jurisdiction, and claimed that, as a state official, he could be sued only in Pulaski county, which was his residence. This court sustained Leonard's contention. We quoted in full § 1175, Crawford & Moses' Digest, which is now § 1397, Pope's Digest; and then said:

"The concluding phrase of this section, 'in the county where the defendant resides,' refers to the county of the officer's official residence, as the section relates to suits against an officer in his official capacity, and the county of his residence is therefore the place in which he performs the functions of his office. In the case of the State Treasurer, the county in which that officer resides is, of course, Pulaski county, for it is there that he maintains his office and keeps the records thereof.

"The reason for the statute is, no doubt, that the Legislature was unwilling to have the records of the officers and boards referred to in § 1175, carried out over the State and away from the place where they should be permanently kept. However, we are not required to determine the legislative purpose; it suffices to know the legislative fiat."

An earlier case, holding to the same effect, is *Reed* v. *Wilson,* 163 Ark. 520, 260 S. W. 438, wherein Wilson, as Commissioner of State Lands was sued in Conway county; and we there held that the State Land Commissioner could be sued only in the county in which he resided. These two cases are controlling. If the appellees were public officers—which we need not decide—then certainly they were state officers, and the venue in actions against them arising out of their official duties would be in Pulaski county under the authority of the two cases just cited.

If the appellees were not public officers, then the venue in this action against them would be governed by § 1398, Pope's Digest, which provides: "Every other action may be brought in any county in which the defend-

ant, or one of several defendants, resides, or is summoned." Since the appellees do not reside in, and were not served in, Independence county; and since we have no statute which localizes an action for libel, and since libel is a transitory action (as we have pointed out in II, *supra*): it is clear that § 1398 would be the applicable venue statute if the appellees are not public officers.

The result is, that the service was properly quashed, and the action dismissed on either theory, *i. e.*, public officers or private persons.

IV. *The Right and Power of the Attorney General.* Finally, the appellant challenges the right and power of the Attorney General to appear for the defendants. We are not cited to any statute or case that sustains the contention of the appellant; but, since it is so seriously argued, we think it appropriate to comment on the contention. At the outset, we pointed out that the Attorney General appeared only to make the plea of venue. If the defendants (appellees) were public officials, as appellant contends, then it might well be said that the attorney general was interested in seeing that public officials were sued in the proper venue. It is well to notice that in *Reed* v. *Wilson, supra,* the Attorney General appeared and made a plea of venue for Wilson, State Land Commissioner, when he was sued in Conway county; so, there is some precedent for the action of the Attorney General in the case at bar. Section 5599, Pope's Digest, says: "The Attorney General shall be the attorney for all State Officials, departments, institutions and agencies, and whenever any officer or department, institution or agency of the State needs the services of an attorney the matter shall be certified to the Attorney General for attention." This section does not make it the duty of the Attorney General to defend a private suit for a person who happens to be a State official; and there is nothing in the record before us even to indicate that such was the intention of the Attorney General. He appeared only to present the plea of venue; and there was no impropriety in his appearance under the facts in this case.

The judgment of the lower court is in all things affirmed.

WATSON *v.* SUDDOTH.

4-7850 193 S. W. 2d 326

Opinion delivered March 18, 1946.

Rehearing denied April 15, 1946.

[redacted]

E. M. Watson, pro se.

Burke, Moore & Walker, for appellee.

SMITH, J. This is the third appeal of this case. The first appeal was ordered dismissed in an opinion not published in our reports (202 Ark. 1197), but published in 149 S. W. 2d 563, for non-compliance with Rule 9.

It was held in the opinion on the second appeal, 208 Ark. 205, 185 S. W. 2d 936, that the decree from which the appeal came would have to be affirmed, for the reason that oral testimony heard at the trial had not been preserved and brought into the record.

The present appeal must also be dismissed for non-compliance with Rule 9, although the decree would be affirmed even though the rule had been complied with, for the reason that the testimony upon which the decree was rendered has not been brought into the record. There appears in the transcript now before us a complaint which alleges that the decree from which the second appeal was prosecuted had been obtained by fraud. There was an answer denying this allegation which pleaded the previous adjudication of the issues which the complaint sought to raise.

There appears also in the present record an *ex parte* statement in the form of an affidavit, not taken as a depo-

sition consisting of questions and answers. There then follows the decree from which is this appeal, which recites that the cause was heard on oral and documentary evidence, none of which appears in transcript. It was said in the opinion on the second appeal that in the absence of the testimony a conclusive presumption would be indulged that the omitted testimony sustained the finding upon which the decree was based. Here the decree must be affirmed for the same reason, even though Rule 9 had been complied with.

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

BRILEY *v.* WHITE.

4-7854 193 S. W. 2d 326

Opinion delivered March 18, 1946.

Rehearing denied April 15, 1946.

Buzbee, Harrison & Wright, for appellant.

Eugene Coffelt and *Kenneth C. Coffelt,* for appellee.

ROBINS, J. In appellees' suit against appellant, C. H. Briley, for damages alleged to have been sustained by reason of a collision between a truck owned by appellant and a truck belonging to appellee, David M. Styers, the jury awarded damages as follows: To appellee, Teddy Don White, $5,000; to appellee, David M. Styers, for damage to truck $320, and for personal injury $300. To reverse judgment entered on the verdict this appeal is prosecuted.

The collision occurred at the intersection of the Geyer Springs gravel road and the German Pike, in Pulaski county, Arkansas. Appellee Styers, with appellee White, a twelve year old boy, in the cab with him, was driving his truck south on the gravel road, and as he was passing out of the intersection with the German Pike (a paved highway) the rear part of his truck was struck by appellant's truck, driven by John York. Both trucks turned over and were badly damaged. Appellee, White, was caught under the Styers truck and suffered a broken leg and various cuts and bruises.

It is unnecessary to detail the evidence as to the cause of the collision since appellant does not argue that there was no substantial testimony from which the jury might have found that the collision was caused solely by the negligence of appellant's driver.

These contentions are made by appellant here:

I. That the court should have granted appellant's motion for a mistrial.

II. That if the judgment is not reversed for error of the lower court in refusing to declare a mistrial, the award to Teddy Don White should be reduced.

I.

During the cross-examination of appellant's driver, John York, by appellees' counsel, the following occurred:

"Q. Now, York, I want to ask you this question, not to embarrass you or criticize you. Were you convicted of reckless driving?" Mr. Harrison: "We object to that. It is most improper." Mr. Coffelt: "I can prove that." The Court: "It don't make a bit of difference whether you prove that or not. The jury is admonished not to regard the question or answer, if there was one, it will be stricken from the record." Mr. Harrison: "For the purpose of the record, I am going to ask for a mistrial." The Court: "Overruled." Mr. Harrison: "Save our exceptions."

While the question asked by counsel for appellees and the statement made by him were improper, the court promptly admonished the jury to disregard the question, which was not answered. Much latitude must be given to the trial court in handling matters of this kind, and, in the absence of a showing of abuse of discretion or a manifest prejudice to the rights of the complaining party, this court will not reverse a judgment on account of the action of the trial court. *Day* v. *Ferguson & Wheeler,* 74 Ark. 298, 85 S. W. 771; *Fort Smith Lumber Company* v. *Cathey,* 74 Ark. 604, 86 S. W. 806; *Ferguson & Wheeler Land, Lumber & Handle Company* v. *Good,* 112 Ark. 260, 165 S. W. 628; *St. Louis, Iron Mountain & Southern Railway Company* v. *Drumright,* 112 Ark. 452, 166 S. W. 938; *United Order of Good Samaritans* v. *Lomax,* 172 Ark. 330, 288 S. W. 709. The lower court did not abuse its discretion in refusing to grant the motion for mistrial.

II.

It is next urged that the amount of the judgment in favor of appellee, Teddy Don White, should be reduced because it is excessive, and for the further reason that the lower court in its instructions permitted the jury to take into consideration, in arriving at the amount of damages to be awarded to this appellee, any permanent injury which the jury might find he sustained as a result of the collision. Appellant urges that it was improper for the lower court to authorize the jury to consider any permanent injury to young White, because, as appellant con-

tends, there was no testimony from which the jury could find that he had suffered such injury. Appellant does not ask for a reversal of the judgment of the lower court on this ground, but urges it as a reason for a reduction in the judgment.

The collision occurred on January 11, 1945. White's left leg was caught under the truck. He remained thereunder for some time and until the truck could be pried up so as to release him. He was then taken to a hospital. In order to reduce the fracture the attending physician applied traction. This consisted of fastening a wooden block to the leg, attaching to the block a rope with a weight at the other end, which exercised a constant tractive force. The next morning he was given an anaesthetic and a cast was put on his leg which stayed thereon two months. He was in considerable pain all this time. After the cast was removed he used crutches about two weeks. His leg was exhibited to the jury and it was stated that at the time of the trial, May 29, 1945, his leg was still swollen and appeared somewhat crooked. The boy's father testified that he could not "get around like he could before his leg was hurt." As a result of the injury young White lost a grade or a year's work in school.

While the attending physicians expressed the opinion that the boy would have normal use of his leg upon complete healing, which admittedly had not taken place at the time of the trial, there was substantial testimony from which the jury might have inferred that his injury was more than a temporary one. Furthermore, it cannot be said with certainty that when the shock of such an injury, the slowness of the healing process, the pain and suffering undergone by the appellee, and his loss of a year's school work are considered the jury's verdict was grossly excessive, even if no permanent damage to the leg was shown. In this view of the matter, the instruction complained of, even though objectionable, was not prejudicial. *Memphis, Dallas & Gulf Railroad Company* v. *Steel,* 108 Ark. 14, 156 S. W. 182, Ann. Cas. 1915B, 198.

No complaint is made as to excessiveness of the judgments in favor of appellee, Styers.

The judgments appealed from are affirmed.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* MURPHY.

4-7861 193 S. W. 2d 305

Opinion delivered March 25, 1946.

Malcolm W. Gannaway and *Robert M. Gannaway,* for appellant.

David L. Ford, for appellee.

HOLT, J. September 7, 1944, appellee, Tom B. Murphy, sued appellant, Insurance Company, on a health and accident insurance policy.

He alleged in his complaint that on March 14, 1940, appellant issued and delivered to him its policy of health and accident insurance under the terms of which appellant agreed to pay $80 per month for total disability necessitating total loss of time and which confined appellee within doors. The policy was made a part of the complaint. He further alleged that he became disabled and confined in April, 1941, from tuberculosis; that appellant paid appellee $80 per month from April, 1941, to July, 1944, at which time appellant ceased payments. It was further alleged that from July 1, 1944, until the filing of this suit, appellee had suffered total loss of time from work, had been totally disabled and confined within doors under the terms of the policy and that appellant was due appellee $80 per month from July 1, 1944, until the date of the trial.

Appellant answered with a general denial.

Upon a trial, June 8, 1945, the jury returned the following verdict: "We the jury find for the plaintiff full recovery in the amount of $80 per month from July 1, 1944, for total disability." Upon this verdict, judgment was entered in the amount of $880, 12% penalty, and for an attorney's fee in the amount of $250. This appeal followed.

The policy of insurance contained the following provisions: "Part K. Confining Illness Benefits for Life. The Association will pay, for one day or more, at the rate of forty ($40) dollars per month for the first fifteen days and at the rate of eighty ($80) dollars per month thereafter for disability resulting from disease, the cause of which originated more than thirty days after the effective date of this policy, and which confines the

insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time. Part L. Non-Confining Illness Forty Dollars per Month. The Association will pay, for one day or more, at the rate of forty ($40) dollars per month, but not exceeding three months, for disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, and which does not confine the insured continuously within doors, but requires regular medical attention; provided said disease necessitates total disability and total loss of time."

The record reflects that appellee became totally disabled from tuberculosis in April, 1941. Prior to that time, he had been engaged principally as a football coach and athletic director. He had a wife and three children and was about 35 years of age at the time this suit was tried.

May 1, 1941, appellant began paying appellee benefits in the amount of $80 per month under the terms of the policy. These payments were continued until February, 1942, when appellant ceased further payments. Thereupon, appellee brought suit against appellant in the Sebastian circuit court, Fort Smith District, to recover monthly payments alleged to be due under the terms of the policy, and on June 22, 1942, upon a jury trial, there was a verdict in favor of appellee for monthly payments in the amount of $80 per month from February 1, 1942, to date of trial. On the verdict, judgment was entered against appellant in the amount of $400, together with 12% penalty and an attorney's fee of $150. There was no appeal from this judgment.

After paying this judgment, appellant renewed payment of the monthly benefits for total disability in the amount of $80 per month which it continued to pay until July 1, 1944, at which time appellant again ceased to make further payments, whereupon appellee brought the present suit.

For reversal, appellant first argues that the testimony was not sufficient to support the jury's verdict. Specifically, it is appellant's contention that before appellee would be entitled to recover benefits under the provisions of the policy, *supra,* he must show that "the disease continuously confines him within doors and requires the regular visits therein by a regularly qualified physician; the disease necessitates total disability, and the disease necessitates total loss of time," and that appellee has failed to make such showing. It is practically undisputed here that appellee has had active tuberculosis since 1941 when he was admitted to the State Sanatorium in Booneville, and that his condition on the date the present suit was tried, showed no improvement. Two eminent physicians so testified. Dr. J. D. Riley, Superintendent and Medical Director of the State Tuberculosis Sanatorium at Booneville testified that he first met appellee April 30, 1941, when he examined him. "I examined him and found that he had tuberculosis and advised his admission to the Sanatorium. . . .Q. Doctor, you testified in this case on June 22, 1942? A. I did. Q. At that time, state whether or not Mr. Murphy was an inmate of the institution of the Sanatorium. A. He was a patient of the Sanatorium at that time. Q. How long did he continue to be confined in the Sanatorium? A. He was confined at the Sanatorium until April 19, 1943, when he was permitted to leave on an extended leave of absence. . . . I explained to Tom that if he could have adjusted himself mentally to taking the cure that I would have preferred that he remain in the Sanatorium in bed, which he had done for about nine months, at the end of which time he was not in as good condition as before. Even though he had not taken physical exercise he could not rest mentally, and his mental anguish prevented improvement, and I believed that some liberties on his part outside of the institution and mild activities were necessary for the condition of his mind."

Beginning with May, 1941, and up to and including May 20, 1945, Dr. Riley made twenty-three X-ray pictures of appellee's lungs. In 1941, three pictures were made in

May, one in July, one in September, one in December, and in 1942, one in February, one in April, one in June, one in August, one in November, and in 1943, one in January, one in March, one in April, one in June, one in August, one in October, and in 1944, one in January, one in April, one in August, and one in October, and in 1945, one in January and one in May. In explanation of the picture made May 20, 1945, a few days before the trial, Dr. Riley testified: "Q. Now, compare the last picture with the one you made June 2, 1942, and tell the jury what change, if any, has taken place in his condition, either for the better or worse. A. This (inserting picture) is his picture taken in June of 1942. You see the elevation of the diaphragm. Now, if you will look at this white marking in the upper part of the picture here, comparing this area of the dark with the better lung tissue, and then if you will look at this (inserting another picture) you will see that the white marking remains there just the same, with no essential change. His condition so far as his lungs are concerned is about the same that it was in June of 1942, but his general condition is much unimproved because of the development in the meantime of paralysis agitans. . . . This, his last picture, was taken May 20, '45, and shows no apparent change, but shows far advanced tuberculosis and the paralysis of the right diaphragm. . . . In my opinion he is totally and permanently disabled."

Dr. W. F. Rose corroborated Dr. Riley's testimony. It was his opinion that appellee was totally and permanently disabled and that his condition at the time of the trial was a great deal worse than when he saw appellee a year ago.

It is undisputed that about a year prior to the date of trial, appellee procured a contract with a life insurance company to sell insurance and opened an office in Fort Smith, across the hall from that occupied by Dr. Rose. It also appears in the testimony of H. R. Parker, representative of appellant, that appellee, Murphy, sold insurance for apellant while being paid by appellant $80 per month for total disability. Quoting from appellant's

brief: "He (H. R. Parker) testified that appellee had a contract with appellant in 1941 and 1942 and wrote some insurance for appellant while he was being paid eighty ($80) dollars per month by appellant. . . . That in paying appellee at the time he was trying to write a little insurance that he was trying to assist appellee."

Appellee's territory with the Life Insurance Company covered thirteen counties and he managed to sell a number of policies, substantially supplementing his income over the monthly payments from appellant. During all of this time, he was under the care of Dr. Riley. Dr. Rose testified that for twelve months prior to the date of trial, he had seen appellee professionally once or twice a week.

It thus appears from the above abstract of the testimony that prior to the time that appellee contracted tuberculosis, his vocation was that of athletic director and football coach which required that appellee be both physically and mentally active. He can no longer follow his vocation. After some nine months of confinement in the sanatorium, upon the advice of his physician, he was permitted to leave the hospital for the reason that appellee's "mental anguish prevented improvement, and I believed that some liberties on his part outside of the institution and mild activities were necessary for the condition of his mind." Does the fact that appellee, although suffering from a total disability, was not continuously confined within doors, and sold some insurance, prevent recovery under "Part K" of the insurance contract presented here? We think not. It is our view that on the facts presented and the law governing, the jury was warranted in finding in favor of appellee.

In the recent case of *North American Accident Insurance Company* v. *Branscum, ante,* p. 579, 191 S. W. 2d 597, we again announced the following rule: "The rule prevailing in most jurisdictions is that the 'total disability' contemplated by a sickness or accident insurance policy, or the disability clause of a life insurance policy, does not mean, as its literal construction would require, a state of absolute helplessness, but contemplates rather

such a disability as renders the insured unable to perform all the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner."

The principles of law announced in the well considered case of *Colorado Life Co.* v. *Steele,* 101 Fed. Rep., 2d 448, an Arkansas case which was decided by the Circuit Court of Appeals, 8th Circuit, February 2, 1939, apply with equal force, we think, to the present case. The facts in that case are in effect similar to those presented here, and the Court based its decision largely on our own cases. The insurance policy there involved provided: "Part Four—§ (A) Confining Sickness: If, as a result of sickness of the insured he be so disabled as to be necessarily and continuously confined within the house and therein regularly visited by a physician, other than the insured or the insured's spouse, parent or child, at least once in each week and shall be necessarily prevented from performing any and every duty pertaining to his occupation, the insured shall be deemed totally disabled and the Company will pay for the period the insured is necessarily and continuously so confined and so attended, the monthly indemnity shown in Part One hereof. The indemnity under this paragraph was $200 per month." In construing the effect of this provision, the court, among other things, said: "The Supreme Court of Arkansas has consistently given a liberal construction to the provisions of these policies which require that the insured be confined to the house and that he be there treated regularly by a physician. It has held that a continuous confinement within this clause of the policy, does not mean that the insured must have actually been confined within the walls of his house, and that the mere fact that he went out occasionally, at stated intervals, for the purpose of taking exercise and fresh air under the advice of his physician, would not be sufficient to prevent recovery. *Great Eastern Casualty Co.* v. *Robins,* 111 Ark. 607, 164 S. W. 750; *Interstate Business Men's Acc. Ass'n* v. *Sanderson,* 144 Ark. 271, 222 S. W. 51; *Interstate Life & Acc. Co.* v. *Lange,* 190 Ark. 855, 81 S. W. 2d 931; *Massachusetts Protective Ass'n*

v. *Oden,* 186 Ark. 844, 56 S. W. 2d 425; *Aetna Life Ins. Co.* v. *Norman,* 196 Ark. 381, 117 S. W. 2d 728. . . . In *Aetna Life Ins. Co.* v. *Norman, supra,* the opinion in which was handed down June 6, 1938, the insured was the owner of a large tract of land and the president and principal owner of a bank. He became disabled from the effects of arthritis and was unable to attend to his usual and customary duties as he did prior to his disability. He still went out to the farm every week in his automobile, which he sometimes drove himself, and he went to his office in the bank almost daily. In holding that the question of his total disability was a jury question, the court, among other things, said (117 S. W. 2d, p. 730): 'So here, while appellee is not rendered absolutely helpless, by reason of the arthritic condition of his feet, the proof is quite substantial that it prevents him from performing acts necessary to the prosecution of his business in substantially the same way he had previously done so. On the whole, we think the evidence made a case for the jury and that the court did not err in refusing to direct a verdict.'

"(5) The plaintiff here was a very active man prior to his illness, being active both physically and mentally. Under the advice of his physician, he did not at all times remain at home, and while out in the open air and being driven about the country more or less, he incidentally transacted some business, but the evidence is undisputed that his affliction prevented him from performing acts necessary to the performance of his business in substantially the same way he had previously done. The jury, we think, was warranted in finding, under the evidence and the law as established by the decisions of the Supreme Court of Arkansas, that plaintiff was, within the meaning of the policy, prevented from performing any and every duty pertaining to his occupation. (6) But it is said that the plaintiff was not entitled to recover, even though totally disabled, because the attending physician did not at all times visit him within his house. We have already noted that under the decisions of Arkansas, it was not essential to plaintiff's right to recover that he be literally

at all times confined within his home. It is undisputed that plaintiff was in fact under the care of a physician during all the time, and that he consulted his physician at least once a week."

Appellant next says that the trial court held that the judgment of June 22, 1942, *supra,* "raised a presumption that total disability of appellee continued from June 22, 1942, and that this presumption was in force at the time of the trial of this cause on June 8, 1945, and that the burden of proof, therefore, was upon appellant here to prove that appellee was not at the time of the trial of this cause disabled, and the court, over the objections and exceptions of appellant, gave the following instruction on the burden of proof: "Instruction No. 4—You are instructed that the plaintiff has introduced in evidence the testimony supporting the former adjudication of this cause on June 22nd, 1942. The burden now shifts to the defendant to establish by a preponderance of the testimony that the plaintiff has recovered from total disability subsequent to the former adjudication. If the defendant fails to do this, then your verdict should be for the plaintiff."

Error is thus assigned in the giving of this instruction. We cannot agree that any error appears. The rule appears to be that in the absence of a contrary showing, the presumption is that appellee was totally disabled on the date of the first judgment, June 22, 1942, *supra,* and at all times subsequent thereto unless proof of subsequent recovery be shown, and when appellee here introduced evidence of the June, 1942, judgment, the burden shifted to appellant to show subsequent recovery. We hold that this rule applies to total disability whether caused by disease or accident.

The court had already given the following instruction No. 1: "The burden of proof is upon the plaintiff to make out his case by a preponderance of the evidence."

Instruction No. 4 complained of was clearly warranted, we think, under the decision of this court in *Equitable Life Assurance Society* v. *Bagley,* 192 Ark. 749, 94 S. W. 2d 722, wherein we said: "The court's finding of fact as

approved by us on former appeal, that appellee was totally disabled in the purview of the contracts of indemnity on August 19, 1933, is conclusive and binding on this appeal. (Citing many cases.) . . . Since we are concluded by the former opinion on the question of appellee's total disability on August 19, 1933, the legal query arises, What presumption attends such finding on future circumstances? The rule seems to be that, in the absence of proof to the contrary, it must be presumed that appellee was totally disabled on August 20, 1933, and that at all times subsequent thereto unless and until it is made to appear affirmatively, by testimony, that appellee has recovered subsequent to the former adjudication. See 10 R. C. L., p. 872, § 15. In view of the stated declaration of law it follows that, after appellee introduced in evidence the testimony supporting the former adjudication, the burden shifted to appellant to establish by a preponderance of the testimony that appellee had recovered from total disability subsequent to the former adjudication."

Finally appellant insists that the court erred in giving instructions, 1, 2 and 3 at the request of appellee for the reason that "they leave out of account entirely the question of medical attention, confinement within doors and loss of time from work which are required by Part 'K' of the policy." These instructions are as follows: "Instruction No. 1—You are instructed that if you find from the testimony that the plaintiff, Tom B. Murphy, was advised by a reputable physician or physicians, that it was to the best interest of plaintiff's health, and particularly to the best interest of the treatment of the disease from which he, the plaintiff, suffered that he take a reasonable amount of exercise and subject himself to fresh air and sunshine and that they, the physician or physicians, permitted automobile trips and you further find that plaintiff did take automobile trips and that such automobile trips were in good faith in reliance upon the advice of his physician or physicians, then the court tells you that even though he may have occasionally on such trips or visits transacted business, it was in compliance with the provisions of the policy providing that he must necessarily and continuously be confined in doors,

and your verdict should be for the plaintiff. Instruction No. 2—You are instructed that the plaintiff is not entitled to recover merely by showing that he is afflicted with some disease or condition which causes pain or suffering. In order to recover under the policy, upon which he sues, the plaintiff must show by a preponderance of the evidence that his disease disables him to the point where he is unable to perform all of the material and substantial duties of his occupation. Instruction No. 3—You are instructed that to come within the meaning of the contract of indemnity, it is not required that the insured, the plaintiff, shall be absolutely helpless, but he is totally disabled when the infirmity from which he suffers renders him unable to perform all the substantial and material acts of his business or the execution of these acts in the usual and customary way."

An instruction almost identical with No. 1, *supra,* was approved in the *Colorado Life Co.* v. *Steele, supra,* and we think was a correct declaration of the law as applied to the facts here. Instructions 2 and 3 were approved by this court in *Mutual Life Insurance Company of New York* v. *Dowdle,* 189 Ark. 296, 71 S. W. 2d 691, in circumstances similar in effect to those presented here. These instructions, we think, are a correct declaration of the law on the facts and provisions of "Part K" of the policy here in question when read in connection with instructions numbered 5, 10, 11 and 15, given at appellant's request. "Instruction No. 5—You are instructed that the plaintiff and defendant in this case are both bound by the terms of the policy sued on herein, and before any recovery can be had on the part of the plaintiff he must have proven, by a preponderance of the evidence, that he is entitled to the benefits sued for under the terms and conditions of the policy which is in evidence and on which he relies for a recovery. Instruction No. 10—The policy provides: 'This policy does not cover death disability or other loss . . . while the insured is not continuously under the professional care and regular attendance, at least once a week beginning with the first treatment, of a licensed physician or surgeon other than himself,' and

you are instructed that this provision of the policy is binding on the plaintiff and a condition precedent to his recovery, and if he has failed to prove that his disability comes within the above provision of the policy, then and in that event he cannot recover, and your verdict must be for the defendant. Instruction No. 11—(as modified) You are instructed that even though you believe from the evidence in this case that the plaintiff has been totally disabled within the meaning of the insurance policy during the period sued on, and that during said period of time he has required regular medical attention at least once a week, and that he has sustained total loss of time, yet if you further believe from the evidence that he has not been confined continuously within doors within the meaning of the insurance policy, as heretofore defined by other instructions, then and in that event plaintiff would only be entitled to recover at the rate of $40 per month for a period of not exceeding three (3) months. Instruction No. 15—In determining the questions, of the disability, confinement of, and loss of time by plaintiff due to disease, you are instructed that you cannot consider any disease except tuberculosis."

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

MURCH-JARVIS COMPANY, INC., *v.* TOWNSEND.

4-7864 193 S. W. 2d 310

Opinion delivered March 25, 1946.

Hill, Fitzhugh & Brizzolara, for appellant.

R. B. Chastain, for appellee.

MILLWEE, J. This is an appeal from the judgment of the Sebastian circuit court affirming an award made by the Workmen's Compensation Commission in favor of appellee, Robert A. Townsend, for temporary, total disability suffered by appellee in June, 1944, while engaged in the employ of appellant, Murch-Jarvis Co., Inc., in Fort Smith, Arkansas.

Appellee began work for the company in November, 1943, as a labor foreman in construction work. In April or May, 1944, he was assigned the duty of making an excavation in a room of a zinc smelter for the purpose of installing a tank. There were two or three belts running through the room for the purpose of conveying ore from the room where it was dried to the mixing room. These belts were constantly in operation during a period of six to eight days when appellee's work was confined

exclusively to the room, resulting in his exposure to and inhalation of dust which was carried into the room by the conveyor belts. At the same time, appellee and other employees were exposed to sulphur fumes which came from the mixing room. Another employee who worked in the room with appellee for four hours refused to continue because of these conditions and was assigned to another job.

Appellee developed a cough and irritation in his throat and bronchial tubes while working in the smelter room. He was first treated by his family physician, Dr. Eberle, in May and was referred by his employer and the commission to other doctors for examination and treatment. These doctors either reported their findings to the commission or testified in the case. In June, 1944, after his condition grew progressively worse, appellee became unable to work and filed his claim for disability compensation. The insurance carrier made payments of $20 per week for nine weeks and until August 22, 1944, when such payments were discontinued.

On January 26, 1945, the employer and insurance carrier filed their notice of intention to controvert appellee's right to further compensation in which they denied that appellee had received any injury, and alleged that if he received any injury or incurred any disease, he had long since recovered therefrom.

A hearing before the referee on January 31, 1945, resulted in an award for total and temporary disability, and appellants were required to resume disability payments at the rate of $20 per week from August 22, 1944. Trial before the full commission resulted in a similar award which was affirmed by the circuit court on appeal.

The commission made an exhaustive and detailed statement of the facts which do not seem to be seriously disputed. The report of Dr. Kellum, dated June 19, 1944, contained findings as to appellee's condition as follows: "Irritate bronchitis caused from dust and sulphur fumes. (Nose and throat are almost normal—no cold. I am of the opinion that dust and sulphur fumes are the cause

of his present complaint.)" The report of Dr. A. A. Blair is dated September 5, 1944, and states that appellee was able to resume work on August 22, 1944. It was evidently on the basis of this report that weekly compensation payments were terminated by appellants. The report described the condition of appellee as bronchial asthma and continues, "Patient discharged for work, but was advised not to go back to dust and smoke of previous work as this is thought to aggravate his condition."

Dr. Charles T. Chamberlain, who examined appellee at the request of the insurance carrier, diagnosed his condition in part as follows: "Chronic Sinusitis; Chronic bronchitis; arterial hypertension; chronic vascular rephritis. . . . In our opinion, the cause of this patient's condition cannot be reasonably held to be the alleged exposure to the dust and fumes which he encountered during the course of his employment in June, 1944. It is true, however, that irritating dust particles and chemical fumes could have served as aggravating factors. . . ."

By agreement of the parties, appellee was referred by the commission to Dr. A. F. Hoge for examination on March 9, 1945. The doctor's report reveals a thorough examination and case history from which the following conclusions were reached: "Mr. Townsend is suffering from bronchial asthma with associated bronchitis, hypertension and hypertensive heart disease.

"Reference is made to bronchial asthma and bronchitis which is the immediate disabling factor in this case. It is noted that this man enjoyed good health and does not give a history of having had any attacks prior to employment with the smelter plant. Assuming this statement to be correct, it is reasonable to infer that the exposure to dust incident to his occupation in the smelter was the exciting cause of the bronchial asthma and associated bronchitis.

"Assuming this, if it were shown that the man was subject to asthmatic attacks prior to his employment at the smelter plant, it is reasonable to assume that the exposure to the dust aggravated the condition. It is com-

mon knowledge that many asthmatics or people who develop chronic bronchial asthma may continue to have asthma long after the original exciting cause has been eliminated. . . . It may continue indefinitely even though no further exposure to the original exciting cause takes place."

A supplemental report of May 10, 1945, by Dr. Hoge states that appellee did not have silicosis or asbestosis.

It will be noted that there is some conflict in the medical testimony as to whether appellee's employment and exposure to the dust and fumes actually caused the bronchial trouble, or aggravated a pre-existing diseased condition which resulted in disability. The commission apparently adopted the opinion of Dr. Chamberlain and found that appellee suffered an accidental injury by reason of inhalation of dust and fumes in the course of his employment, which injury aggravated a pre-existing condition and resulted in total, but temporary, disablement. Appellants do not dispute the findings of the commission that there was an aggravation of a pre-existing disease, but do urgently insist that appellee did not suffer an accidental injury within the meaning of the Workmen's Compensation Law.

Our act (Act No. 319 of 1939) provides that "injury" and "permanent injury" shall mean: "accidental injury or death arising out of and in the course of employment, and such occupational disease or occupational infection as arises naturally out of such employment or as naturally and unavoidably results from such accidental injury as hereinafter defined." The term "accident" is not defined in the Act, but there are certain designated occupational diseases to which the Act is made applicable. None of the pre-existing diseases suffered by appellee are classed as occupational diseases under the Act.

"The term 'accident,' as used in a compensation act requiring the injury compensated for to be by 'accident,' is usually held to be employed in its ordinary sense as meaning an unlooked-for and untoward event which is not expected or designed. . . . The term 'accidental'

when used in compensation acts to indicate the type of injury for which compensation may be had has likewise been held to mean something unusual, unexpected, and undesigned; so, in the same way, the words 'accidental injury.' . . ." 71 C. J., pages 566-8.

There are numerous cases from other jurisdictions holding that a disease, or an aggravation thereof, resulting from inhalation of dust particles or fumes may constitute an accident, or injury, within the meaning of the particular act involved. However, there is a lack of harmony and uniformity in the decisions on the subject. Many of these cases are collected in the annotations in 62 A. L. R. 1460, 90 A. L. R. 619, and 97 A. L. R. 1412. See, also, 71 C. J., Workmen's Compensation Acts, § 344; and Schneider, Workmen's Compensation Text, Vol. 4, Perm. Ed., § 1346. The apparent conflict in many of the cases may be explained by the different factual situations involved, and difference in construction of the particular act. Our own cases are committed to the rule that an aggravation of a pre-existing diseased condition resulting in death or disability is compensable, if caused by an accidental injury that arises out of and in the course of employment. *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252; *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961. In *Sturgis Bros.* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629, we affirmed the commission's holding that an accidental injury to the physical structure of the body need not be the result of external violence, but may result internally from overexertion.

Appellants insist, however, that appellee did not suffer an accidental injury because no definite date or occasion can be fixed as to when the aggravation happened. Schneider, in his Workmen's Compensation Text, Vol. 4, Perm. Ed., page 387, has this to say on the question: "Diversity of opinion exists as to what constitutes the customarily required definite time and place of an accident. On this question the expressions of the courts vary from the statement that 'accidents do not happen

all day' to decisions to the effect that it may require as much as six months for an accident to culminate in a disabling injury. A reasonably definite time is all that is required. A certain fixed and definite event or occurrence is required from which time can be calculated. 'No stated period can be given as sudden as applied to each case, each must naturally depend on its own circumstances.' . . ."

In *Lea Mathew Shipping Corp.* v. *United States Employees' Comp. Com.*, 56 F. 2d 860, where the inhalation of dust from shoveling copper ore over a period of several days aggravated the pre-existing disease of bronchiectasis, the resulting disability was held to be an "injury" under the Longshoremen's and Harbor Workers' Compensation Act. The Missouri court, in *Vogt* v. *Ford Motor Company,* 138 S. W. 2d 684, held asthma to be a compensable accident where it was contracted over a four months' period from paint dust. The injury was held accidental where an employee of a tannery assisted in unloading a car of dry hides and his throat became infected from the dust arising from the hides so that it was swollen the next day and gradually grew worse. *Dove* v. *Alpena Hide & Leather Co.,* 198 Mich. 132, 164 N. W. 253.

Appellants rely on the case of *Kentucky Stone Co.* v. *Phillips,* 294 Ky. 576, 172 S. W 2d 216, where claimant suffered permanent disability by reason of breathing stone dust in the course of his employment over a long period of years. The Kentucky statute did not provide compensation for occupational diseases and the court said: "It seems rather incongruous to say that an injury caused by breathing dust over a period of years is an accidental injury. To hold such an injury accidental would practically nullify the statute in this regard and open the door to compensation of occupational diseases, a result clearly not contemplated by the statute." It was indicated by the court that the result would have been different, if the injury producing the disease had been traceable to a more definite time and place.

The Kentucky case is clearly distinguishable from the case at bar on the facts. There is no proof here that appellee was exposed to dust and fumes during the course of his employment over a period of years. Appellee had been working for the company only six months, and it is not shown that he ever before had to work under the conditions existing at the time he entered the dust-laden room in May, 1944. While there is some confusion in the testimony on the point, there is substantial evidence to support the commission in finding that inhalation of the dust and fumes over a period of several days culminated in total disablement of appellee five or six weeks later. We think the proof meets the requirement that a reasonably definite time and place of accident be shown, and that the commission correctly held that the disablement of appellee resulted from an accidental injury within the meaning of the Workmen's Compensation Law.

Appellants also insist that if appellee sustained an accidental injury he is not entitled to the full allowance for total disability awarded by the commission, but his compensation is limited, as provided in § 14, par. 3, of the Act, to such proportion only of the compensation as would be payable if the disease or personal injury were the sole cause of the disability, the reduction being the proportion attributable to the other causes of disability. This section of the Act seems to be applicable only when an occupational disease is involved and, as has already been pointed out, none is involved in this case. However, if it be conceded that the section is applicable, there is no evidence in the record upon which a proportional limitation or reduction of the award could be based, and appellants failed to develop the case on the theory that this section of the act was applicable. Under the circumstances, appellants must be held to have waived their right to insist upon the applicability of this provision of the act.

The judgment of the trial court affirming the decision of the Compensation Commission is correct, and it is, therefore, affirmed.

DUFFY *v.* DIXON.

4-7859 193 S. W. 2d 314

Opinion delivered March 25, 1946.

[redacted]

John Baxter and *Robert A. Zebold,* for appellant.

E. W. Brockman, for appellee.

McHANEY, J. Appellant is the father and appellee is the maternal grandmother of the three minor Negro children whose custody is involved in this action, Ora Lee, a girl, Leon, a boy, and Kathleen Duffy, a girl, aged 13, 11 and 9 years respectively at the time of trial.

Appellant and Ella, the mother of said children, were married in 1930. They separated in 1936 when she moved to the home of her mother, appellee, taking said children with her with appellant's consent, or at least without objection from him. They were divorced in 1943, and the custody of said children was not at issue, and they continued in her custody at the home of appellee, until her death in 1944.

Appellant resides in Desha county, and appellee's home now is, and at all times herein mentioned was, at Gould, in Lincoln county. After the death of Ella, the mother of said children, appellant sought their custody, but appellee refused to let him have them. Early in 1945, perhaps early in February of that year, appellant went to the school house in Gould, where said children were in attendance, and abducted two of them, Leon and Kathleen, and took them to his home in Desha county. Appellee, a few days later, on February 9, filed a *habeas corpus* action in the Lincoln chancery court to regain the custody of Leon and Kathleen, and for the permanent custody of all three of them. She alleged that she has had their care and custody for the past nine years and that appellant had made no contributions to their support during that time. Also that he is not a fit and proper person to have their care and custody. The court awarded the writ and directed appellant to deliver the children temporarily to appellee and set the case for trial at the April term of court. Appellant filed a response to the petition denying that he had not contributed to them and that he was not a fit and proper person to have them.

Trial resulted in an order finding that appellee is a fit and proper person to have the care and custody of said children and the writ was made final with the right of visitation to appellant. This appeal followed.

Appellant makes two contentions for a reversal of said order. The first is that he, being the father of said children and a fit and proper person, has the prior right to their care and custody. The court made no finding that he is an unfit or improper person, and ordinarily a parent who is a fit and proper person has the prior right to the care and custody of his children. But a court of equity dealing with the custody of infant children of divorced parents must be guided by a consideration of the best interests of such children, as their welfare and best interests are the primary consideration in determining their custody. *McCourtney* v. *McCourtney,* 205 Ark. 111, 168 S. W. 2d 200; *Blain* v. *Blain,* 205 Ark. 346, 168 S. W. 2d 807.

As stated above appellant and Ella, his wife, were separated in 1936, and she took the children to her mother's home with either his acquiescence or consent, where they have remained until this time. They were divorced in 1943 on his complaint which did not ask for their custody and no disposition was made of them in the decree. An examination of the evidence discloses that he apparently took very little interest in them for a period of nine years, or until after Ella's death, when the children had reached an age to make them useful in his farming operations. He contributed substantially nothing to their support. On the other hand appellee took them and their mother into her home, took care of them, sent them to school, fed and clothed them, and, according to the evidence, is doing a very good part by them. We think the trial court correctly awarded their custody to appellee.

The second contention is one made for the first time in this court, that the Judge of Lincoln chancery court was without jurisdiction to issue the writ of *habeas corpus,* directed to appellant,, a resident of Desha county in another Chancery District, and make it returnable before himself. Our recent case of *State* v. *Ballard, ante,* p. 397, 190 S. W. 2d 522, is cited to support this argument. But that case is not controlling here. There the State objected to jurisdiction from the beginning and the sole question presented on appeal was that of jurisdiction. Here the question was not raised in the trial court. Appellant filed a response, entered his appearance and thereby consented to the jurisdiction. The court had jurisdiction of the subject-matter of the action and consent gave jurisdiction of the parties.

Affirmed.

H. B. DEAL & COMPANY, INC., *v.* MARLIN, JUDGE.

4-7876 193 S. W. 2d 315

Opinion delivered March 25, 1946

Leo F. Laughren and *Ezra Garner,* for petitioner.

Surrey E. Gilliam, Floyd E. Stein, Melvin T. Chambers and *Harry Colay,* for respondent.

McFaddin, J. This is an original proceeding in this court for a writ of prohibition. H. B. Deal & Co., Inc., (hereinafter referred to as "petitioner") filed petition herein on January 9, 1946, seeking to prohibit Hon. Tom Marlin, judge of the Second Division of Union Circuit Court, from proceeding in a certain cause there pending (No. 7482), wherein Thomas L. Head and 58 others were plaintiffs and H. B. Deal & Co., Inc., was defendant. A temporary writ was issued, returnable on January 14, 1946. On the return day attorneys for both parties appeared in open court, and the temporary writ was ordered to remain in force until this final hearing.

Petitioner is a corporation with its home office in St. Louis, Missouri, but authorized to do business in Arkansas. On February 16, 1942, petitioner entered into a fixed-fee contract with the United States of America, whereby the petitioner (designated in the contract as "constructor") agreed to construct, for the United Staes Government, the Ozark Ordnance Works near El Dorado, Arkansas, at an estimated cost of $9,198,400, exclusive of the constructor's fixed-fee of $202,700. Section 2 of Article X of the said contract reads, in part:

"The constructor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics. . . ."

On April 22, 1943, Thomas L. Head, *et al.*, filed cause No. 7482, against the petitioner, in the Union Circuit Court, claiming (a) that the plaintiffs were laborers and mechanics who had worked for the petitioner under the said contract, and (b) that the petitioner had failed to pay the plaintiffs the full amount due each for wages and overtime as provided in the contract. Each plaintiff sought recovery for said alleged unpaid amount. After a series of motions had been filed by petitioner and acted upon by the circuit court, the petitioner then filed on June 29, 1945, its petition and bond for removal of the cause to the U. S. District Court. On July 5, 1945, the said federal court ordered the cause remanded to the

state court; and on November 21, 1945, the petitioner filed its demurrer and answer in the circuit court.

On December 1, 1945, the plaintiffs, Thomas L. Head, *et al.*, filed motion in the Union circuit court—in the form of an amendment to their complaint—whereby they sought to have the petitioner answer certain interrogatories and to produce its books or furnish certain information therefrom pertinent to the hours the plaintiffs had worked, and the amounts paid plaintiffs. The circuit court granted this motion on December 10, 1945, and ordered the petitioner to answer the interrogatories and furnish the information within thirty days. Then, on January 9, 1946, the petition for a writ of prohibition was filed in this court. The petitioner has alleged in its petition, and argued in its briefs the points which we will list and discuss herein.

I. *Absence of Jurisdiction.* The petitioner claims that the circuit court was without jurisdiction to make the order of December 10, 1945. Petitioner points out that under the contract between the U. S. Government and the petitioner, the constructor would be reimbursed for actual expenditures in performance of the work; and petitioner then states its contention in this language:

"Hence, it is plain under the provisions of this contract that any judgment rendered in the case would eventually be paid by the United States of America and the interests of the United States of America are involved in the litigation, and for this reason the Union Circuit Court does not have jurisdiction of the case and this is true even though the United States of America is not a formal party to the lawsuit."

To support this contention as just quoted, petitioner cites *Morrison* v. *Work,* 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394; *Transcontinental & Western Air* v. *Farley,* 71 Fed. 2d 288; and *McCain* v. *Crossett Lumber Co.,* 206 Ark. 51, 174 S. W. 2d 114, to the effect that, where the government is the real party in interest, an action cannot be maintained.

We see no merit to petitioner's contention in this regard. The fact, that the constructor will ultimately be reimbursed by the U. S. Government for the cost of the labor does not prevent court jurisdiction when the laborer sues the constructor for the wages due under the contract. The petitioner entered into a solemn contract with the U. S. Government, where, for a fixed fee of $202,700, petitioner agreed to construct the Ozark Ordnance Works and agreed to pay laborers for overtime on the scale of wages fixed by the government. We have heretofore quoted one of the provisions of the contract. To quote all of the provisions wherein the government undertook to see that laborers received full wages without subterfuge would unduly extend this opinion. The government placed the quoted provision in the contract for the benefit of the workers. They therefore had a right to sue on the contract. We have repeatedly held that a contract made for the benefit of a third party is actionable by such third party. *Freer* v. *J. G. Putman Funeral Home,* 195 Ark. 307, 111 S. W. 2d 463, is one such case. Other cases on this point are collected in West's Arkansas Digest, "Contracts," § 187. See, also, 17 C. J. S. 1121. The right of a workman to sue a public contractor for wages as fixed by the wage scale in the contract has been recognized in several cases, some of which are: *Stover* v. *Winston Bros. Co.,* 185 Wash. 416, 55 Pac. 2d 821; (appeal to U. S. Sup. Ct. dismissed; 299 U. S. 508, 81 L. Ed. 376, 57 S. Ct. 44); *Fata* v. *S. A. Healy Co.,* 289 N. Y. 401, 46 N. E. 2d 339, 144 A. L. R. 1031; *Novosk* v. *Reznick,* 323 Ill. App. 544, 56 N. E. 2d 318. See, also, Annotation in 144 A. L. R. 1035.

The fact, that the constructor will be reimbursed by the United States for the labor cost does not make this an action against the United States. In *James* v. *Dravo* (302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, 114 A. L. R. 318) the State of West Virginia assessed a gross receipts tax against Dravo Construction Co., which was engaged in constructing locks and dams for the U. S. Government on certain rivers in West Virginia. Dravo Construction Co. sought to defeat the tax by claiming, *inter alia,* that

the United States Government would ultimately have to pay whatever tax Dravo Construction Company might have to pay. But the Supreme Court of the United States upheld the tax and denied the contention of Dravo, holding that, the fact that the tax would ultimately increase the cost to the Government, would not invalidate the tax or defeat its collection. *James* v. *Dravo, supra,* points the way to our holding here. If a state tax may be collected by the state against the constructor, as in the the reported case, then, *a fortiori,* a labor claim may be enforced against the constructor, particularly when the government itself set the scale of wages and provided for the payment of overtime as previously shown. The mere fact that the Federal Government is the ultimate owner or user of the works does not allow the constructor to defeat an action brought to collect wages which the Federal Government stipulated in the contract that the constructor should pay.

We, therefore, hold against petitioner's first contention.

II. *Excess of Jurisdiction.* The petitioner contends that the Union circuit court in the order of December 10, 1945, acted in *excess of its jurisdiction* (as distinguished from *lack* of jurisdiction). The petitioner says that the circuit court exceeded its jurisdiction in making the order, because—petitioner contends: (a) there was a misjoinder of parties plaintiffs; (b) the plaintiffs already had the information sought in the motion; (c) petitioner did not have the information which the court ordered to be produced; (d) the order for the information was premature; and (e) it would be burdensome on the petitioner to answer the proposed interrogatories.

The circuit court had jurisdiction of the *res* and of the parties. Before the circuit court made the order here complained of, there was an extensive hearing: witnesses testified for the plaintiffs and documents were introduced; the petitioner offered no witnesses. The purpose of the hearing was to see whether the court should require the petitioner to furnish certain information and answer certain questions. The plaintiffs contended that they

were entitled to have the petitioner's books produced under the authority of §§ 5147-8, Pope's Digest, and under the authority of such cases as *Leola Lumber Co.* v. *Bozarth,* 91 Ark. 10, 120 S. W. 152; *Hammond Packing Co.* v. *State,* 81 Ark. 519, 100 S. W. 407; and *Fidelity and Deposit Co.* v. *Cunningham,* 181 Ark. 954, 28 S. W. 2d 715. Plaintiffs contended that they were entitled to have the petitioner answer the interrogatories proposed under the provisions of § 1476, Pope's Digest.

At the conclusion of the hearing, the circuit court found that the plaintiffs were entitled to have the interrogatories answered, and were entitled to certain ordered information. In other words, the circuit court exercised its discretion. In applying for a writ of prohibition on the items (b), (c), (d), or (e) under this Heading II, we think the petitioner is seeking to use the writ of prohibition as a substitute for the adequate remedy of appeal; and this cannot be done. In 42 Am. Juris 165, under the topic "Prohibition," the rule is stated:

"It is the universal rule that mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition, and that a writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it; or, as it has sometimes been said, the writ of prohibition cannot be converted into, or made to serve the purpose of an appeal, writ of error, or writ of review to undo what already has been done. This is true both because there has been no usurpation or abuse of power and because there exist other adequate remedies. Thus, when jurisdiction is clear, an erroneous decision in ruling on the sufficiency of the petition or complaint or on a motion to dismiss, or on matters of defense, or in rendering judgment, is not ground for a writ of prohibition."

We held in Heading I, *supra,* that the Union circuit court has jurisdiction. These items (b), (c), (d), and (e) relate only to matters which petitioner claims to be errors or irregularities. We do not pass on such contentions in a proceeding for prohibition, as petitioner's remedy

by appeal is adequate in this case. See *Finley* v. *Moose,* 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 74. Even when the existence of jurisdiction depends on contested questions of fact which the inferior court is competent to decide, a writ of prohibition will not be granted where the remedy of appeal is adequate. See *M. & P. Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. 2d 421; *Roach* v. *Henry,* 186 Ark. 884, 56 S. W. 2d 577; and *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. 2d 1030.

We think it unnecessary to consider at length the question of misjoinder (item (a) of this Heading II), which was one of the points urged by the petitioner herein. The complaint alleged that the plaintiffs were laborers having claims against the petitioner for alleged unpaid wages under the contract. If a separate action had been brought by each of the 59 claimants, the actions could have been consolidated under §§ 1288-9, Pope's Digest. In *Holcomb* v. *American Surety Co.,* 184 Ark. 449, 42 S. W. 2d 765, we held that such claims could be brought in one action in the first instance.

The petition for writ of prohibition is denied, and the temporary writ is quashed.

BARNETT *v.* BARNETT.

4-7836 193 S. W. 2d 319

Opinion delivered March 25, 1946.

Edward H. Coulter, for appellant.

Aubert Martin and *D. A. Bradham,* for appellee.

GRIFFIN SMITH, Chief Justice. Silas Barnett, by deed of November 1, 1940, named Frank Barnett (his illegitimate son) as grantee. By the deed's terms approximately an acre—including the family residence—and described as Lot Eleven, etc., was conveyed. October 23, 1944, Frank and his wife, Ollie, sold the property to Sam Haskell and his wife, Era. Included in the controversy by reference, (but not for the purpose of adjudication of title) is Lot Seventeen. It is vacant and adjoins Lot 11, but the value is not stated.

Three days after executing the deed to Lot Eleven, Silas married Bessie Paskel. Bessie lived with Silas as housekeeper, and appears to have been strongly attached to him. Silas died December 11, 1940—five weeks after he married Bessie.

After Frank sold Lots Eleven and Seventeen to the Haskells, Bessie refused to move. An original suit in ejectment was abandoned after Bessie alleged that Frank's deed was obtained through fraud. The cause was transferred to equity, where the deeds were canceled.

The Chancellor supplemented his decree with an opinion in which it was found that Silas (twice a widower) had for eleven or twelve years been attended by Bessie. He was advanced in years with consequent reduced earning capacity; but relaizing that the end was near he desired to measurably provide for Bessie's necessities. It is quite clear that, like most other Negroes so circumscribed regarding property rights, there was not a full understanding of the effect of illegitimacy and nonparticipation in the father's estate. Pope's Digest, § 4340. Having expressed apprehension to a friend, Silas was advised that marriage would solve the problem, and that Bessie would then be assured of "a roof over her head."

In the Chancellor's opinion there is the statement that Silas did not tell Bessie of his intention to convey the home place to Frank, but left her under the impression

that he intended to execute a will, leaving Lot Eleven to her. The Chancellor was not certain just what Silas intended to do, but declared that intentions were not controlling inasmuch as Bessie was not consulted, and did not appreciate the extent of what had been done, if in fact she knew about the deed. There is testimony that Bessie ". . . was familiar with the occasion when the deed was made," but she emphatically asserted that Silas intended to make a will. A legitimate son (D. L. C. Barnett) died before the instant suit was brought; and none claiming through him has alleged any rights.

Bessie testified that Silas told Frank ". . . to make a will for all three of us"—Bessie, Frank, and D. L. C. The father's wishes were disregarded, Bessie says, and in effect she charges that Frank fraudulently substituted the deed and that the dying man mistakenly supposed he was providing for the three. But, near the same time he asked advice about how to proceed in order to take care of Bessie during her lifetime, and was told that marriage would solve the problem. Bessie was 19 years of age when she went to live with Silas, according to her testimony.

The friend who suggested marriage was Emanuel Walker. He testified that when Silas became ill ". . . he called me to his room one evening and said that if anything happened to him he wanted Bessie to have a home if nothing else. I told him the only thing I knew was for him to marry her. About a week or ten days after that they got married."

Silas was apparently unable to write at that time, although there is testimony that he was not illiterate. The signature was witnessed by Carrie McCay, who testified that the document was not read by or to Silas. George Hammons, notary public who took the acknowledgment a day after Silas made his mark, testified that neither the text nor substance was discussed when his official act was performed, nor during the time he was in the home.

Frank Barnett's version of the transaction is that his father expressed a desire to make the conveyance and asked him (Frank) to have the deed prepared. This was done; then, after Silas had signed it, Silas told Frank to get a notary public to take the acknowledgment. When Hammons arrived at the sick man's bedside ". . . Silas reached under his pillow and got the deed and told Hammons he wanted it acknowledged."

Frank insists that he took possession of the deed at once, but did not have it recorded for several months, ". . . but I have had it under my control ever since it was executed."

While some of the testimony is woefully contradictory, Bessie's version is that Silas intended to execute a will in favor of "the three of them." Silas had previously deeded Lot Seventeen to Frank; and the Chancellor, in setting aside the deed from Silas to Frank covering Lot Eleven, and the deed from Frank and his wife to Haskell conveying both lots, was seemingly convinced that Frank deceived his father when he procured a deed to Lot Eleven, the intention being to convey Lot Seventeen.

In any event, the thread of substance running through a preponderance of the testimony is that Silas wanted Bessie to have "a roof over her head" while she lived; and that is what she would have succeeded to without question if the deed to Frank had not been made shortly before the marriage. There is nothing to indicate that Silas wanted Bessie's heirs or those whom she might favor by deed or will to become beneficiaries of the home place to the exclusion of the illegitimate son.

We agree with appellee that *Roberts* v. *Roberts, Administratrix,* 131 Ark. 90, 198 S. W. 697, is applicable. In that case a summary from Ruling Case Law, v. 9, p. 591, was quoted with approval, effect being that if shortly before marriage the husband-to-be conveys his real estate without consideration, and without the consent or knowledge of the intended wife, with the purpose and result of unfairly depriving her of dower, the courts will set aside the conveyance as a fraud upon her rights. In *West* v.

West, 120 Ark. 500, 179 S. W. 1017, the rule was said to be that if a man or woman conveys away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife.

Our conclusion is that the deed to Frank (being in legal effect a fraud upon Bessie's marital rights) was voidable as to her. The decree is modified with directions that dower and homestead be vested in Bessie; but, subject to these rights, the remaining interest passes to Frank. The judgment insofar as this end was not accomplished is reversed, and the cause is remanded with directions to enter an order not inconsistent with this opinion.

McHENRY *v.* McHENRY.

4-7868 193 S. W. 2d 321

Opinion delivered March 25, 1946.

Sam M. Levine and *Robert A. Zebold,* for appellant.

Rowell, Rowell & Dickey, for appellee.

SMITH, J. Chester McHenry owned, at the time of his death, which occurred June 22, 1935, a 300 acre farm in Jefferson county. He was survived by several children and grand-children, and by Julia his widow, who was his second wife, but not the mother of any of his children. On September 2, 1922, he obtained a loan of $10,000 from the St. Louis Joint Stock Land Bank, which was secured by a deed of trust on the farm. The loan was payable in semi-annual installments of $350 each, the last falling due in 1955, interest being included in the payments.

At the time of Chester's death a balance of $8,200 was due on the loan, which included three delinquent installments, which Chester was unable to meet, and a foreclosure of the deed of trust was threatened. Chester's children had all left home and some were living in St. Louis, some in Chicago, and others in Detroit, and none were willing or able to render any assistance. He had an ambitious and highly intelligent grand-son named Cleophus McHenry, who was given a good education and who lived with an aunt in Detroit while attending Wayne University in that city. Cleophus had received expense money from Chester, his grandfather, who wrote him to return before completing his schooling, to take charge of the farm. His grandfather was in bad health and died a few days after Cleophus returned home. All the family had left the farm except Chester's widow, with whom Cleophus resided until 1944, when she too left the farm, but did not take her personal effects with her.

Cleophus was confronted, when he returned home, with a very difficult situation. There was no money to pay the delinquent installments due on the mortgage debt, and payment was being demanded. The houses were in bad repair, there was Johnson grass on the farm, the equipment was poor, and there was an insufficiency of live stock to properly cultivate the land. The testimony is conflicting as to the value of the farm when Cleophus took charge of it. There was testimony that it was worth

no more than the debt due on it. However, a planter owning a 6,500 acre plantation adjoining this farm, placed the value at from fifty to sixty dollars per acre at that time. In 1937, 167 bales of cotton were produced on the land. Cleophus applied to several persons and agencies for assistance, but was told that it could not be given, unless he acquired title to the land. He wrote his relatives explaining to them his desperate plight, but no one of them was able or willing to lend any assistance, By correspondence and by personal visits he obtained deeds from all the heirs, except three who refused to execute deeds, which deeds with his own interest, gave him the apparent title to 19/24th interest in the land.

With these deeds Cleophus was able to obtain the necessary line of credit with which to operate the farm, and with its proceeds bought the tools and stock needed, and he put the houses in good condition, and has now an up to date and well equipped farm.

This suit was brought by the widow and the heirs who had executed these deeds to cancel them, and from the decree granting the relief prayed is this appeal., it being alleged that the deeds had been obtained "through misrepresentation and with fraudulent intent."

The plaintiffs testified in effect that Cleophus represented to them that it would be necessary for him to have the title in himself individually, in order to operate the farm, and to raise the money necessary to pay the delinquent installments due on the mortgage, and to pay other installments as they matured, and thus save the farm for the heirs. Cleophus denied this, and testified there was no agreement that he should not take the title which the deeds purported to convey, and that but for these deeds he would not have undertaken the arduous and what appeared to be almost impossible task of redeeming the land from the mortgage.

Much testimony was taken orally, and at the end of the first day of the trial there was found a writing which was offered in evidence on the second day of the trial, which writing the widow testified had been in her pos-

session since its execution, but had been misplaced. This instrument reads as follows:

"In consideration of the conveyance to me of the Chester McHenry tract of land in Jefferson county, Arkansas, by certain of the heirs of the said Chester McHenry, I hereby agree that I shall operate and cultivate the said lands until the indebtedness now on said lands will have been canceled and paid off, including any additional indebtedness which will have accrued for building or re-building of houses and making of repairs and improvements on said farm, with the understanding that when all of such indebtedness will have been paid I shall have all the rents and profits derived from the operation, cultivation and use of said lands for a period of five years thereafter, and at the expiration of such period of time, I agree to divide up the rents and profits derived from said lands, among the respective heirs according to the proportionate amount due each as the heirs of Chester McHenry.

"The above agreement is conditioned especially and absolutely on the understanding that as long as Julia McHenry lives and I continue to hold the title to the aforesaid property she shall be privileged to live on the said place and be maintained therefrom.

"Dated this 28 day of November, 1938.

"(Signed) Cleophus McHenry."

When this writing was produced Cleophus was asked if he had signed it, and he answered, "I deny it definitely." But when it was proposed to call witnesses to prove his signature his attorney said, "We will admit the signature."

The complaint was then amended to allege that if Cleophus had not acquired the title through fraud, he had acquired it as a trustee for the McHenry heirs, and had unfaithfully repudiated the trust. The heirs had called on Cleophus for an accounting of his trusteeship in 1944, and when he stated that they had no interest in the land, but had conveyed their respective interests to him, this suit was filed.

All the heirs testified that the consideration, and the only consideration for the deed was Cleophus' agreement to operate the place and pay it out of debt, and save it for the heirs. After the execution of the instrument above copied was established by admission, Cleophus stated that it had been executed for the benefit and protection of his grandmother only, and not for the benefit of the other heirs. But it does not read that way, and letters written by Cleophus to other members of the family show that it was not so intended or understood. For instance, in a letter dated November 27, 1938, to one of his aunts, Cleophus wrote, "I have done my best to pay the place out, but I can't do it unless they are willing to sign these deeds and let me refinance it. Cottrell (a grandson of Chester) thinks they will sign them, so that we can save it. . . . I will have the contract and quit claim deeds drawn up if they want to sign them, I am going to see that St. Louis man today. Our time is up."

The deeds, three in number, referred to are dated as follows: one, December 17, 1938, another December 19, 1938, and the other December 20, 1938.

It is conceded that inasmuch as these deeds are absolute in form, and apparently conveyed the title to the land they described, the testimony must be clear, cogent and convincing to cancel them, and to permit the showing that their intention was and their effect is to create a trust. But the Chancellor found that the testimony met this requirement, and we concur in that finding. *Ripley* v. *Kelly,* 207 Ark. 1011, 183 S. W. 2d 793.

Now the agreement above copied, which evidences the trust, provides that Cleophus should have the rents and profits of the land for a period of five years, after he paid the mortgage, but it may be answered that he has not yet discharged the mortgage, although he had all the rents and profits, including Federal Government parity payments in the sum of $3,452.65. A balance of $5,447.49 remained unpaid when Cleophus made his last payment on the mortgage indebtedness.

It may be further said that Cleophus repudiated the trust and has compelled the heirs to prosecute extended

and expensive litigation to establish it. Moreover, Cleophus has had substantial compensation for his services, which no doubt, saved the farm for himself, and the other heirs. The decree did not require him to account for any rents prior to 1945, the year in which the suit was filed, and he was allowed to keep the large amount of valuable, personal property now on the farm, which he had accumulated during his operation of the farm, and of that part of the decree the heirs make no complaint.

At § 840 of the Chapter on Trusts, 65 C. J., p. 929, it is said: "Generally speaking, a trustee who neglects his duties, or who is guilty of bad faith, or who violates his obligations, or who repudiates the trust, claiming title as absolute owner, forfeits his right to compensation, from the date of his default, and independent of any provision for compensation in the trust instrument itself."

The original decree allowed a fee of $1,000 to the attorneys for the heirs who had brought and prosecuted the suit under the authority of § 10531, Pope's Digest. This section provides that in suits for partition of lands, it shall be lawful for the court rendering the decree ordering partition to allow a reasonable fee to the attorney bringing the suit, which fee shall be taxed as part of the costs, and be paid pro rata as the other costs are paid, according to the respective interests of the parties to said suit in said lands so partitioned. But when the attention of the court was called to the opinion of this court in the case of *Lewis* v. *Crawford,* 175 Ark. 1012, 1 S. W. 2d 26, that allowance was rescinded, and no fee was allowed, and from that part of the decree a cross appeal has been prosecuted by the heirs. We think the fee was properly disallowed. Strictly speaking, this was not a partition suit, but one to cancel deeds and establish a trust and partition was a mere incident.

We conclude therefore that the decree should be affirmed both upon the direct and cross-appeal.

TAYLOR *v.* CAMMACK.

4-7862 193 S. W. 2d 323

Opinion delivered March 25, 1946.

Thos. Compere, for appellant.

George Norman, for appellee.

ROBINS, J. The question presented by this appeal is: Were the appellants, Barbara Ann Taylor, Eleanor Sue Taylor and William Knox Taylor, minor children of Thurman B. Taylor, deceased, pretermitted in the will of their father, so as to render said will ineffective as to them?

Thurman B. Taylor, a resident of Ashley county Arkansas, died on December 24, 1940, leaving him surviving his widow, Mrs. Ella J. Taylor, one of the appellees, and three children, the above named appellants.

The following instrument was duly admitted to probate as the last will and testament of said Thurman B. Taylor:

"In the name of God, Amen: I Thurman Taylor of Hamburg, Ark., being of sound mind and disposing memory, but knowing the uncertainty of human life, hereby revoking any and all wills heretofore made by me.

"First: I desire that all my just debts be paid. I desire to leave all my possessions to my wife, Mrs. Ella J. Taylor.

"I desire that Ella J. Taylor and.....act as my executor without bond, and full power to sell and dispose of it in his (its) judgment it is necessary for the payment of debts, or to the advantage of the estate, or of the heirs.

"Thurman B. Taylor. (SEAL)

"Signed, sealed, and published, and declared by said Thurman B. Taylor the testator, as and for his last will and testament; and we, at his request, and in his presence, and in the presence of each other have hereby subscribed our names as witnesses thereto this 8 day of May, 1933.

"Roy E. Bell

"A. S. Dees."

At the time of his death Mr. Taylor owned the west half of lot three, block three, and lot eight as shown by Bunn's Survey of the town of Hamburg, Arkansas. Acting under the power given her by the will of her husband, and, as was admitted in the trial below, in order to obtain money to educate the children of testator and also to discharge his debts, appellee, Ella J. Taylor, sold and by deed conveyed this property to appellee, Mrs. H. D. Cammack, for a consideration of $7,000, which is stipulated to be a fair price therefor.

The instant suit was brought on behalf of appellants by M. F. Taylor, as their next friend, and in the complaint it is alleged that since these children were not mentioned in the will of Thurman B. Taylor, deceased, they were entitled to inherit his property as pretermitted children under the provisions of § 14525 of Pope's Digest. The prayer of the complaint was that the said deed executed by Mrs. Taylor to Mrs. Cammack be canceled.

It is the contention of appellees that by the use of the word "heirs" in the will the testator described and referred to his children, the appellants, and that since this constituted a mention of them they were not pretermitted. The lower court sustained this contention, held that the conveyance from Mrs. Taylor to Mrs. Cammack was valid, and dismissed the complaint. This appeal followed.

The purpose of the statute (§ 14525, Pope's Digest), providing an inheritance for pretermitted children, is not to require a testator to make some devise or bequest to each of his children, but rather to insure that there should be no unintentional disherison of a child by the testator. "The object of such statutes is not to secure equality of distribution or to compel a testator to make a substantial provision for his children, but is rather to guard and provide against testamentary thoughtlessness. . . ." 26 C. J. S. 1047; *Culp* v. *Culp,* 206 Ark. 875, 178 S. W. 2d 52; *Kinnear* v. *Langley, ante,* p. 878, 192 S. W. 2d 978.

The word "heirs," in its technical sense, is not synonymous with the word "children," but Mr. Taylor, at the time he executed the will and at the time of his death, had no heirs other than these three children; and we think that it is reasonable to assume that when he used the word "heirs" he used it in the non-technical sense, and meant thereby his children. "The word 'heirs' in its strict and technical sense applies to persons appointed by law to succeed to the estate in case of intestacy; but it is frequently used to designate those persons who answer this description at the death of the testator." *Crutcher* v. *Joyce,* 134 F. 2d 809.

In the Petition of Minot, 164 Mass. 38, 41 N. E. 63, the Supreme Judicial Court of Massachusetts, in construing a statute of that state for the protection of pretermitted children, said: "At the time the will was made, the testator's son was not born, and we are not informed whether he then or ever had any other child. After a bequest to his wife, he gave the whole of the rest of his property to a trustee, who was to pay the whole income to the testator's wife during her life, and the reversion was to go to those persons who would then be his heirs at law by blood; that is, to his children, if any should then be living. He knew that his wife was pregnant, and the above provision was no doubt intended to include the child, and there was therefore no omission to provide in his will for his children, if there should be any living at his death."

Virtually the same question posed in this case was decided in the case of *Powell* v. *Hayes,* 176 Ark. 660, 3 S. W. 2d 974, wherein we held that a reference by a testator in his will to his "heirs" constituted a mention of his children, who were his only heirs at law. In that case we said: "This court has held that a will in which the testator provides for all of his children as a class, without expressly naming them, is a sufficient mention of his children within the statute providing that, when any person shall make a will and shall omit to mention the name of a child, he shall be deemed to have died intestate as to such child. *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373. In the alleged will under consideration in this case the testator gave the balance of his property to his wife and heirs, as the law provides. In its strict legal sense the word 'heirs' signifies 'those upon whom the law casts the inheritance of real estate.' But this construction will give way if there be upon the face of the instrument sufficient to show that it was to be applied to children. *Flint* v. *Wisconsin Trust Co.,* 151 Wis. 231, 138 N. W. 629, Ann. Cas. 1914B, p. 67, and case-note at p. 70; Commentary on Wills, by Alexander, vol. 2, par. 850-852, inclusive; Page on Wills, 2d Ed., vol. 1, p. 1496, § 891; and 28 R. C. L., p. 248, § 216. The word 'heirs' has been held to be susceptible of two interpretations; the one which is technical, and embraces the whole line of heirs; the other, not technical, but common, and is used to denote the heirs who may come under the designation of heirs at a particular time, and it is often used in common speech as synonymous with children. *Turman* v. *White's Heirs,* 14 B. Mon. (Ky.) 560; and *Feltman* v. *Butts* (Ky.), 8 Bush. 115. The holding of this court is in accordance with this rule. *Robinson* v. *Bishop,* 23 Ark. 378, and *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014, 44 L. R. A., N. S., 782, Ann. Cas. 1914D, 712. Looking at the entire will and all the circumstances surrounding the testator, we think the word 'heirs,' as used in the will, manifestly meant children. The word was not used to denote succession but to describe devisees who were to take under the will. The record shows that the testator had several pieces of real estate, and left surviving him his widow and several chil-

dren, who state that they are his only heirs at law. He devises the balance of his property, after the devise to Annie Hayes, to his wife and heirs as the law provides. This meant that they should take such part of his estate as they were entitled to under our statutes of descent and distribution, and shows that he did not intend to omit any of his children from his will."

The lower court correctly construed the will and its decree is in all things affirmed.

EAVES *v.* LAMB.

4-7865 193 S. W. 2d 328

Opinion delivered April 1, 1946.

Bon McCourtney, for appellant.

Adams & Willemin, for appellee.

ROBINS, J. On January 16, 1945, appellant, Wanda Faye June Eaves, twelve year old daughter of appellant

A. H. Eaves, was struck and seriously injured by a truck owned and driven by appellee, Charles Lamb. Appellant, A. H. Eaves, brought this suit as next friend of his daughter and for his own benefit, praying damages for his daughter to compensate her for her injuries and damages to recompense him for medical expense and for loss of services. It was alleged in the complaint that the child's injuries were caused by the negligence of appellee in driving his truck in a careless and reckless manner, and that appellee was negligent in that, after he discovered the perilous position of the child, he failed to exercise due care to avoid striking her.

Appellee in his answer denied generally the allegations of the complaint; and, as a further defense, he alleged that the injured child had the habit, known to her parents, of purposely running in front of or near motor cars, and that she was doing this on the occasion of her injury.

There was a trial to a jury, and a verdict in favor of appellee was returned. From judgment entered on the verdict appellant prosecutes this appeal.

No complaint is made by appellant as to instructions given or refused by the lower court, or as to the sufficiency of the testimony to support the verdict. For reversal appellant urges only this ground: That the trial court erred in permitting Biggers and Barnshell, witnesses for appellee, to testify that on numerous other occasions the injured child had run in front of cars driven by these witnesses, requiring them to bring their cars to a complete stop. This testimony was objected to by appellant on the ground that it was incompetent and irrelevant.

It is unnecessary for us to determine whether this testimony was properly admitted, because, even if the court committed error in admitting this testimony, appellant is not in a position to complain thereof, nor was such error, in view of the instructions given the jury by the court, prejudicial to appellant.

In the first place, when this testimony was offered by appellee, appellant had already introduced testimony relating to the same matter. In the examination by counsel for appellant of appellant's witness, E. O. Dodson, this occurred: "Q. It is intimated that this little girl runs out and chases cars. Did you ever see her run out there in the road and chase cars? A. Not when I could go by. Q. Did you ever see her conduct herself in that manner? A. No, sir. Q. Did you ever hear tell of it before? A. No, sir." Virtually the same questions were asked by counsel for appellant, and like answers elicited in the examination of Mrs. E. O. Dodson, Mark Wileman and John Henley, all witnesses in chief for appellant.

In 31 C. J. S., p. 913, the rule is thus stated: "It frequently happens that evidence which might be inadmissible under strict rules is nevertheless introduced into the case through inadvertence or otherwise, under which circumstances it is held, sometimes as a result of statutory regulation, that the adverse party is entitled to introduce evidence on the same matters lest he be prejudiced. The party who first introduces improper evidence cannot object to the admission of evidence from the adverse party relating to the same matter." "A party who introduces improper evidence such as that which is incompetent, or evidence inadmissible under the pleadings, will not be permitted to assign as error the subsequent admission of same or similar evidence, or evidence in rebuttal or in explanation offered by his adversary." 5 C. J. S., p. 191.

We said in *German-American Insurance Company* v. *Brown,* 75 Ark. 251, 87 S. W. 135: "For another reason appellants are precluded from complaint at the introduction of this evidence. They first drew out, on cross-examination of appellee, the testimony as to communications from McKibben, and read in evidence two of the telegrams received by appellee from him. Where one party introduces incompetent testimony, he cannot complain of the action of the court in allowing the other party to introduce the same character of evidence di-

rected to the same point at issue. He waives all objection to error which he thus invites. *St. Louis & S. F. R. Co.* v. *Kilpatrick,* 67 Ark. 47, 54 S. W. 971; *Klein* v. *German Nat. Bank,* 69 Ark. 140, 61 S. W. 572, 86 Am. St. Rep. 183; *Standard Life Ins. Co.* v. *Schmaltz,* 66 Ark. 588, 53 S. W. 49; 1 Thompson on Trials, §§ 706, 707; Elliott, App. Proc., § 626; *Reynolds* v. *State,* 27 Neb. 90, 42 N. W. 903; *Fillmore* v. *Union Pac. Ry. Co.,* 2 Wyo. 94." To the same effect were our holdings in *National Life & Accident Ins. Co.* v. *Langford,* 123 Ark. 619, 185 S. W. 266; *Coffee* v. *Arkansas Power & Light Company,* 195 Ark. 559, 113 S. W. 2d 1100; and in *Bankers' Fire Insurance Company* v. *Williams,* 176 Ark. 1188, 5 S. W. 2d 916.

So, even if it be conceded that the testimony as to negligent behaviour of the injured child on other occasions was inadmissible, appellant, having already introduced the same kind of testimony, cannot complain thereof.

Furthermore, during the trial, appellant elected to ask recovery only on the theory that appellee was negligent in not exercising due care to avoid the injury after he discovered the perilous position of the little girl; and the court, among other instructions to the jury, gave the following: "The case is submitted to you on what is termed the discovered peril doctrine, *which eliminates from your consideration any evidence of negligence on the part of the child.*" (Italics ours.)

By this instruction the testimony complained of now by appellant was withdrawn from consideration by the jury.

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

ANGELLETTI *v.* ANGELLETTI.

4-7867 193 S. W. 2d 330

Opinion delivered April 1, 1946.

ED. F. MCFADDIN, Justice. This appeal challenges that portion of a divorce decree concerning alimony and property rights.

Joe Angelletti is 57 years of age, and is totally blind. Appellant, Ethel Angelletti, is several years younger. The parties were married in March, 1944. They separated in July, 1945; and shortly thereafter appellee filed suit for divorce on the grounds of indignities. Appellant filed answer and cross-complaint. Upon a trial, with the parties and witnesses before the court, a decree was entered: (a) awarding appellant (Ethel Angelletti) a divorce; (b) vesting in her the title to certain property in Greenwood, Arkansas, subject to appellee's lien for $100; and (c) allowing appellant an attorney's fee of $50 and all court costs.

The appellant is satisfied with the divorce; but in this court complains: (a) because she received no permanent alimony; (b) because a $100 lien was decreed against the Greenwood property; and (c) because she received no interest in other real property of appellee. There is no cross-appeal. We discuss appellant's contentions.

I. *Alimony.* The awarding or refusing of alimony rests in the sound discretion of the court as determined by the facts in each case. Some of our cases so holding are: *Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S. W. 2d 399; *Guier* v. *Guier,* 200 Ark. 552, 139 S. W. 2d 694; *Lewis* v. *Lewis,* 202 Ark. 740, 151 S. W. 2d 998. In the case at bar, the appellee has been totally blind for 25 years, and has exhausted nearly all of his means in an unsuccessful effort to regain his sight. The evidence shows that his only income is $43 per month, received as rent from a building in Fort Smith. From this $43, appellee has to pay taxes, make monthly payments on the mortgage, and then support himself with whatever remains. Not only is he blind, but he is afflicted with heart trouble and hypertension. On the other hand, appellant is younger and more active, and far more capable of earning her living than appellee is of contributing to her support. In view of these facts, we cannot say that the chancery court abused its discretion in refusing to award the appellant permanent alimony.

II. *The Lien for $100.* By a previous marriage Mrs. Angelletti had received a dower or homestead interest in some property. Joe Angelletti paid the other claimants to this property $100 for a deed of their interests. Then in September, 1944, Joe and Ethel Angelletti sold this property and reinvested the entire proceeds in a lot in Greenwood described as: "25 feet off of the west end of lot ten in block five original donation to Greenwood." The deed was taken in the name of Joe Angelletti. We refer to this last-described property as the "Greenwood property." The trial court awarded this Greenwood property to Mrs. Angelletti in fee, subject to Joe Angelletti's lien of $100. We think the court was correct in decreeing the lien. Joe Angelletti had expended that

amount in increasing Mrs. Angelletti's title in the first property from a mere homestead to a fee simple; and thus enabled the sale thereof, and subsequent acquisition of the Greenwood property. There is no testimony to indicate that the $100 was intended as a gift; and the legal presumption, of a gift of the $100 to Mrs. Angelletti as the wife, is overcome by the fact that the deed to the Greenwood property was taken in Joe Angelletti's name. Therefore cases like *Carpenter* v. *Gibson,* 104 Ark. 32, 148 S. W. 508, have no similarity to the facts in the case at bar.

III. *Interest in Other Real Property of Appellee.* Appellant claims that Joe Angelletti had property in Fort Smith that rented for $43 per month, and that appellant was entitled to an interest in this property under § 4393, Pope's Digest, which reads in part: ". . . and the wife so granted a divorce against the husband shall be entitled to . . . one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled."

The answer to the appellant's contention is found in the facts: (a) that she did not in her pleadings ask for any such interest to be ascertained and allowed; and (b) at the conclusion of the evidence, when the decree was rendered, she did not make any such claim to the trial court on which to predicate an assignment of error in this court. In short, she is raising this issue in this court, for the first time.

The only pleading filed by Mrs. Angelletti was an answer and cross-complaint. The prayer of that pleading was: "Wherefore, the defendant prays that the plaintiff's complaint be dismissed, that she be granted a divorce and awarded a reasonable alimony, and also, the 25 feet off of the west end of lot ten, block five of the

original donation to the Town of Greenwood, Arkansas, court costs, attorney fees and all other proper relief."

At the conclusion of the evidence, there occurred a colloquy between the court and appellant's counsel: "The Court: What is involved here besides the divorce? Are there property rights involved? Mr. Johnson: Yes, sir, we ask for attorney's fees and alimony against this plaintiff and—— The Court: Anything else? Mr. Johnson: We filed a cross-complaint for divorce on the grounds of indignities, . . . The Court: I am asking what you are claiming in regard to the property? Mr. Johnson: We claim the property was bought by her money and she is entitled to it. . . ." This answer related to the Greenwood property. Then, after the court had announced the decree as previously mentioned in this opinion, appellant's counsel said: "I don't think we are satisfied. I think we are entitled to alimony against this man. This woman spent a year taking care of him under circumstances that were very adverse. She endured his abuse and took care of him for a year."

It is thus clear that the appellant never asked the chancery court to award her any interest in the Fort Smith property of the appellee. The appellant did not even mention to the chancery court that she was expecting an interest in the property, and this claimed interest is asserted in this court for the first time. Issues not presented in the trial court cannot be raised for the first time on appeal. In *Banks* v. *Corning Bank,* 188 Ark. 841, 68 S. W. 2d 452, Mr. Justice MEHAFFY, speaking for this court, said of an appellant's contention made—for the first time—on appeal:

". . . This question was not before the lower court, and therefore cannot be considered by us.

" 'The authorities are agreed on the proposition that the case on appeal must be decided on the same theory on which it was tried in the court below. Thus issues, which were treated in the lower court by the appellant as not involved, cannot be raised on appeal.' 2 R. C. L. 183.

" 'The rule that questions not raised in the lower court will not be considered on appeal generally prevents a party from obtaining on appeal relief which was not asked for in the court below. . . .' 3 C. J. 694."

In *Gulley* v. *Budd, ante,* p. 23, 189 S. W. 2d 385, we quoted from *Mo. Pac. R. R. Co.* v. *J. W. Myers Comm. Co.,* 196 Ark. 976, 120 S. W. 2d 693, as follows:

" 'This court has frequently held that no issue can be raised in this court which was not raised in the trial court; and since appellant's present contention was not raised in the trial court, as we have herein pointed out, we believe the relief it is now asking on appeal should be denied. *Bolen* v. *Farmers' Bonded Warehouse,* 172 Ark. 975, 291 S. W. 62; *Leonard* v. *Luther,* 185 Ark. 572, 48 S. W. 2d 242; *Banks* v. *Corning Bank & Trust Co.,* 188 Ark. 841, 68 S. W. 2d 452; *Id.,* 292 U. S. 653, 54 S. Ct. 863, 78 L. Ed. 1502; *Illinois Bankers' Life Assurance Co.* v. *Lane,* 189 Ark. 261, 71 S. W. 2d 189.' "

Appellant cites *Hegwood* v. *Hegwood,* 133 Ark. 160, 202 S. W. 35, to sustain her contention that the court should have awarded her an interest in the Fort Smith property, even though she did not ask for the property interest, and did not describe it in any of the pleadings, and did not have it described in any of the evidence. The cited case does not go to the extent claimed by appellant. In the cited case the wife was awarded a divorce and the court awarded the wife an interest in the lands. This court held that the decree of the trial court should be affirmed, stating that the decree for divorce draws to the court the power to ascertain the description of the husband's property. Such a holding is far short of the appellant's contention in the case at bar, which is to the effect that an interest in real estate should be allowed by the Supreme Court even when it was not asked in the lower court. We find no case that goes to that extreme

The decree of the chancery court is affirmed.

4-7849 193 S. W. 2d 333

Opinion delivered April 1, 1946.

[redacted]

Hardin, Barton & Shaw, for appellant.

W. A. Bates, Bryan Bates and *Charles I. Evans,* for appellee.

McHANEY, J. Appellees, who are the administrator of the estate of E. M. Fuller, deceased, the widow and the daughter of said E. M. Fuller, brought this action against appellants who, in addition to Hand, are W. E. Judy, Fuller-Judy Chevrolet Company, Fuller-Judy Hardware Company and Citizens Gin Company, for the purposes, among others, to have appellant, Hand, declared to hold certain shares of the capital stock of Fuller-Judy Chevrolet Company, hereinafter called the Chevrolet Company, and of the Fuller-Judy Hardware Company, hereinafter called the hardware company, as trustee for the estate of E. M. Fuller.

The decree from which is this appeal holds "that defendant, Grady Hand, holds the E. M. Fuller stock in Fuller-Judy Chevrolet Company as trustee for the estate of E. M. Fuller, deceased; that Hand is entitled to decree for one thousand dollars with 6 per cent. interest from January 4, 1938, which the administrator of the E. M. Fuller estate is directed to pay into court for Hand."

Also the court found and held that Hand "holds the stock of E. M. Fuller and W. E. Judy in Fuller-Judy Hardware Company as trustee; that he paid five hundred dollars in settlement of the debt of the hardware company, Fuller and Judy, personaly, to Moody Cotton Company of Galveston, Texas, which released the hardware company stock. The hardware company, Judy and the administrator—are directed to pay said sum with six per cent. interest thereon from June 1, 1938, into the court for defendant, Hand."

This is all that was decided in the decree of the court of May 21, 1945. "All other questions in the case" were expressly reserved for future consideration. Therefore, appellant, Hand, is the only appellant directly interested in the result of this appeal. He claims to have bought the Fuller stock in the Chevrolet Company outright, for his own use and benefit and not for the benefit of Fuller, and makes the same claim as to the hardware company stock, owned by both Fuller and Judy. Mr. Fuller died intestate on July 9, 1942, and this suit was not filed until October 28, 1942.

The transactions out of which this litigation grew originated probably in 1929 or 1930. E. M. Fuller and W. E. Judy were jointly interested in four or more business corporations, including the hardware company and the Chevrolet Company. They owned practically all of the capital stock of the hardware company equally. In the Chevrolet Company, Fuller owned 500 shares, or 50 per cent. of its capital stock, Judy owned 250 shares, or 25 per cent., and Hand owned the other 250 shares or 25 per cent., the par value being $25 per share.

The hardware company bought, probably in 1929 or 1930, the date not being certain, a large amount of cotton which purchases were financed by and the cotton shipped to Moody Cotton Company of Galveston, Texas. The price of cotton declined, and as a result the hardware company became indebted to Moody Cotton Company in a large sum of money, in excess of a half million dollars. Fuller and Judy personally indorsed this debt to Moody

Cotton Company and also pledged their stock in the hardware company as security therefor. When cotton continued to decline Moody demanded additional collateral, sent a representative to Waldron where Fuller, Judy and Hand resided, and Fuller agreed to pledge his 500 shares in the Chevrolet Company, if Judy would pledge an equal amount, his own 250 shares and the 250 shares owned by Hand, his son-in-law. Hand agreed to let his father-in-law, Judy, have his stock for this purpoose, and all the outstanding stock of the Chevrolet Company was thus pledged to Moody. In addition to the Moody indebtedness, the hardware company was largely indebted to others, and was hopelessly insolvent. Efforts were made in 1936 by Hand and Mr. Piles, the banker for all of them, to adjust or settle the indebtedness to Moody. They made a trip to Galveston for this purpose, but nothing was accomplished. In 1937, Moody sent its claim to an attorney in Ft. Smith, Mr. Barry, for collection. After a thorough investigation by Mr. Barry with all the parties, including the banker, Mr. Piles, and by authority of Moody, Barry agreed to and did release the Chevrolet Company stock to Hand on the payment of $2,000. This was done on January 4, 1938, by a written agreement, signed by Fuller, Judy and Hand, and certificate No. 1 for 500 shares of said stock in the name of E. M. Fuller was delivered to Hand, bearing the assignment of Fuller in blank. Presumably it was so signed when the certificate was pledged to Moody. Later negotiations with Mr. Barry resulted in the transfer to Hand of all of the stock in the hardware company held by Moody for a consideration of $500 paid on June 1, 1938.

We think the trial court was justified in holding that Hand held the stock of Fuller in both these corporations as trustee for Fuller. Mr. Piles, the banker, says the reason for the transfer to Hand was that, when the Chevrolet stock was transferred to Hand, Fuller was still indebted to Moody not only by his personal indorsement, but by his pledge of his stock in the hardware company, and that he was also indebted to others in very substantial sums, and that it was thought best by all the parties

that said stock should be in the name of Hand. So, also, as to the hardware company stock that was later transferred to Hand by the payment of $500, a nominal sum as compared to the whole debt due Moody, at which time both Fuller and Judy were released personally on said indebtedness. This smacks rather strongly of a scheme to defraud other creditors, but none of them are here complaining, and Hand does not raise the question if he could.

The rule in this state is well settled that a trust in personal property may be created by parol and established by parol evidence, and that the statute of frauds does not extend to trusts of personal property, but that the evidence to establish the trust must be clear and convincing. *Scott* v. *Miller,* 179 Ark. 7, 13 S. W. 2d 819; *Oliver* v. *Oliver,* 182 Ark. 1025, 34 S. W. 2d 226; *Laster* v. *Oldham,* 189 Ark. 5, 69 S. W. 2d 1078.

We think the evidence and the circumstances measure up to this requirement. From the organization of the Chevrolet Company, Judy had been its president, Fuller its vice-president, and Hand its secretary, and they each were allowed and drew a small monthly salary of $25, $50 and $25 respectively. This arrangement continued to exist after January 4, 1938, the date all the stock in the Chevrolet Company was transferred to Hand, to the date of the death of Mr. Fuller in July, 1942. There has never been any question about the solvency of the Chevrolet Company. On the very day this stock was transferred to Hand, it had a credit balance on deposit in the bank of Mr. Piles, a sum in excess of $2,000, or a sum more than sufficient to redeem this stock. In August, 1938, Mrs. Hand, wife of Grady, and daughter of Judy, who was and had been since its organization the bookkeeper for the Chevrolet Company, prepared a financial statement of said company for the bank which was signed by Grady Hand, and which showed the same officers as listed above and a total of tangible assets of $17,000, but did not list or value its intangibles, such as going-concern value or the value of its Chevrolet "franchise." The

stock was probably worth par at that time, but if we consider only the value of tangibles listed, the stock of Mr. Fuller was worth $8,500, and it required an expenditure by him of only $1,000 to redeem his stock. When Hand redeemed all the stock for $2,000, his stock redeemed at the same time was worth $4,250 on the same basis.

Another significant fact is that, at the end of 1940 or 1941, Hand had caused entries to be made on the books of the Chevrolet Company showing payment to Mr. Fuller of something over $1,800, and smaller amounts to himself and Judy. These were false entries as the audit of the books showed that these payments were not made, that check stubs were written to show such payments, but the checks were never written, and the bank account was long by these amounts, about $3,000. Hand admitted that this was done to evade the payment of income taxes, as they showed on the books as expenses.

There are other facts and circumstances to show that Hand did not acquire the stock either in the Chevrolet Company or in the hardware company with the intent at the time to claim it as his own. There is no evidence in the record that he ever so claimed to Mr. Fuller in his lifetime. There is evidence and very persuasive evidence by Mr. Piles that, some months before Fuller's death, he, Fuller, Judy and Hand drove out into the country from Waldron to try to work out a settlement of the differences among Fuller, Judy and Hand; that a settlement was worked out and agreed to by all of them, the details of which are not here important, but it was to be carried out through Mr. Piles; that pursuant thereto Fuller and Judy deposited checks with Mr. Piles for the sums they were to pay, but that Hand failed to deposit with Mr. Piles the stock certificates in the two companies held by him; and that the agreement was never performed because Hand failed to carry out his part of it.

When we consider these facts and circumstances, and others that might be detailed, we think they speak louder and more forcefully than the testimony of Hand and his witnesses that his acquisition of this stock for

the consideration paid was for his own use and benefit. As said by the late Chief Justice HART, in *Clark-McWilliams Coal Co.* v. *Ward,* 185 Ark. 237, 47 S. W. 2d 18, which was a case somewhat similar to this: "It is true that H. G. Clark and N. R. Clark flatly contradict the testimony of Ward (that a deed absolute on its face was intended as a mortgage), and it is earnestly insisted that their testimony is entitled to as much credence as the testimony of Ward. Be that as it may, the testimony of Ward is strongly corroborated by the surrounding circumstances. These circumstances are stronger than the words of men and point unerringly to the fact that the transaction was intended between the parties to be a security merely for debt and not an absolute conveyance of the property."

This suit comes at a time when the lips of Mr. Fuller are closed by death. But the circumstances surrounding the transaction still survive and "are stronger than the words of men."

The decree is correct. It does justice and equity. It reimburses Hand for the small amount of money advanced by him with interest. It requires him to surrender the stock acquired by him to the administrator, the widow and daughter of Fuller, and it is accordingly affirmed.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* BOWMAN.

4-7873 193 S. W. 2d 480

Opinion delivered April 1, 1946.

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

Shaver, Stewart & Jones, for appellee.

SMITH, J. In the judgment from which is this appeal, there was a recovery of accumulated disability benefits under a $15,000 life insurance policy, together with the statutory penalty and attorneys' fees, on account of alleged total and permanent disability of the insured, occuring and existing while the policy was in force.

The policy was issued May 2, 1925. A growth developed in the insured's throat, which was malignant in character, and in the operation made necessary thereby, his left vocal cord was removed, since which time he can only speak in a whisper. For two months after his operation he was not permitted to speak at all.

Insured owned a large plantation, which he had personally supervised, and was also a stock raiser, and he testified that, on account of his operation, he was compelled to abandon both these occupations, and had turned over all his business to his son. He formerly visited his plantation daily, and remained there from dawn until dark, but he now goes there only two or three times each week, and remains there only about thirty minutes. He was 51 years of age at the time of his trial, and had always enjoyed vigorous health prior to his throat trouble.

The insured testified that he turned his business interests over to his son because of his inability to attend to them. He was unable to give his tenants and employees instructions without getting near enough to be heard by them when he spoke in a whisper, and that the attempt to carry on a conversation, even for a few minutes, caused strain and exhaustion, which induced nervousness, dizziness and headache.

The insured had used machinery to a large extent in the operation of his plantation, which he testified he had sold because he could not give proper and necessary direction in its operation. When he wished to give directions in the use of this machinery, his hay binder and his tractors, it was necessary to stop the machines so that the operators thereof could hear and understand his directions.

He grew spinach for the market, and the cutters were usually women, boys and girls, who required constant, and patient overseeing in their work. Old stock had to be left in the field, and yellow leaves must be stripped. Washing, rinsing, packing, icing and loading the spinach required considerable directions, which he was unable to give.

He owned something like 185 head of cattle and had ridden a horse as he looked after them, driving them from a used pasture to a fresher one, all separately inclosed. In driving these cattle from one pasture to another, the use of his voice was required, and when he lost his voice he could no longer perform that labor.

This and other testimony, somewhat similar, was, in our opinion, sufficient to support the verdict of the jury that insured had become permanently and totally disabled from following the usual and ordinary pursuit of his employment, although he had not become helpless and was able to render service in the sale of his cattle and farm products.

Dr. Daubs testified that the fact that the growth was malignant, a fact which appears to be undisputed, would

require the patient to be cautious and careful in the way he used his voice, otherwise there might be a return of his trouble. This doctor and other throat specialists testified that the removal of the vocal cord requires an effort to make a sound, and that the effect of this effort is tiring, as a greater use of the lungs is required. The medical testimony on behalf of both insured and insurer was to the effect that if malignancy did not recur, a scar would eventually form, and that in many instances the ability to speak would be restored, but not in a full, natural tone of voice. We are not concerned with the prognosis of the operation. The policy sued on provides that the company shall have the right at any time, and from time to time, but not oftener than once a year, to demand that the insured furnish the insurer proof of the continuance of his disability, and if it were made to appear that the disability had ceased, no further disability benefits would be paid. However, as we have said, the testimony shows that presently and at the time of the trial, the insured was permanently disabled and so long as this disability continues he will be entitled to the benefits for which the policy provides.

We have many cases which discuss and define the terms total and permanent disability within the meaning of insurance policies such as the one here under consideration. A number of cases are collected and cited in the opinion in the case of *Aetna Life Ins. Co.* v. *Person,* 188 Ark. 864, 67 S. W. 2d 1007, and others still are cited in the case of *Met. Life Ins. Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681.

The latest case in our reports on this subject is that of *North American Ins. Co.* v. *Branscum, ante,* p. 579, 191 S. W. 2d 597. This case collects a number of earlier cases and again announces the rule frequently approved, which is stated in 29 Am. Jr. 872 as follows: "The rule prevailing in most jurisdictions is that the 'total disability' contemplated by a sickness or accident insurance policy, or the disability clause of a life insurance policy, does not mean, as its literal construction would require, a state of absolute helplessness, but contemplates rather such a dis-

ability as renders the insured unable to perform all the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner."

No complaint is made of the instructions under which this issue was submitted to the jury, and the testimony was, in our opinion, sufficient to require its submission and to support the finding that appellee was disabled within the meaning of the policy sued on.

It is insisted that, in any event, the verdict was excessive. In one of the instructions given as to the extent of liability, over the objection of the insurance company, the jury was told that, if there were a finding in favor of the insured as to liability, the verdict should be for the sum of $1,350, this being upon the theory that the right to recover arose when the disability occurred, whereas, the insurance company insists that there was no right to recovery for any period of time prior to the notice of disability which was furnished March 21, 1945.

We have, therefore, the question, whether right to recover for the disability, should be computed from the date when the notice of disability was given, or from the date of its occurrence.

To sustain its contention the appellant insurance company cites and relies upon the opinion in the case of *Smith* v. *Mutual Life Ins. Co.*, 188 Ark. 1111, 69 S. W. 2d 874. There is some ambiguity in this opinion, arising out of the fact that it states only the date when the notice of disability was given, and does not state the date when the disability occurred. That suit was against the appellant here, and the policy here sued on is identical with the one there construed. That opinion reviewed earlier cases on the subject, and held that their effect was to hold "that liability attached upon causation of the injury suffered, but that the cause of action on such liability accrues only after the filing of the proof of disability" and "the making of proof of loss was not treated or considered as a condition precedent to liability . . . but

it was treated as a condition precedent to the right of recovery."

The later cases of *Equitable Life Assur. Co.* v. *Felton,* 189 Ark. 318, 72 S. W. 2d 1049, and *Fidelity & Deposit Company* v. *Frazier,* 190 Ark. 833, 81 S. W. 2d 915, written by the Chief Justice, who wrote the opinion in the Smith case, *supra,* interprets for the court the Smith case as having held that, while the right to sue did not exist until notice of the disability had been given, yet when given, the right exists to recover for the disability and was enforceable from the date when the disability occurred. In the Felton case, *supra,* disability dated from May 3, 1930, but proof thereof was not made until March 10, 1933, yet recovery of disability benefits between those dates was upheld. That opinion cites the case of *Missouri State Life Ins Co.* v. *Case,* 189 Ark. 223, 71 S. W. 2d 199, in which case it was held, to quote a headnote that: "Unless by inescapable language of the policy notice of disability and proof thereof are made conditions precedent to recovery under disability clauses, it is the existence of disability that fixes liability and not proof thereof."

In the Frazer case, *supra,* Chief Justice JOHNSON, speaking for the court, said: "In the recent case of *Smith* v. *Mutual Life Ins. Co.,* 188 Ark. 1111, 69 S. W. 2d 874, which arose over provisions of a policy of insurance not materialy different from the one here under consideration (which are the identical provisions contained in the policy here sued on), we held that liability arose against the insurer and in favor of insured when the insured suffered total and permanent disability unless the provisions of the policy were such as to make proof of loss a condition precedent to liability. We expressly held in the Smith case that the provisions of said policy which required proof of loss were not a condition precedent to liability. See *Aetna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. 2d 912; *W. O. W.* v. *Meek,* 185 Ark. 419, 47 S. W. 2d 567; *Aetna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335."

We conclude, therefore, that the instruction permitting a recovery from the date the disability occurred is not erroneous, and as no error in the record appears, the judgment must be affirmed, and it is so ordered.

SINGLEY *v.* CROOM.

4-7863 193 S. W. 2d 482

Opinion delivered April 1, 1946.

Rehearing denied April 22, 1946.

Edward S. Maddox and *M. P. Watkins,* for appellant.

E. D. Viner, Smith & Judkins and *W. M. Ponder,* for appellee.

HOLT, J. Appellees brought this suit to enforce the specific performance of a contract to convey certain tracts of land in Sharp and Fulton counties. The suit was defended upon the ground that the title tendered was not merchantable as the contract of sale required that it should be. The court found that it was, and the relief prayed was granted and performance of the contract was ordered, and from that decree is this appeal.

The record before us has not been sufficiently abstracted to enable us to determine whether the court was in error in holding that the title tendered was in fact merchantable and the presumption being that the decree of the court was correct, the appeal must be dismissed for non-compliance with Rule 9, and it is so ordered.

CAINE *v.* LUNON.

4-7796 190 S. W. 2d 521

Opinion delivered January 21, 1946.

[redacted]

Oscar Barnett, for appellant.

W. A. Singfield, for appellee.

McHANEY, J. Appellees, who are the heirs-at-law of Jeff Lunon, deceased, brought this action of ejectment against appellants, to recover the possession of lot 2, in block 1, Nelson Williams Addition to Gurdon, Arkansas. They deraigned title from a deed of the Commissioner of State Lands, dated January 8, 1943, based on a tax forfeiture and sale to the State in 1939, to E. J. Lunon, and a deed from said E. J. Lunon and wife to "E. J. Lunon, Bessie Williamson, Pernella Lunon and all other heirs of Jeff Lunon, deceased." This deed further provides: "This deed is given for the purpose of conveying to the heirs of Jeff Lunon, deceased, said lot, which was bought from the State of Arkansas by E. J. Lunon for the forfeiture of the taxes of 1939." They alleged that they are the owners of said lot and entitled to the possession thereof; that appellants are in the unlawful possession and refuse to surrender same to them after demand therefor, with a prayer for possession and that appellants be ejected.

Appellants demurred because the complaint did not state a cause of action, and that the court had no jurisdiction of the action. They also filed a motion to dismiss because no affidavit of tender was made under §§ 4663 and 4664 of Pope's Digest. Neither the demurrer nor the motion appears ever to have been presented to the court for action thereon. They answered with a general denial.

They later amended their answer by stating that they had paid the State $43.49 for the purchase of the lands claimed by appellee, and they attached to said amendment a copy of their correction deed from the State, showing that on May 24, 1941, the State had conveyed to appellant R. C. Caine a tract of land in the City of Gurdon, not platted, which had been forfeited and sold to the State for the 1937 taxes, and described as follows: "Pt. N½ NW¼ Sec. 33, Twp. 9, S., Range 20 W., lands not platted."

Trial resulted in a judgment by default for appellees, appellants having failed to appear and defend the action.

We think the Court erred in entering judgment against appellants by default, particularly in ejectment where the title to real property is involved. As far back as *Boyer* v. *Robinson,* 6 Ark. 552, it was held that a judgment by default, while defendant's plea of a general denial is undisposed of, is error. In *Yell* v. *Outlaw,* 14 Ark. 621, it is said, on page 623, that, "It is a clear proposition that a plaintiff would not be entitled to judgment when there is a good plea in unanswered," citing *Cole* v. *Wagnon,* 2 Ark. 154, and the Boyer case, *supra.* The same rule applies when there is a demurrer undisposed of, *Taylor* v. *Coolidge,* 17 Ark. 454, or a motion, unless it is frivolous, *Rice* v. *Simmons,* 89 Ark. 359, 116 S. W. 673.

Here, as above stated, there was a demurrer, a motion, and an answer, all undisposed of when judgment by default was entered. This was error.

The judgment is accordingly reversed and the cause remanded for a new trial.

HARDNICKE, GUARDIAN, *v.* CHERRY.

4-7857 190 S. W. 2d 521

Opinion delivered January 21, 1946.

J. H. Carmichael, for appellant.

Luke Arnett, for appellee.

PER CURIAM: The requirement that oral testimony be brought into the record by bill of exceptions, except where depositions are used, was not modified by Act 196 of 1945.

The testimony complained of in the pending motion to strike does not appear to have been brought into the record by bill of exceptions or depositions; therefore it was not properly preserved, and appellee's motion to strike should be sustained. But that does not necessarily dispose of the case and the motion to dismiss the appeal is overruled, with leave to the respondent to apply to the trial court for an order, *nunc pro tunc,* to make the record speak the truth if, as a matter of fact, the questioned testimony was properly preserved.

TAYLOR *v.* STATE.

4401 190 S. W. 2d 440

Opinion delivered February 4, 1946.

E. M. Ditmon, for appellant.

Guy E. Williams, Attorney General, and *Oscar E. Ellis,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Information containing two counts was filed by the Prosecuting Attorney: one charging burglary, the other grand larceny. The jury acquitted as to the first count, but found that Taylor was guilty of larceny in that he had aided Clifton Stovall, who admitted breaking into a place of business operated by Jimmy Hendricks at Fort Smith. Stovall, then under penitentiary sentence of three years on a plea of guilty, testified that he alone entered the building, but had talked with Taylor concerning the transaction. Taylor and Stovall had met at "Smalley's" Restaurant prior to the time Stovall opened a window in Hendricks' place of business with a screwdriver. There is this statement in Stovall's testimony:

"I went on the lot and burglarized the place and put the stuff in the alley, and [Taylor] pulled down the alley and I put the stuff in his car." He also testified that Taylor either opened the door to accommodate him, or helped put the stolen property in the car.

The two men then drove to Oklahoma, where the "take" was hidden. It was found when Stovall confessed and revealed the hiding place.

In his opening statement to the jury the Prosecuting Attorney asserted that certain "hot patches" had been taken from Hendricks' place and were found in Taylor's car. On objection that the patches were not listed as property alleged to have been stolen, an amendment to the information was permitted. This is urged as error.

Proof disclosed that when Taylor was apprehended there were indications he was "moving." Personal effects were found in his car; also a number of so-called "hot patches" suitable for repairing automobile tubes were behind or under a back seat. Hendricks testified that a partial box of "quick-cure" patches was stolen. When shown the patches recovered from appellant's car Hendricks gave an affirmative answer to the question, "Those were taken out of that building the night it was broken into?"

We do not think Taylor was prejudiced by the Court's action in permitting the information to be

amended. If the defendant participated in the transaction with knowledge of what was being done, the patches were only a minor part of the loot, and their presence in his car was a link in the chain of evidence.

The more urgent argument for reversal relates to what is termed by appellant a conviction upon the uncorroborated testimony of the accomplice, Stovall.

We have frequently commented upon the meaning of § 4017 of Pope's Digest. It prohibits conviction in a felony case unless the testimony of an accomplice is corroborated by other evidence "tending to connect the defendant with the commission of the offense." See *Thompson* v. *State,* 207 Ark. 680, 182 S. W. 2d 386, and the decisions cited, pages 683-'84. Although the conviction of Thompson was reversed, the law's requirements and limitations are discussed.

In the case at bar officers testified regarding the position of appellant's car, and to other suspicious circumstances. Nearness of the car to appellant's activities at 1:30 a.m., the fact that the car had seemingly been moved to a prearranged place suiting Stovall's needs and facilitating the joint enterprise—these and other circumstances were sufficient to meet the need of corroboration. While in the absence of identifying marks or numbers, identification of the patches exhibited at the trial as those taken from Hendricks could not be absolute, that degree of precision is not essential. It was only necessary that the defendant's guilt be established beyond a reasonable doubt. The jury was satisfied in that respect, and we cannot say, as a matter of law, that the corroboration did not tend to connect Taylor with the crime.

Objections to instructions were general only. None of the declarations of law was inherently wrong; nor was the defendant prejudiced by testimony he contends was inadmissible.

Affirmed.

4407 193 S. W. 2d 489

Opinion delivered April 8, 1946.

Sullins & Perkins, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Appellant sought to invoke § 3968, Pope's Digest, to secure a discharge from two pending informations. The trial court denied appellant's motion; and there is this appeal.

FACTS

On March 13, 1943, four separate informations were filed, each charging appellant with the crime of murder alleged to have been committed on January 17, 1943. Information No. 1 charged appellant with the murder of Lyle Graham; information No. 2, with the murder of Paul Phillips; information No. 3, with the murder of Lyle Carter; and information No. 4, with the murder of Howard Nail. In July, 1943, appellant was tried on informations 1 and 2, and given life imprisonment on each conviction. He is now serving sentence; and has never been brought to trial on either information 3 or 4. On June 15, 1945, appellant filed motion in the circuit court to be dis-

charged from the offenses charged in informations 3 and 4: the basis of his motion being § 3968, Pope's Digest, which reads: "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner." Among other allegations in the motion, there is this one: "Defendant further says that he has been anxious for trial on said charge ever since it was filed; that said cause has never been continued at his request or with his consent, and that more than two terms of court have passed since the filing of said information, at any of which terms of court, this case could have been tried, and that by reason of the failure of the prosecuting attorney to bring said cause to trial, he is entitled to discharge from said information . . ."

Appellant's motion was resisted by the State; and Hon. Jeff Duty, prosecuting attorney, testified as follows: "My name is Jeff Duty. I am prosecuting attorney of the 4th Judicial District. I prosecuted Tuck Bishop in the two cases which were tried. Bishop was convicted and the jury assessed a life sentence in each case. The testimony in both cases brought out the facts that there were only two actual living eyewitnesses to the killings. These witnesses were Ed Kendrick of Lowell and Bert Plummer of Springdale. At the time of the second trial of Tuck Bishop both Ed Kendrick and Bert Plummer were members of the armed forces of the United States, Ed Kendrick being a member of the United States Army Air Forces and Bert Plummer a member of the United States Marines. To prepare for the trial of the second information charging Bishop with the killing of Lyle Graham, it was necessary to bring Ed Kendrick to Fayetteville from Randolph Field, Texas, and to bring Bert Plummer from the Marine Base in San Diego, California. The War Department granted these men ten days leave of absence in order to appear and testify. At

the conclusion of the last trial both of these men had to leave Fayetteville at once in order to arrive at their respective posts on time. While Ed Kendrick was on his way back to the post in Texas, his unit moved to a port of embarkation and he joined the unit and was shipped overseas to the Mediterranean Theater of War. Bert Plummer arrived in San Diego and his unit, the Second Marine Division, was immediately shipped to New Zealand and thence to Tarawa, and he is now and has been all the time with that division. At present he is on the mainland of Japan and has not been in this country since leaving Fayetteville. Ed Kendrick was reported missing in action during the last stages of the battle in Italy. That report has not been changed. However, he has not been at this time reported killed in action or as dead. Ed Kendrick has not been in the United States since leaving with his unit. These men being the key witnesses in the case, it was and is impossible for the State to go to trial without at least one of the men present. The other trials were conducted after special venires of juries had been secured and to have tried the other informations against Tuck Bishop at the conclusion of the first two trials would have necessitated special jury venire and it was impossible for the two soldiers to remain in Fayetteville longer than four hours after the conclusion of the last trial, due to having to report at their respective military posts. Both of the other trials consumed at least three days each. Efforts have been made to ascertain when either of the key witnesses can be present in court; and in all probability Bert Plummer will be returned to this country in the early part of 1946 in time to testify at the next term of court, which convenes in April, 1946. . . . The whole case revolves around and depends on the two soldiers named above."

On December 5, 1945, the circuit court denied appellant's motion; and there is this appeal.

OPINION

Section 3968, Pope's Digest, is not a new law. Along with §§ 3969-70-71 it has been the law since the early days

of Arkansas' statehood. These four sections were §§ 169-70-71-72, respectively, of Chapter 45 of the Revised Statutes of 1837. Section 3968 has been considered by this court in many cases, some of which are: *Stewart* v. *State,* 13 Ark. 720; *Dillard* v. *State,* 65 Ark. 404, 46 S. W. 533; *Fox* v. *State,* 102 Ark. 393, 144 S. W. 516; *Ware* v. *State,* 159 Ark. 540, 252 S. W. 934; *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777; *Lee* v. *State,* 185 Ark. 253, 47 S. W. 2d 11; *Smith* v. *State,* 201 Ark. 1185 (not reported in full in Arkansas Reports), 146 S. W. 2d 158; *Grubbs* v. *State,* 182 Ark. 1185 (not reported in full in Arkansas Reports), 30 S. W. 2d 833.

We have held that a prisoner in the state penitentiary is entitled to invoke this statute (*Fulton* v. *State, supra*); and that the order denying the motion for discharge is a final and appealable order (*Ware* v. *State, supra*). This statute is applicable to the present case. The only questions are: (1) whether the facts in this case, as testified to by the prosecuting attorney, are sufficient to justify the application of § 3971, Pope's Digest; and (2) if so, what should be the order of continuance.

Section 3971, Pope's Digest, reads: "If, when application is made for the discharge of any defendant, under either of the three preceding sections, the court shall be satisfied that there is material evidence on the part of the State which cannot be had, that reasonable exertions have been made to procure the same, and that there is just ground to believe that such evidence can be had at the succeeding term, the cause may be continued to the next term, and the prisoner remanded or admitted to bail as the case may require."

We believe the State, by the testimony of the prosecuting attorney, made a satisfactory and sufficient showing to the effect that: (1) there is material evidence on the part of the State which could not be had on December 5, 1945, the date of the order here assailed; (2) that reasonable exertions had been made to secure the testimony; and (3) that there is just ground to believe that such evidence can be presented at a trial of the appellant at the

April, 1946, term of the Washington Circuit Court. The military authorities sent the witness, Plummer, to testify in the trial against the appellant in July, 1943. Now, since hostilities have ceased, it is reasonable that the prosecuting attorney may secure the witness, Plummer, to appear and testify some time during the April, 1946, term of the circuit court, which commences on the fourth Monday in April (§ 2832, Pope's Digest). In *Ex parte* Rash, 64 Idaho 521, 134 Pac. 2d 420 (decided February 20, 1943), the Supreme Court of Idaho, in construing a statute of that state, similar in some respects to §§ 3968 and 3971, Pope's Digest, took an excellent attitude on the right of the accused to a speedy trial. Said the Idaho court: "The present stage of the war or present consequent demand for service of all man and woman power in activities directly contributing to our successful prosecution or assistance in the prosecution of the worldwide conflict, or the fact that during certain seasons of the year farmers should not be called upon to sacrifice their farm activities, does not authorize unlimited continuance of criminal cases or cessation of judicial functions, an integral and constitutional part thereof being speedy jury trials. . . . We believe that due to the exigencies of the times we are justified in the present instance in going directly to the essential point involved, namely, the right of petitioner to a speedy trial."

The Idaho court remanded the accused to the trial court with directions to afford him a speedy trial under the applicable Idaho statutes. There are annotations in 58 A. L. R. 1150 and 118 A. L. R. 1037 which incidentally concern the rights of an accused to a speedy trial, and the methods to obtain the same. We are inclined to model our order here along the same general lines as did the Idaho court in the case cited.

We, therefore, modify the judgment of the circuit court to this effect: Under § 3971, Pope's Digest, appellant is entitled to a trial on the pending informations at some regular or adjourned day of the April, 1946, term of the Washington circuit court; and if, through delay on

the part of the State, such trial be not accorded him, then he is entitled to be discharged under § 3968, Pope's Digest.

As so modified, the judgment of the circuit court is affirmed at the cost of the appellant.

PARROTT *v.* FULLERTON.

4-7875 193 S. W. 2d 654

Opinion delivered April 8, 1946.

Virgil D. Willis, for appellant.

Woody Murray, for appellee.

SMITH, J. In a proceeding in the Boone County Court, authorized by and conforming to the provisions of § 6976, *et seq.,* Pope's Digest, an order was entered establishing a road from the home of petitioner, O. R. Fullerton, across his land, to and along the south line of two adjacent 40-acre tracts of land, to an improved highway, one tract being owned by Chester Parrott, the other owned by Ed Carroll. Carroll did not oppose the road and agreed to donate the strip of his land required for the road, while Parrott opposed the road, upon the ground that there was no necessity for it, inasmuch as Fullerton had access to the highway by another road.

Pursuant to the statute under which the procedure was had, viewers were appointed by the court, who, after viewing the land, reported that "necessity requires the laying out of such road for the reason that no other reasonable route exists that would provide a way of access for the said O. R. Fullerton from his home to any adjacent county road or highway and we did therefore view and lay out such road as follows:" the road described being the one for which Fullerton had petitioned.

The matter was heard on this report, and the intervention of Parrott opposing the road. The County Court made the finding that "said road is necessary as a private road for the petitioner O. R. Fullerton; that the

route thereof as set out in said report is the most practicable and desirable one,", and that said road should be established. The viewers assessed Carroll's damages at $20, and those of Parrott in the same amount, which report was also approved by the court, and an order was entered conforming to these findings establishing the road, and assessing damages, from which order Parrott prosecuted an appeal to circuit court.

Although the petition and the order of the court referred to the proposed road as a "private road," it was held in the case of *Houston* v. *Hanby,* 149 Ark. 486, 232 S. W. 930, that a road established under the authority of the statute above referred to, becomes and is a "public road" in the sense that it is open to the use of all who see fit to use it.

On the trial of the appeal in the circuit court, a jury was waived, and much testimony, more or less conflicting, as to the necessity for the road was heard, from which the court found, "after considering and weighing the testimony as to the convenience and benefit the proposed road will be to the petitioner and to the other people it will serve and that as to the injury and inconvenience it will occasion the respondent, doth determine and find that the proposed private road as laid out by the viewers is necessary and proper and that it ought to be opened and established."

Petitioner Fullerton testified that he had used as a means of ingress and egress, a road across which the owner of the land had built a fence, after which the road was abandoned and had not since been used, and that since the erection of this fence and for a number of years, he had been using a road across Ed Carroll's land, which road was in bad condition and permitted only a limited use, and on account of its condition, milk trucks, which had picked up milk cans at his home, ceased coming there, and petitioner had sold his cows and had gone out of the dairy business. Petitioner testified there were gullies in this road, some as deep as four feet, and that it would cost much more to make the road passable than it would

cost to make the new road available. Petitioner further testified that he had recently called a doctor to visit his son who was ill, and on account of the condition of the road the doctor was required to walk from the highway to his house, and back, a distance of about a half a mile.

There is but little, if any, conflict in the testimony as to petitioner's necessity for a road to the highway. The road herein first referred to was through a gate which the owner had torn down and had placed a fence across the road. No prescriptive right to use that road had been acquired, and none could be after the erection of the fence. In the case of *Porter* v. *Huff,* 162 Ark. 52, 257 S. W. 393, it was held, under facts somewhat similar to those in the instant case, that: "When appellee inclosed his land and placed gates across the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right." Here not only was the gate removed, but a fence was built in its place, which prevented any use of that road.

In the recent case of *Roth* v. *Dale,* 206 Ark. 735, 177 S. W. 2d 179, we reviewed our earlier cases as to what showing of necessity would be required to warrant the establishment of a new road under the authority of § 6976, Pope's Digest, and our holding was summarized in a headnote as follows: "If the road which the petitioner already has is at times difficult to travel and expensive to keep in repair, and the proposed road is better located and can be established without great injury to any other person, the road is necessary within the meaning of § 6976, Pope's Digest, and the petition should be granted."

We do not review the conflicting testimony. If it be said that there was testimony to the effect that the new road was not a necessity within the meaning of § 6976, Pope's Digest, there was other testimony sufficient to support the finding that there was such necessity. In the case of *Houston* v. *Hanby, supra,* there was conflicting testimony as to the cost of construction and damages arising out of the construction of the new road, and it was there said, "but in testing the legal sufficiency of

the evidence we must view it in the light most favorable to appellee's (the petitioner for the road) cause." We announce our conclusion to be that the necessity for the road was clearly shown, and further that the testimony supports the finding of the court below that the proposed road is not only the most direct, but also the least expensive in construction and maintenance.

The circuit court on appeal sustained the award of damages to Carroll in the sum of $20, which was not questioned. The court further found, "that the damages sustained by the respondent, C. C. Parrott, amounts to $40, which last-named amount shall include the cost and expenses to respondent in removing and resetting the fence along the south side of his tract," and it was further ordered, "that the petitioner pay all the costs of the proceeding in the county court, and that the respondent, C. C. Parrott, pay all costs of this appeal."

We think the imposition of the costs of this appeal against Parrott was error, and that in this respect the judgment must be modified.

In our opinion all the costs of the proceedings, including the costs of the appeal to this court, should be assessed against the petitioner. The law gives the petitioner for a road the right to have a road opened only when necessity requires that this should be done, as necessity is defined in the case of *Roth* v. *Dale, supra,* and the cases there cited. The landowner whose land is to be taken has the right to be heard on this question of necessity, and he should, in no event, be required to pay the costs on the original hearing in the county court. You cannot take one's land and require him to pay the costs of the proceeding in which it was taken.

The Court of Appeals of Kentucky held in the case of *Vice* v. *Eden,* 125 Ky. 255, 68 S. W. 125, that subsequent costs in case of an appeal from the order of the county court establishing a road, should be paid by the unsuccessful party, as in other appeals in civil cases.

Our statutes relating to the establishment of highways generally—§ 6943, Pope's Digest—provide that, "in all cases of a contest, the court having jurisdiction of the cause shall have power to render judgment for costs, according to justice, between the parties." We think "justice between the parties" would prevent the costs in the county court being charged to the landowner whose land was taken, and this cost was assessed against petitioner, but the judgment from which is this appeal requires the respondent to pay all costs of the appeal to the circuit court. We think this is not justice between the parties for two reasons. First, the appeal on the question of necessity was not taken arbitrarily, or for purposes of delay, but in the utmost good faith. We do not hesitate to say that if the court had refused to establish the road, we would affirm that action. But in view of the conflict in the testimony, we affirm the order of the court establishing the road.

The second reason is that the county court allowed only $20 as damages to the respondent, whereas the circuit court fixed the damages at $40. This is a substantial increase, indeed it is a hundred per cent. increase. This modification entitles the appellant, respondent, to the cost of the appeal to the circuit court. It is true the allowance of $40 as damages includes the "costs and expenses to respondent in removing and resetting the fence along the south side of the tract" where the new road will run.

The record does not show what the costs of removing and resetting the fence will be. The report of the viewers made no allowance on this account, but "found that the value of and damage to the property of the said C. C. Parrott to be appropriated for the establishment of said road is the sum of $20" and that award was approved by the County Court. The circuit court increased the award of damages to $40 without finding as to the costs of the fence, but directed that the award "shall include the cost and expense to respondent in removing and resetting the fence along the south side of his tract." Ap-

parently, but for this modification of the county court judgment, respondent would have been required to remove and reset his fence at his own expense, without any allowance therefor, whereas, this is as much a recoverable element of damages as is the value of the land actually taken, which was a strip off the entire south side of respondent's 40 acre tract of land, a distance of one-fourth a mile.

In the note of the annotator to the case of *Tillamonk County* v. *Johnson,* 10 A. L. R. 451, it is said: "Subject to the doctrine of some courts, thereafter discussed, that the cost of fencing is not to be allowed as a separate item, it is a general rule in the law of eminent domain, where part only of a piece of land is taken, that the cost of fencing thereby made necessary on the untaken land is an element in the determination of damages." Three Arkansas cases are cited to support this text, *St. Louis, A. & T. R. Co.* v. *Anderson,* 39 Ark. 167; *Texas & St. L. R. Co.* v. *Cella,* 42 Ark. 528; *St. Louis, I. M. & S. R. Co.* v. *Walbrink,* 47 Ark. 330, 1 S. W. 545. The later case of *Stuttgart & R. B. R. Co.* v. *Kocourek,* 101 Ark. 47, 141 S. W. 511, may be added.

The order of the circuit court approving the establishment of the road will be affirmed, but the judgment will be modified to relieve respondent from the payment of costs, all of which, including the costs of this appeal, will be assessed against appellee, this because appellant secured substantial relief by each of his appeals. As thus modified the judgment will be affirmed.

EVANS *v.* AMERICAN CYANAMID & CHEMICAL CORPORATION.

4-7856 193 S. W. 2d 1003

Opinion delivered April 8, 1946.

Rehearing denied April 13, 1946.

Ernest Briner and *Armistead, Rector & Armistead,* for appellant.

Howard Cockrill and *Ashley Cockrill,* for appellee.

GRIFFIN SMITH, Chief Justice. The questions are twofold: (a) Was a mineral lease of 1936 surrendered by direct action of the grantee, or (b) if the purpose was otherwise and the grantor's agent was mistaken regarding the transaction relied upon as a voluntary discharge, had the grantee's conduct amounted to an abandonment?

H. R. Bizzell had for many years owned approximately 160 acres in Saline County. In 1936 The Arkansas

Bauxite Corporation sought certain mineral rights. Bizzell's aunt, Mrs. Louetta Horn, owned twelve and a half acres lying immediately south of an equal area belonging to Bizzell. Mrs. Horn authorized Bizzell to deal with her land while he was looking after his own holdings.

Fred J. Venner was Bauxite Corporation's manager —an enterprise in which he had considerable financial interest. In November, 1936, Venner leased the twenty-five acres in question, procuring rights to the north twelve and a half acres from Bizzell, and to the south portion from Mrs. Horn.

In 1940 Bauxite Corporation sold its properties to American Cyanamid & Chemical Corporation. It subsequently developed that Venner, in taking the Horn-Bizzell leases, acted as trustee and that his rights inured to the Corporation.

April 12, 1938, Bizzell purchased the twelve and a half acres from his aunt. In November, 1942, Bizzell sold to H. W. Anderson all of his acreage, including the tract acquired of Mrs. Horn. January 8, 1943, Anderson sold to S. E. Evans, the appellant here.

Cyanamid does not claim any interest in the original Bizzell property. The Horn lease was not expressly mentioned in the contract whereby Cyanamid acquired properties of its predecessor. However, the document was found in the fall of 1940, and in January following Cyanamid procured from Venner an assignment of the lease, and it was recorded in October, 1941.

The parties have stipulated that in 1938 when Bizzell acquired title to the Horn tract, ". . . he had actual knowledge of the outstanding [Venner] lease."

It is appellee's contention that appellant (doing business as S. E. Evans Construction Company) ignored the recorded lease and began taking minerals from the Horn tract after warning by correspondence and otherwise had been given. On the other hand appellant insists that Venner, as early as April, 1938, had completed oper-

ations on the Bizzell-Horn twenty-five acres, and that Venner returned Bizzell's lease (which had not been recorded) and gave letters stating that each lease was turned back to the original owner. Carbon copy of a letter identified as having been written by Venner April 12, 1938, and addressed to Bizzell, was introduced, but the original was not found. Venner testified that his "best" recollection was that he gave letters releasing each of the tracts, and that he was anxious to get rid of the property because it was in a dangerous condition by reason of mining operations and he feared injuries might occur, with resulting litigation.

Bizzell did not agree with Venner that two letters were written. There was but one, and it related to the Horn lease.

Leroy J. Harrington was superintendent for Venner's Company in 1938 and heard the conversations, in part, between Bizzell and Venner, although he was not in the same room.

It is indicated that Cyanamid's attention to existence of the Horn lease was not activated until one of its agents, in looking through Bauxite Corporation's old files, discovered it, and the new management concluded it was valuable and procured an assignment and caused the document to be recorded. Appellant claims there was notice, in that Bizzell, financially assisted by Venner, had fenced or partially fenced the twenty-five acres. Bizzell testified that water to an appreciable extent had accumulated in one of the pits and that he (Bizzell) used this as a fishing pond; also that his cattle ranged on the south half of the twenty-five acres, and that in April, 1938, Venner and those whom he represented moved machinery from the lease and said they were through with it because the high-grade ore had been exhausted. Bizzell lived "within sight" of the property, and claims to have been familiar with all of the material operations.

By its terms the lease executed by Mrs. Horn was to run for a term of fifty years. A cash payment of $500

is recited. Section 3 obligates the lessee to pay royalties of thirty cents "per gross ton (2,240 lbs.) of green bauxite ore containing for each quarterly period (of three months each) a minimum average alumina content of fifty-five percent and containing a maximum silica content of not exceeding four percent."

The lessee obligates himself to supply the lessor with audit records or such information as may be reasonably required regarding the quantity of ore mined and removed, payment to be on the tenth of each month "for all ore transported from the mine or mines on said land during the preceding calendar month." There is a provision limiting the lessee's liability for taxes "to the payment of severance taxes" incurred by reason of the removal of minerals. The lessee's rights were to mine, dry, and calcine bauxite ore " . . . and for the purpose of manufacturing any products thereof and selling the same, and for the purpose of mining and selling all other ores, clays and minerals of whatsoever class and kind which may be found on or in the [lands described]."

In addition to Harrington's testimony, R. H. Harris of Bauxite Corporation's operating force, was called as a witness on behalf of the plaintiff. He talked with Harrington at the time Bizzell contends the two leases were released; but, like Harrington, his version differs from Venner's testimony. Effect of what these two witnesses say is that they agreed regarding worthlessness of the north twelve and a half acres, but each thought (and seemingly so informed Venner) that there was still "good ore" on the Horn tract—that is, "good ore" in the sense of classification at that time. There is also testimony that Venner and his group had leased the so-called Townsend tract. Mrs. Townsend and Bizzell are cousins. Bizzell assisted Venner in procuring the Townsend lease and was familiar with its topography, etc. Harrington testified that the physical or mechanical plan or operation called for work on the Townsend property, and, inferentially, that the purpose was to come back to the Horn deposits.

Whatever the plans may have been in April, 1938, it is quite clear that friendly relationships existed between Venner and Bizzell, and it is equally clear that in respect of the lease now questioned Bizzell acted for Mrs. Horn, with her complete approval.

We think the Chancellor was sustained by a preponderance of the evidence in holding that the Horn lease was not surrendered by consent of Venner when Venner released the Bizzell tract. More than five years elapsed between the time the transactions (whatever they may have been) occurred in Venner's office and the time he testified. Venner thought two letters had been written—each releasing a separate tract—and Bizzell was positive there was but one letter and that Venner returned to him one unrecorded lease. Why—if Venner knew the Horn lease had been cancelled by the process he described—did he assign this same lease to Cyanamid, coupled with a warranty that he was the owner ". . . [with] all the leasehold rights which said lease purports to create; . . . that said lease is now unencumbered, valid, and in full force and effect in accordance with its terms"?

The answer must be that, as appellee points out, Venner forgot the details of what occurred in his office in 1938. He remembered Bizzell because many of his transactions were with the resident who was familiar with properties. It is not difficult to understand why, after Bauxite Corporation had sold its properties, Venner would think he had written a letter that could not be produced, and regarding which a carbon copy was not in the file where it naturally would have been placed if such a letter had been written; nor could any such copy be found. Appellee expressly asserts that it does not question Venner's veracity, but only his recollection.

The same reasoning which prompted the Chancellor to find that the Horn lease had not been surrendered, nor a letter of cancellation given, and that the purpose to do so did not exist,—this same reasoning justified the Court in finding that the lease was not abandoned. Bizzell, being Mrs. Horn's agent, knew that the lease was

not surrendered if in fact it were not; hence he will be presumed to have acquiesced in retention of the rights and deferment of operations to a later date.

Section 7 of Mrs. Horn's lease provides: "In any case where the lessor hereafter claims a default on the part of the lessee in any of the premises, covenants, payments or other matters to be performed on the part of the lessee under the provisions hereof, or in the event of a change of ownership, the lessor does hereby bind [herself] to give immediate notice of any such default or change of ownership in writing to the lessee and addressed to the lessee at Bauxite, Arkansas, such notice to be mailed by registered mail with return receipt requested . . ."

It is not contended that such notice was given—that is, notice that the lessor's interests were being sacrificed through failure of Venner to take the ore. Appellant's answer naturally is that notice was not necessary, since there was surrender. But the finding is otherwise, and it must therefore be presumed that Bizzell acquiesced in the delay.

Inequity of the contract is argued in that at the time it was executed Venner and his associates were prospecting for a grade of ore which then had a value for abrasive purposes as distinguished from alumina and aluminum developments made possible by war's necessities. It is shown that large quantities of low-grade ore were taken as to which royalties were not payable. But the parties made their contract. *Prima facie* Mrs. Horn received $500 cash with expectation of royalties of thirty cents per long ton for ore of the grade specified. The circumstance of worldwide demand for aluminum years after the lease was made and the fact that inferior ore became valuable, are matters we cannot correct by changing the contract; hence the decree must be affirmed.

Mr. Justice McFaddin concurs in the result, but arrives at his conclusions by a process of reasoning different from that expressed in the opinion.

HOLT, ROBINS and MILLWEE, JJ., dissent from refusal to modify on motion of rehearing.

HARRIS *v.* DACUS.

4-7870 193 S. W. 2d 1006

Opinion delivered April 8, 1946.

Rehearing denied April 13, 1946

W. Leon Smith, for appellant.

Bruce Ivy and *Reid, Evrard & Roy,* for appellee.

ROBINS, J. Appellant brought this suit in the lower court to enforce specific performance of a contract under which he alleged appellees, A. P. Dacus and P. M. Dacus, through their agent, W. M. Burns, agreed to sell appellant a 24½ acre tract in Mississippi county, Arkansas. Appellee, J. H. Doan, was made a defendant, it being alleged that he had obtained a conveyance of the land

from A. P. Dacus, P. M. Dacus and Chloe Dacus, with full knowledge that these parties had already agreed to sell same to appellant, and appellant prayed that this conveyance to appellee Doan be canceled.

In their answer appellees denied that any contract to sell the property to appellant had ever been made, and they pleaded the statute of frauds in bar of any rights of appellant.

The lower court found all issues of law and fact in favor of appellees, and to reverse decree dismissing his complaint for want of equity appellant prosecutes this appeal.

On February 2, 1942, appellee, A. P. Dacus, wrote W. M. Burns, a real estate agent at Blytheville, the following letter:

"We received your letter of Jan. 31st with reference to the Creamery Package Company land located at Blytheville. As stated to you over the phone several days ago, our price is $3,000 net to us and it is all right for you to sell same for any amount above that price, however, we would not want to give anyone an option on same at this time as we have had two other parties that have been figuring with us in the last sixty days. Will be glad to hear from you from time to time with reference to same."

Appellant on February 4, 1942, gave Burns a check for $500, and signed the following document:

"OFFER AND ACCEPTANCE

"Feb. 4th, 1942

"To W. M. Burns, Agent

"You are hereby authorized to offer for my account the sum of three thousand, one hundred & no/100 dollars for the following described property:

"Block of land in Sec. 15 15.11, and known as the Creamery Package Mfg. Co. land south of Canning Plant, Blytheville, 24½ acres.

"This amount to be paid in the following manner: Cash or trade as per statement below $1,100. Loan to be assumed or placed for my account.

"Balance payable

"Balance two years, $1,000 each year,
"6% interest $2,000.00
"Total $3,100.00

"TRADE OR OTHER SPECIAL CONDITIONS
"GENERAL CONDITIONS

"It is understood that the owner or owners shall furnish complete abstract showing good title, or policies of title insurance, pay all taxes now due or delinquent, and make conveyance to me or my order by warranty deed, date of which shall fix time for dating of notes, adjustment of rents, interest and insurance. Possession given at once.

"Attached hereto is check for the sum of $500 to become part of payment on acceptance of this offer and if for any reason the offer is finally rejected said sum is to be returned without expense to me. This offer is to hold good if accepted within 10 days from date.

"Signature R. S. Harris

"Phone Address

"THE ABOVE OFFER IS HEREBY ACCEPTED

this 5th day of Feb., 1942. We agree to pay a broker's commission of $100.

"..... Owners"

Mr. Burns then transmitted the above "Offer and Acceptance" to Dacus Lumber Company, "Attention Mr. A. P. Dacus," with the following letter dated February 4, 1942:

"I received your letter of the 2nd this morning, I am pleased to hand you contract in duplicate, together with check in the sum of $500 as earnest money and to apply

as part payment for your 24½ acres in Blytheville, and known as the Creamery Package Mfg. Co. land.

"Purchase being $3,100 and in accordance with your letter of December 29th, also our conversation over the phone since that date, at which time it was agreed that you would be willing to accept $1,000 cash and two years for balance with 6% int. and to pay $1,000 each year one and two years.

"Will say that I have had 5 different people to go over this land in the past week, and the party who's offer I submitted you on the 2nd, was for less money than your net price, this was to be all cash, however.

"You will please sign the contract, return me one copy and retain one for your files, also, let me have abstract by early mail.

"Yours very truly,

"/s/ W. M. Burns."

Burns, when he received the check from appellant, placed a call for appellee, A. P. Dacus, who had been attending to all transactions pertaining to the land for himself and his son, appellee, P. M. Dacus, over long distance telephone. He did not succeed in reaching the elder Dacus, but talked to his son and informed him of the trade with Harris. The younger Dacus claimed that he hadn't handled the matter in any way, wasn't familiar with it, and referred Burns to his father. In the meantime, another real estate dealer in Blytheville called the elder Dacus and offered him, on behalf of appellee, Doan, $3,000 cash for the land. Dacus accepted this offer and thereafter executed deed to Doan. When Burns' letter, with appellant's check and signed offer to buy the land reached Dacus, he returned the check and proposal to Burns with a letter stating that he had already sold the land to another party.

On behalf of appellant it is contended that Burns was the agent of appellees, A. P. Dacus and P. M. Dacus, and was authorized to sell the land, that he did in fact sell the land to appellant, and that the letter of Burns to A.

P. Dacus, quoted above, was a memorandum of the contract signed by Burns as agent for the owners of the land.

Appellees argue that Burns was not authorized to sell the land except for cash, that he did not in fact sell the land to appellant, that the letter of Burns was not a sufficient memorandum of the sale to satisfy the statute of frauds and that the alleged memorandum was not delivered to appellant.

By § 6059 of Pope's Digest it is provided: "No action shall be brought . . . to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them . . . 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."

There is a conflict in the authorities as to whether or not the memorandum of the contract of sale of real estate, required by the statute of frauds, must be delivered to the party seeking to enforce the contract. This court, in the early case of *Johnson* v. *Craig,* 21 Ark. 533, held (headnote 1): "Where the power of an agent to sell the land of his principal is limited in time, and he makes an agreement to sell the land, it will not be binding upon his principal, unless he deliver to the purchaser some memorandum in writing of the sale, before the time to which his agency is limited."

The High Court of Errors and Appeals of Mississippi, dealing with this question, in the case of *Johnson* v. *Brook,* 31 Miss. 17, 66 Am. Dec. 547, said: "We have been able to find no case in which a writing signed by a party, and kept in his possession, without delivery to the other party, has been held to be a compliance with the statute . . ."

In the case of *Callanan* v. *Chapin,* 158 Mass. 113, 32 N. E. 941, the Supreme Judicial Court of Massachusetts

said: "Although the agreement was signed by the parties, yet, as there was no delivery, it never took effect, and cannot be considered a sufficient memorandum, within the statute of frauds."

The Supreme Court of Tennessee, in the case of *Wilson* v. *Winters,* 108 Tenn. 398, 67 S. W. 800, quoted with approval this extract from the opinion in *Parker* v. *Parker,* 1 Gray (Mass.) 409: "It was further urged that if the instrument was not valid as a deed, it might be considered as a memorandum in writing, signed by the party agreeing to convey the real estate therein described, and thus authorize a decree in equity to make a conveyance. But in regard to this, the same difficulty exists. As a memorandum in writing stipulating to convey the land, to make it operative, it must have been executed and delivered to the plaintiffs or some one in their behalf."

In "Browne on the Statute of Frauds," Fifth Ed., § 354, this is said: "Even when a paper is drawn up as the final obligation, if it be retained by the party signing it, and never in any way delivered as his agreement, it cannot be made use of, even as a memorandum."

Other cases in which the same rule is laid down are: *Swain* v. *Burnette,* 89 Cal. 564, 26 Pac. 1093; *Steel* v. *Fife,* 48 Ia. 99, 30 Am. Rep. 388; *Mentzer* v. *Hudson Savings Bank,* 197 Mass. 325, 83 N. E. 1102; *Sanborn* v. *Sanborn,* 7 Gray (Mass.) 142; *Dickinson* v. *Wright,* 56 Mich. 42, 22 N. W. 312; *Comer* v. *Baldwin,* 16 Minn. 172; *Poplin* v. *Brown,* 200 Mo. App. 255, 205 S. W. 411; *Brown* v. *Brown,* 33 N. J. Eq. 650; *Montauk Association* v. *Daly,* 32 Misc. R. 588, 67 N. Y. S. 312 (aff. 62 App. Div. 101, 70 N. Y. S. 861); *Grant* v. *Levan,* 4 Pa. 393.

The decision of this court in the case of *Johnson* v. *Craig, supra,* was rendered eighty-five years ago; and, so far as we have been able to discover, has not since been modified or overruled. In the case of *Central Clay Drainage District* v. *Hunter,* 174 Ark. 293, 295 S. W. 19, cited by appellant as impliedly overruling the opinion in *Johnson* v. *Craig, supra,* the statute of frauds was not pleaded

as a defense, although one of the headnotes suggests that such was the case. In that case only the statute of limitations was involved. The opinion in the case of *Johnson* v. *Craig, supra,* is a well reasoned one, and apparently is supported by the weight of authority in other states. We adhere to the rule there announced, and hold that, even if the letter of Burns to Dacus, relied on by appellant as constituting the memorandum of the contract of sale, could be said to be sufficient in its language and terms to satisfy the requirements of the statute of frauds, yet, since this letter was never delivered to appellant, it could not form the basis of a suit by appellant for specific performance.

The decree of the lower court is affirmed.

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

4-7868 193 S. W. 2d 657

Opinion delivered April 8, 1946.

Rehearing denied April 29, 1946.

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

Joe W. McCoy and *W. H. McClellan,* for appellee.

MINOR W. MILLWEE, Justice. The plaintiff, Emma Lee Moore, a minor seven years of age, brought this action by her father, as next friend, to recover damages for injuries sustained when she was struck by a freight train of the defendant railway company on April 14, 1944. The complaint alleged negligence on the part of defendant and its employees in failure to keep a lookout and to exercise reasonable care to prevent injuring plaintiff after discovering her peril. It was also alleged that the trainmen negligently failed to give warning signals and to bring the train under control when they realized plaintiff was in a perilous position and oblivious to danger.

The answer of the company was a general denial and a plea of contributory negligence of the child, and negligence of the child's mother in permitting the child to place herself in a perilous position. It was further alleged that plaintiff's injuries, if any, were due to an unavoidable accident. The company prosecutes this appeal from a verdict and judgment in the plaintiff's favor for $3,000.

There are two tracks on the line of the railroad running generally north and south through the city of Malvern. Calhoun Crossing is just north of the railway station, and approximately a mile further north is what is known as the East End Crossing. A footpath runs irregularly along the side of the east track between the two crossings and has been used by people living along the track and by the public generally for many years.

According to the testimony on behalf of plaintiff, she, in company with her mother, grandmother and sister, was returning from a visit with relatives about 7 p. m. on the day the injury occurred. It was still daylight, and they were walking southward in a pathway along the east side of the east rail of the track in single file with the child about a block ahead of her mother. As they approached a point near Calhoun Crossing, a freight train was approaching from the north. The mother discovered the approach of the train and after warning the grandmother and sister, who were walking behind her,

started running and calling to plaintiff who was walking near the east rail of the track. The child continued walking with her back to the approaching train and before her mother could reach her the front of the train passed and the child was struck by some part of the side of the train. Several witnesses for plaintiff testified that no warning signals were given and that the train did not slacken speed until after the child was struck. The view of the trainmen was unobstructed for a distance of more than 1,500 feet from the point of injury.

The defendant's fireman testified that he was keeping a lookout and saw the group a half mile away; that they were together and backed away from the pathway on the shoulder of the right-of-way as the train approached, but the little girl broke loose from someone who was holding her and chased a dog that ran on the tracks in front of the train; that he gave the stop signal to the engineer who applied the brakes immediately; that the child was struck by the pilot or step of the engine as she reached for the dog. He testified that the whistle and bell were sounded continuously from the East End Crossing until the child was struck, and that the train was running 45 miles an hour. The engineer, who was on the right side of the cab and did not see the parties, testified that the regular crossing signal was given, but the whistle was not sounded continuously.

At least three witnesses testified that the mother told them the child was chasing a dog, but this was stoutly denied by the mother and several witnesses supported her version as to the position of the child and how the injury occurred. It will thus be seen that the evidence is in sharp dispute as to whether the child was walking near the track in a perilous position and apparently oblivious to her dangerous situation, or whether she suddenly ran from a point of safety in front of the approaching train.

The court gave defendant's requested instruction No. 11A on this point as follows: "You are instructed that if you find and believe from a preponderance or a greater weight of the evidence that the plaintiff, Emma

Lee Moore, ran upon or near the railroad track while she was chasing her dog and at the time the train was approaching and that by the exercise of ordinary care, the operators of the train could not avoid striking her, then you are told that the defendant or operator of the train would not be negligent and you should so find."

The defendant first contends there is no evidence of negligence on the part of the operators of the train and that the testimony is insufficient to support the jury's verdict. It is argued that the testimony of the fireman shows conclusively the giving of the signals and absence of negligence on the part of the trainmen.

In determining whether there is substantial evidence to support the verdict of the jury, we must view the testimony in the light most favorable to appellee. When we do this, we cannot say as a matter of law that the operators of the train were free from negligence in the giving of warning signals or taking proper precautions to avoid the injury after discovering the perilous position of the child, or, after such discovery should have been made by the exercise of ordinary care. If the fireman had an unobstructed view of the right-of-way and plaintiff was walking dangerously near the track and gave no evidence that she was aware of the approach of the train and no signals were given, as the witnesses in plaintiff's behalf testified, we cannot say the injury might not have been avoided by due diligence of the trainmen. The court properly left it to the jury to say under the circumstances whether the trainmen were in the exercise of ordinary care.

In the case of *St. Louis S. W. Ry. Co.* v. *Thompson,* 89 Ark. 496, 117 S. W. 541, this court said: "The law governing the duty of a railroad company to a trespasser upon its track or to one who at or near its track has become imperiled by his own negligence has been stated frequently by this court.

"It is well established that when a defendant becomes aware of the plaintiff's negligence and of the danger to which that negligence exposes him, and yet

fails to exercise ordinary care in avoiding it, he is liable for the injury."

The case of *St. Louis, I. M. & S. R. Co.* v. *Denty,* 63 Ark. 177, 37 S. W. 719, involved an injury to a child four years of age and the court said: "The failure of the company to keep a lookout would not excuse an adult person who carelessly sat or stood upon the track and allowed a train to strike him. Under the previous decisions of this court, such a person could not recover; but with an infant four years of age the rule is different. A child of that age does not possess sufficient discretion to be adjudged guilty of negligence; and if the employees of the company in charge of the train were guilty of carelessness causing injury, the company must respond in damages."

The case of *Hines* v. *Johnson,* 151 Ark. 549, 236 S. W. 835, involved an injury to a seven-year-old child. There it was said: "The argument is made that there was not sufficient substantial evidence tending to show that the child was in a perilous position in front of the train as it approached to warrant the instruction. There was a walkway on the bridge three feet west of the west rail of the track for the use of employees in walking over the bridge. According to appellee's evidence, the child was running on this walkway towards the north as the train was approaching from the south. The child was small, being only seven years of age. We think a child of tender years running over a bridge on a walkway in such close proximity to the railroad track was in a perilous situation, and must be so regarded by employees operating the train."

Various objections were made by the defendant to the proof offered by plaintiff tending to show that the pathway over which the parties traveled had been used by them and the public generally for a long period of years. Defendant also objected to the giving of plaintiff's requested instruction No. 5 which told the jury that, if they believed from the preponderance of the evidence that the pathway upon which plaintiff was walking had

been used by the public over a period of years without objection on the part of the defendant, then plaintiff would not be a trespasser but a mere licensee, and defendant owed her a duty to use reasonable care to avoid injuring her.

In support of its contention that the testimony regarding the use of the pathway was inadmissible, and the instruction erroneous, defendant relies on 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. That case involved the liability of the railroad to a trespasser or licensee on its right-of-way who was injured by reason of the defective condition of a footpath, and the court held there was no liability in the absence of an express or implied invitation to such party to be there. Mr. Justice Wood pointed out in the opinion, however, that railway companies, under the lookout statute in effect at that time, owed to persons on their tracks the duty to exercise ordinary care to keep a lookout whether such persons were there by invitation, or as licensees, or trespassers. The case of *Arkansas Short Line* v. *Bellars,* 176 Ark. 53, 2 S. W. 2d 683, also relied upon by defendant, involved the injury of a woman walking upon the track in preference to using a path alongside the track. The court held she was a mere licensee in using the track and the company owed only the duty not to willfully or wantonly injure her, or the duty to exercise ordinary care not to injure her after discovering her peril. We think evidence of the use of the footpath was admissible; and that the instruction, when considered with the other instructions given at the request of both parties on this issue, conforms to the principles that have been announced in our cases. *Mo. & N. A. R. Co.* v. *Bratton,* 85 Ark. 326, 108 S. W. 518; *Moody* v. *St. Louis, I. M. & S. Ry. Co.,* 89 Ark. 103, 115 S. W. 400, 131 Am. St. Rep. 75; *Mo. Pac. R. Co.* v. *McKinney,* 189 Ark. 69, 71 S. W. 2d 180.

It is next insisted that the court committed error in failing to declare a mistrial because counsel for plaintiff invited counsel for defendant to examine injuries to the child's head which were being pointed out to the jury.

While we agree that such invitation and the ensuing colloquy between counsel was improper, we do not agree that it was so prejudicial as to call for a mistrial by the court.

The court gave instructions Nos. 1 and 4 at the request of plaintiff as follows: "No. 1—The court instructs the jury that a child of tender years cannot be guilty of negligence, so if you find in this case by a preponderance of the evidence that Emma Lee Moore was a child of such tender years that she did not have the capacity to appreciate dangers and hazards and to exercise care and prudence for her own self-preservation, she would not be guilty of negligence and her rights could not be defeated by any careless act of hers. Also, you are told that any acts of carelessness or negligence on the part of the child's mother could not be imputed to the child. In other words, any rights that Emma Lee Moore may have in this case cannot be defeated because of some act of carelessness or negligence by her mother."

"No. 4—You are instructed that contributory negligence is the doing of something that a person of ordinary prudence would not do or the failure to do something that a person of ordinary prudence would do under like circumstances; and in this case in determining whether Emma Lee Moore could be guilty of contributory negligence you should consider the facts in the light of the circumstances as they existed at the time, and the age and experience and knowledge of the child, and the experience and knowledge that a person of the age of said child should have had, and whether a child of her age would have such experience and knowledge that she could be held accountable for any careless acts on her part."

It is contended that the instructions incorrectly stated the law and ignored the negligence of the plaintiff's mother in permitting the child to walk near the railroad track. A distinction is made in the decisions between a suit where recovery is sought for the benefit of the child only, and the case where the parent is suing

for loss of contributions and services of the child. In the first case the negligence of the parent may not be imputed to the child, while the rule is different where the suit is for the benefit of the parent. In *St. Louis S. W. Ry. Co.* v. *Cochran,* 77 Ark. 398, 91 S. W. 747, this court said: "A child of tender years cannot be guilty of negligence, nor can the contributory negligence of the parent be imputed to it, so as to prevent a recovery in a suit brought by the child to recover damages for injury caused by the negligent act of another. But the father may, in a suit brought for his own benefit for the negligent killing of his child, be chargeable with negligence contributing to the injury." See, also, *St. Louis, I. M. & S. Ry. Co.* v. *Colum,* 72 Ark. 1, 77 S. W. 596; *St. Louis, I. M. & S. Ry. Co.* v. *Flinn,* 88 Ark. 484, 115 S. W. 142; *St. Louis, I. M. & S. Ry. Co.* v. *Sparks,* 81 Ark. 187, 99 S. W. 73; *St. Louis S. W. Ry. Co.* v. *Adams,* 98 Ark. 222, 135 S. W. 814; Annotation, 15 A. L. R. 414. The instant suit is brought solely for the benefit of the child and the instructions complained of correctly declared the applicable rule.

It is also cotended that the verdict is excessive. The plaintiff received a rather severe skull fracture. A piece of the skull which was pressing on the brain and causing convulsions was removed. The child was rendered unconscious for a period of two months while confined in the hospital and for some time after she was removed to her home. There was some evidence of paralysis resulting from the head injury, and forced feeding by means of a rubber tube through the nose was necessary for a period of four months. An arm was broken and there was evidence of considerable pain. Under the testimony adduced on this issue, we cannot say the verdict is excessive.

There are other assignments of error in the giving of certain instructions requested by plaintiff, and the refusal to give instructions requested by defendant. We have carefully examined the instructions given by the trial court and those refused at the request of defendant, and find those given correctly declared the applicable law and fully and fairly covered the issues involved.

Finding no error, the judgment is affirmed.

EAST *v.* WOODRUFF.

4-7877 193 S. W. 2d 664

Opinion delivered April 15, 1946.

D. H. Crawford, for appellant.

J. H. Lookadoo and *Agnes F. Ashby,* for appellee.

MINOR W. MILLWEE, Justice. Plaintiffs, Meleese Woodruff and L. C. Woodruff, her husband, brought this action against the defendant, Virgil East, owner and operator of the East Bus Line, to recover damages for personal injuries to Mrs. Woodruff resulting from a collision caused by the alleged negligence of defendant's bus driver in carelessly operating a large passenger bus in and near the intersection of Clinton and Eighth Streets in the city of Arkadelphia. Defendant prosecutes this appeal from a verdict and judgment for the plaintiffs in the circuit court.

Clinton Street runs east and west in the business section of Arkadelphia, while Eighth Street extends north and south and intersects the former at right angles. According to the testimony of Mrs. Woodruff, she was driving her husband's car east on Clinton Street at a moderate rate of speed on the night of the accident. As she approached the intersection of Eighth Street she saw defendant's driver stop the bus on the east or left-hand side of Eighth Street north of the intersection. In the words of the witness: "Just as I got about the intersection, the bus shot out in front of me and cut the corner." After cutting across the northeast corner of the intersection to his left, the bus driver proceeded in a southeasterly direction to the middle of Clinton Street and then suddenly swerved the bus to his right in a southwestern

direction to enter the lane of a filling station situated on the southeast corner of the intersection.

Mrs. Woodruff testified that she was traveling about 10 miles per hour when the bus suddenly cut in front of her without warning, and that she applied the brakes and swerved her car to the right with the bus in an effort to avoid the collision, but the car struck the bus which dragged the car into a steel post. From the manner in which the bus driver suddenly cut the corner and started down Clinton Street, she thought he intended to continue down the street. She was 10 or 15 feet from the bus when it suddenly turned to the right, and she was so far across Eighth Street that it was impossible to turn either north or south thereon. The testimony of Mrs. Woodruff's sister, who was riding with her at the time of the collision, was substantially the same as that of Mrs. Woodruff. There was testimony that the brakes of the Woodruff car had been repaired on the morning of the accident and were in good condition at the time of the collision.

Plaintiffs introduced a diagram of the streets where the collision occurred upon which Mrs. Woodruff indicated by pencil the course taken by the bus. This sketch clearly shows that the bus entered the intersection from the wrong side of the street and cut sharply across the northeast corner of the intersection into Clinton Street and then directly across the lane of traffic in which Mrs. Woodruff was driving. The bus driver testified that this sketch of the course he traveled was approximately correct. He also testified that when he stopped at the intersection he saw plaintiff's car approaching to his right which was the only vehicle in sight. He had plenty of time to get across the street and "angled" across the intersection to the filling station. He was not positive whether he looked around any more for plaintiff's car after he started across the intersection. As he slowed up to enter the platform of the filling station, he heard a passenger say, "She is going to hit you." He applied the brakes and Mrs. Woodruff ran in between the bus and light post, striking the bus very lightly after striking

the post. He did not drive over 8 miles per hour as he crossed the street and began to slow down as he drove on the platform. The bus was either stopped or barely moving when the car hit. He gave no warning signals of his intention to turn left across the intersection or to his right from Clinton Street into the filling station.

It is first insisted that the trial court erred in refusing to give defendant's requested instruction No. 1A which reads as follows: "The undisputed testimony in this case shows that the bus of the defendant entered the intersection of 8th and Clinton Streets before the car driven by Mrs. Woodruff entered that intersection. That being the case, it was the duty of Mrs. Woodruff to have her car under such control that she could stop it in time to avoid a collision as she proceeded into and across the intersection, and if she did not have her car under such control, she was guilty of negligence and cannot recover, and your verdict must be for the defendant."

There are several reasons why this instruction should not have been given. It is true, the defendant's witnesses testified that Mrs. Woodruff's car had not reached the intersection when the bus started across the corner. Mrs. Woodruff was carefully examined on this point and, while she admitted that she was not out into Eighth Street when the bus moved forward, the effect of her testimony was that she entered the intersection at approximately the same time the bus started across. Under this state of the testimony, it was the duty of the court to submit the question to the jury which was done in defendant's requested instruction No. 2. The case of *Smith Arkansas Traveler Co.* v. *Simmons et al.*, 181 Ark. 1024, 28 S. W. 2d 1052, involved a collision at an intersection, and the testimony of appellee tended to show that he entered the intersection first, while that of appellant showed that each reached the intersection about the same time, and this court held the conflict in the testimony presented a question for the jury to determine. We think that is the situation in the case at bar in view of the testimony on behalf of plaintiffs that the two vehicles entered the intersection at approximately the same time.

In support of his contention that the court erred in its refusal to give instruction 1-A above, defendant relies on the cases of *Murray* v. *Jackson,* 180 Ark. 1144, 24 S. W. 2d 980, and *Jacks* v. *Culpepper,* 183 Ark. 505, 37 S. W. 2d 94. These cases involved collisions which occurred in the intersection and hold that, where one vehicle has already entered an intersection and the other vehicle has not, the former has the right of way despite a city ordinance which provides that the car on the left shall yield the right-of-way to the one on the right where the two vehicles approach an intersection at approximately the same time. Neither of these cases involved a collision outside an intersection, as is the case here, nor was the question of the illegal entry and crossing of an intersection presented in the cases cited. Paragraph (b) of § 64 of Act 300 of 1937 provides that an approach for a left turn at an intersection shall be made in that portion of the right half of the roadway nearest the center line, and that after entering the intersection, the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered.

It seems to be admitted by the bus driver that he approached the intersection from his left-hand side of Eighth Street and cut across the northeast corner of the intersection into Clinton Street. The rule applicable to the situation thus presented by the undisputed evidence is stated in 42 C. J., p. 977, as follows: "One who approaches an intersection on the wrong side of the highway is not entitled to the benefit of a regulation giving the right of way to vehicles approaching in a certain relative direction. So also, a rule that the motor vehicle first entering a street intersection and making a turn therein has the right of way over another vehicle subsequently entering the intersection applies only in favor of a vehicle entering the intersection from the proper side of the street and making the turn in a proper manner." See, also, Huddy, Cyclopedia of Automobile Law (9th Ed.), Vols. 3-4, p. 267; Berry on Automobiles (7th Ed.), Vol. 3, pp. 82-83.

If it be conceded that defendant's bus driver entered the intersection first, and had the right of way, this did

not license him to unlawfully cut the corner or suddenly swerve the bus to his right after leaving the intersection across a lane of traffic which he, by the exercise of ordinary care, could have known the plaintiff was traveling when the turn was made. In Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 2 (Perm. Ed.), p. 181, it is said: "Although a driver of a motor vehicle has the right of way at an intersection over a driver approaching on an intersecting road, either because of priority of approach or because the traffic regulations give the right of way to vehicles approaching from the right or to travelers on favored streets or going in favored directions, the right so given is not exclusive, but instead is at all times relative and subject to the fundamental common-law doctrine that he should exercise the right so as to avoid injury to himself or others." At page 154 of the same volume the author says: "A motorist cannot ordinarily claim a right of way because of priority of approach secured by violation of law, as by turning to the left before reaching the center of a street intersection or by failing to stop at a stop signal."

The trial court gave defendant's requested instruction No. 2 as follows: "If you find from the testimony that the defendant's bus entered the intersection of 8th and Clinton streets before the car driven by Mrs. Woodruff entered the intersection, you are told that the bus had the right of way and could lawfully continue into and across the intersection. And if you so find, you are further told that the plaintiff, Mrs. Woodruff, was under the duty to have her automobile under such control as she proceeded into and across the intersection that she could stop it or slow it sufficiently in time to avoid striking defendant's bus, and if she failed to do so, and by reason thereof struck the bus, causing the injuries complained of, the plaintiffs cannot recover and your verdict should be for the defendant." In view of the conflict in the testimony as to whether defendant's bus entered the intersection first, and, in view of the undisputed evidence that the bus approached and traversed the intersection in an improper manner, instruction No. 2 was more favorable to defendant than the applicable law and the facts

warranted, and no error was committed in the refusal to give defendant's requested instruction No. 1-A.

It is also insisted that the trial court erred in giving plaintiff's requested instructions Nos. 1 and 2. Specific objection is made to that part of the two instructions which permitted the jury to find that the two vehicles entered the intersection at approximately the same time. The defendant contends there is no testimony upon which such finding can be based, and that the undisputed evidence is that the bus entered the intersection first. The particular language of the instructions to which objection is made is based on the testimony of Mrs. Woodruff which we have already discussed in connection with defendant's first assignment of error. Since there was evidence on behalf of plaintiffs to the effect that the vehicles entered the intersection at approximately the same time, which conflicted with the testimony of defendant's witnesses on this point, it was proper to submit the issue to the jury under the conflict thus presented.

It is finally contended that Mrs. Woodruff was guilty of contributory negligence as a matter of law. Defendant now says it is undisputed that she drove her car into a position of peril at a speed which prevented her from stopping in time to avoid a collision, and that the court erred in its failure to so instruct the jury. It may first be pointed out that defendant made no request of the trial court to so instruct the jury. On the contrary, several instructions covering the issue of Mrs. Woodruff's contributory negligence were given at defendant's request which correctly left the determination of that question to the jury. Whether the action of the bus driver in cutting the corner of an intersection and suddenly swerving in front of the car of plaintiffs without warning was the sole and proximate cause of the collision was a question for the jury. When the testimony is considered in the light most favorable to appellee, the jury was warranted in finding that the negligence of the bus driver placed Mrs. Woodruff in a precarious position of unexpected and suddenly arising danger. Consequently, she had a right to use such means for avoiding the danger of

a collision as would appeal to a person of ordinary prudence in a like situation.

In the case of *Blakely & Son* v. *Jones,* 186 Ark. 1169, 57 S. W. 2d 1032, it was contended, as here, that appellee was guilty of contributory negligence as a matter of law. Mr. Justice BUTLER there said: "In determining what is or is not negligence in any given case, the test is always what in the light of all the circumstances and in situations similar to that of the person under inquiry, one of ordinary prudence would or would not do, and where men of ordinary intelligence might differ in their honest judgment, the question of negligence is one for the jury." See, also, *Coca-Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856; *Kirby* v. *Swift & Co.,* 199 Ark. 442, 134 S. W. 2d 865; 5 Am. Jur., Automobiles, § 703.

Under the facts and circumstances revealed in this record, Mrs. Woodruff was not guilty of negligence as a matter of law; but rather her acts in the premises were properly presented to the jury, and it was for that body to say whether or not she exercised due care in view of the facts submitted. The jury has, by its verdict, resolved the conflict in the evidence on the question of contributory negligence in favor of plaintiffs under instructions which fairly presented the issue, and that verdict is binding on this court on appeal.

The judgment of the circuit court is, therefore, affirmed.

CROW *v.* JOHNSTON.

4-7855 194 S. W. 2d 193

Opinion delivered April 15, 1946.

Rehearing denied May 27, 1946.

George K. Cracraft, for appellant.

Daggett & Daggett, for appellee.

HOLT, J. Appellee brought this suit to quiet his title to land claimed as an island in the Mississippi River.

He alleged in his complaint and amendment thereto that he owned "all of a certain towhead (designated as 'Island 62 towhead') between Islands 62 and 63, in the

Mississippi River, adjoining and a part of section 36, T. 4, S., R. 3 E., 1,000 acres," in Phillips county, Arkansas.

He further alleged "that he, and those under whom he claimed title, have heretofore paid state and county taxes on said described lands, . . . continuously for the years 1911 to 1931 inclusive, a period of more than fifteen years, under color of title thereto; and plaintiff pleads the provisions of §§ 8920, Pope's Digest, (Act March 18, 1899), and 8921, Pope's Digest, (Act March 27, 1929), as a complete bar to any right, title, claim or interest of the defendants in and to the said described lands."

He further alleged, and claimed title under a deed from the State Land Commissioner on August 4, 1940, (under the Acts of Arkansas of 1917, Vol. 2, p. 1468, commonly called the Island Act), in which the land is described as "the whole of 'Island 62 towhead' heretofore mentioned and lying and being situated south and east of Island No. 62 in the Mississippi River and located in sections thirty-five and thirty-six, in township four south, of the base line in range three east of the Fifth Principal Meridian, in Arkansas and section two, in township five south, of the base line in range three east of the Fifth Meridian, in Arkansas in Phillips county, Arkansas, (170.6 acres) and more particularly described as follows, to-wit:" (Then follows a metes and bounds description of 170.6 acres.) He further pleaded laches.

Appellants answered with a general denial and by way of cross-complaint, asserted (quoting from appellants' brief): "that defendants were the owners and in possession of fractional sections 35 and 36; that they had paid taxes thereon for a long period of time; that the area described in the complaint was, in fact, formed as 'accretions' to sections 35 and 36 and that by virtue of the payment of taxes on the original land in sections 35 and 36, they had, in fact and in law, paid taxes on the accretions. They further alleged that the lands described in the deed from the State Land Commissioner to plain-

tiff, although purporting to be a deed to an island, covered an area representing true accretions to sections 35 and 36; that the deed constituted a cloud upon the title of defendants (because said area was in fact accretions) and prayed that the deed from Mr. Lucy and Mrs. Burke (the devisees of R. C. Burke) to the defendant, and the deed from the Commissioner to the defendant be canceled as clouds on their title."

The trial court, after a patient and extended hearing, found the issues in favor of appellee, and from the decree comes this appeal.

The primary question presented, and which, in effect, is decisive of this case, is the one of fact, whether the land in controversy formed as an island, or by way of accretions to the south shore of Island 62, which belongs to appellants.

It is conceded that in cases of this character appellee must prevail on the strength of his own title and not upon the weakness of his adversary. (*Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951.)

The rule is equally well established that while the cause comes to us for trial *de novo,* we must affirm unless we can say that the findings of the trial court are against the preponderance of the testimony. (*LeCroy* v. *Sigman, ante,* p. 469, 191 S. W. 2d 461.)

The record is voluminous, comprising some 300 pages of maps, charts and testimony, and we can do little more than set out here the effect of the evidence as we view it.

After reviewing all of the testimony, we have reached the conclusion that the findings of the court below and the decree based thereon, are against the preponderance thereof.

At the outset, it may be said that the evidence introduced fell within three types, charts and maps of United States engineers and of the Mississippi River Commission, the testimony of lay witnesses who had lived for a long number of years in the immediate vicinity of the lands involved, and that of other experienced engineers.

Island 62 owned by appellants, according to the maps and charts, was in existence as early as 1835, prior to Arkansas' admission to the Union in 1836, and this island has continued in existence as land in place until the present; also the "Island 62 towhead," involved here, was an island in 1835, lying south and east of Island 62 and existed as such until some time in 1912 when the testimony showed that it completely disappeared or had been cut away by the actions of the Mississippi River current. A third island, 63, also existed at the time above mentioned and lay immediately south of "Towhead 62" on the east side of the Mississippi River and this island still exists.

It was the theory of appellee, and the chancellor so found, that "Island 62 towhead" in 1912, by accretions built on to it to the north and northwest, gradually expanded and grew until it reached the shoreline of Island 62, and that the land described in the State Land Commissioner's deed, *supra,* lies within this accreted area.

We think, however, that the great preponderance of the testimony is against this theory. All of the maps and charts made subsequent to 1912 that were introduced, and especially those prepared by the Government engineers and the Mississippi River Commission, disinterested parties here, demonstrate that "Towhead 62" never reformed. Nowhere on any of these maps does any channel, chute, arm of the river or living stream of water appear separating the alleged reformed towhead from 62. In effect, the contrary is shown. The Jack's map made in 1925, strongly relied upon by appellee and which was largely used as a guide by Mr. Green who surveyed the land for the State Land Commissioner, does not show any channel or chute separating Island 62 on the south and east from land alleged to be the original "Towhead Island 62." The only evidence on this point is that there appeared to be a depression 75 to 100 feet in width close to the high bank of original Island 62 and extending out at a 45° angle across the sand bar in a southerly direction which filled with water when overflows occurred. This depression, however, fell far short of constituting a defi-

nite chute or arm of the river separating Island 62 from the alleged towhead. The preponderance of the testimony of the lay witnesses is to the same effect.

A summation of the testimony of the two highly trained and experienced engineers, Richardson and Parmalee, is embraced in the following testimony of Parmalee: "After studying this whole question, together with the maps extending over 100 years and recent examinations, that it is definitely concluded that the area described in the deed from the State Land Commissioner to the appellee are accretions formed from the shore of Island 62 proceeding outwardly into the stream and not accretions inwardly from an island or towhead to the shore of Island 62; that 'as a matter of public land description these lands adjacent to the original Island 62 should be described as being accretions to fractional sections 35 and 36, township 4 south, range 3 east.' "

The testimony of the lay witnesses, many of whom lived on Island 62 and were familiar with the actions of the Mississippi River since Towhead 62 disappeared in 1912, tends to corroborate this testimony. The testimony of all the witnesses who testified on accretion formations was to the effect that accretions are formed downstream and not upstream. Appellee himself so testified in effect: "A towhead always builds downstream, because an eddy gets in there and that will build up around a root." These physical facts strongly support the theory of appellants that the land in question was formed by accretions on the south of appellants' holdings on Island 62.

Robert Moore, whose testimony was corroborated by other witnesses, testified that he was 63 years old, had lived in the vicinity of the land all of his life and now lives about seven miles from Island 62; that in his younger days, a towhead (meaning "Towhead Island 62") in the Mississippi River lay between Islands 62 and 63; that boats ran up and down the chute and they would go in high water time because there was a fairly good channel then and the channel lay next to the towhead and that it did not lay next to the main bank of Island 62 be-

cause a sand bar had filled out from the main island going east as this sand bar moved out from Island 62; that the towhead was caving at the head and before the towhead went completely out this sand bar had made out from the Twitty Island (conceded to be another name for Island 62) and in extreme low water almost went across in a bar of white sand to Towhead 62 and then when they put in the dike water came in from the Oldtown Bar; that the dike and the main channel of the old river built up and threw the current this way "and all that towhead started away." It went out in three or four years; that after that towhead went away no other towhead ever came back.

The testimony shows, as noted above, that "Towhead Island 62" had completely washed away by 1912, and that a towhead is an island.

We have many times held that title to land carried with it all accretions formed or made prior to the conveyance, as well as after, though not mentioned in the deed of conveyance. It appears, however, that the deed to John D. Crow from whom the appellant inherited the land here, contained the words "and all accretions." *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 299; *Mobbs* v. *Burrow,* 112 Ark. 134, 165 S. W. 269.

Much weight must be given to testimony that the willows, which appeared on these accretions to Island 62 on the south, gradually grew smaller and shorter and to taper off as they approached the sand bar on this south shore line of 62. *Mosby Dennison Company* v. *Maxwell,* 146 Ark. 482, 226 S. W. 646.

On the facts before us, we have well defined rules of law to guide us in determining whether the land involved lies within accretions to appellants' land.

As above noted, a number of maps and charts prepared by Government engineers and the Mississippi River Commission were placed in evidence, and in the circumstances here, we attach considerable weight to them, their accuracy being unquestioned. In the recent

case of *Horne* v. *Howe Lumber Company, ante,* p. 202, 190 S. W. 2d 7, we said: "These surveys were prepared by the War Department and were admissible in testimony without other proof of their accuracy. It was held in the case of *City of Los Angeles* v. *Duncan,* 130 Cal. App. 11, 19 Pac. 2d 289, that: 'Such maps are *prima facie* evidence of the facts shown thereon, but the weight and effect to be given thereto is a question of fact for the court.' "

This court, quoting from *Nix* v. *Pfeifer, supra,* said: "Land formed by gradual and imperceptible accretion or by gradual recession of the water belongs to the owner of the contiguous land to which the addition is made," and in *Wallace* v. *Driver,* 61 Ark. 429, 335 S. W. 641, said: "In order to constitute an accretion, it is not necessary that the formation be indiscernible by comparison at two distinct points of time. It is true that it is an addition to riparian land, 'gradually and imperceptibly made by the water to which the land is contiguous'; but the true test 'as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.' . . . When a riparian owner becomes the owner of land, he acquires, as incident thereto, without price, whatever may be added to it by gradual and impereceptible accretion, while, at the same time, he assumes the risk of losing it all by its being gradually washed away by the waters of the river; but his line always remains at the water's edge, wherever that may be. His line expands as the waters recede and accretions form to his land, and contracts as the waters encroach upon and wash away his land."

In *Belle Fontaine Improvement Company* v. *Niedringhaus,* 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269, the annotator defines an island: "It may be said that to constitute an island in the river the same must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river, and not a sand bar, subject to overflow by the rise of the river and connected with the main-

land when the river is low." (See, also, *Hahn* v. *Dawson,* 134 Mo. 581, p. 589, 36 S. W. 233.)

As above noted, we think the great weight of the testimony establishes that the area in controversy represents true accretions to Island 62, land owned by appellants, and that "Island 62 towhead" which the testimony showed was completely washed away in 1912, never reappeared or reformed.

Finally, appellee contends that even though it should be established that the land here involved belonged to appellants by accretion, still appellee should be declared the owner for the reason that he and his predecessors in title have paid the taxes on the land continuously from 1911 to 1931 inclusive, and in support of this contention pleads the provisions of §§ 8920 and 8921 of Pope's Digest, along with adverse possession and laches.

Having concluded that the land involved belongs to appellants by accretion, we think these contentions of appellee to be without merit for the reason that the land upon which he paid the taxes from 1911, as above indicated, was described on the assessment books of Phillips county as "towhead between Islands 62 and 63, adjoining and part of section 36, T. 4 S., R. 3 E., 1,000 acres, in Phillips county, Arkansas." Obviously, this description attempts to describe "Towhead Island 62" alleged to be lying between Island 62 and Island 63. It does not describe any land now owned, or ever claimed, or owned by appellants in view of our holding here that "Towhead Island 62" disappeared in 1912 and has never reappeared. In other words, this description was no notice to appellants that appellee was paying taxes on any of their land.

For the errors indicated, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion.

GRIFFIN SMITH, Chief Justice, not participating.

4408 194 S. W. 2d 182

Opinion delivered April 29, 1946.

Rehearing denied May 27, 1946.

[redacted]

Alston & Woods, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

SMITH, J. Informations were filed against Joe L. Scott and C. H. Murry, in one of which they were charged with the offense of assault with intent to kill; in the

other with the crime of robbery. In one information it was alleged that the defendants had assaulted one Verner Andrews with the intent to kill the said Andrews. In the other information it was charged that the defendants had robbed Andrews of certain personal property.

By consent defendants were tried upon both informations at the same time, and were found guilty of the offense of assault with intent to kill, but were acquitted upon the other charge. Sentence was pronounced on the verdict against Murry, from which he has appealed. Sentence against Scott was suspended to permit him to rejoin the army.

The testimony is to the effect that Murry and Scott had been honorably discharged from the army, and were returning to their homes. As they approached Texarkana, there was a collision between the automobile in which they were driving and another car, which resulted in damage to that car. An unsuccessful attempt was made to settle the damage, but the owner of the damaged car insisted that they drive into Texarkana, where the damage might be appraised. The request was not approved by Murry and Scott and they attempted to elude the driver of the damaged car, and in doing so they drove into a tourist court operated by Andrews, driving over a sidewalk where there was no driveway, and stopped their car in a space not intended for that purpose.

The owner of the damaged car followed into the tourist camp, where the argument about the damage was resumed. Andrews heard the commotion, and called the police department, and as he left his office to see what the commotion was about, he picked up and put in his pocket a blackjack, and as he left his office he was assaulted by Murry who struck him in his eye. Andrews drew the blackjack from his pocket, and struck Murry with it, and Scott came up behind Andrews and knocked him down. Both defendants jumped on Andrews, took his blackjack away from him, and began beating him with it, and carried Andrews through a side door into his office where they asked him for his money. He pulled

loose from the men and started to run, when one of them knocked him down with the blackjack. When he arose his head was pummeled against the wall until it bled profusely. When he liberated himself he got a shotgun and returned to the encounter, where his gun was taken away from him, and the beating was resumed. He was carried into the kitchen of the camp and again beaten with the blackjack, and Murry told him he was going to have to pay off. Andrews asked what they wanted, and one of the assailants said they wanted $50. Andrews produced the money, when Scott suggested that they had better not leave him there, as someone might have their license number, so they took Andrews and put him in their car where there was a drunken man, an acquaintance of the defendants, who had been picked up by them to prevent the arrest of the drunk man, as they explained. When the four men were all in the car, Scott started to drive off. Andrews got out of the car when Scott said to Murry, "Give me the blackjack. Let me hit him a few licks." Andrews testified that they took his wrist watch off of him, and while they were struggling to put him back in the automobile the sheriff and his deputy arrived.

The fourth man who remained in the car was in a drunken stupor, and had no part in the affray, if indeed he was aware of what was going on.

Andrews was badly beaten. He received wounds to his tongue, head and eyes, and the scars on his head were visible at the time of the trial. When he was carried to the hospital six stitches were taken in his head, and one in his tongue. His eye was bloodshot for several days. There were blood spots on the wall against which his head had been beaten. There is a scar in the shape of a "Y" on the left side, near the center of his head and a long scar down the side towards the ear, about three inches long and one on the back of his head about one inch long. All the scars were the result of the attack and Andrews was confined to the hospital about nine days.

When the shotgun was taken away from Andrews it was placed in defendant's car, and they explained that this was done, not to shoot Andrews with it, nor to steal

it, but to prevent Andrews from shooting them. Undoubtedly both Scott and Murry were under the influence of intoxicating liquors, but it is not contended that either was so drunk that he did not know and realize what he was doing.

The testimony is sharply conflicting, but we have given Andrews' version, as we are required to do, in testing the legal sufficiency of the testimony to support the verdict. Murry and Scott testified that they offered to pay $10 in satisfaction of the damage done to the car they had struck, and when the owner of that car refused the offer, they attempted to elude him, and in speeding away the hood of their car blew off, and they ran into the court of Andrews' tourist camp. The man whose car they had struck soon appeared, and a settlement of the damages was effected, and their pursuer drove away. While the settlement was being negotiated Andrews appeared and ordered defendants away. Murry testified that he said, "Wait until we pay for the fender, and we will get out." Andrews went into one of the rooms of his court, and according to the version of defendants, reappeared, and without provocation, assaulted Murry with his blackjack. It is admitted that Andrews struck Murry with the blackjack, which is conceded to be a lethal weapon. Indeed the defense is that the assault upon Murry with the blackjack, referred to as a deadly weapon, so infuriated Murry that an irresistible passion was aroused and that this provocation for the admitted assault upon Andrews operated to reduce the degree of their offense from an assault with intent to kill, to an aggravated assault.

Defendants denied any intention either to kill, or to rob, Andrews. They denied taking the watch off of Andrews' person, which was later found near their car. They admitted putting Andrews' shotgun in their car, but said this was done to prevent its use. Defendants contend that the lack of any intention to kill Andrews is shown by the fact that they did not kill him which might have been done with either the blackjack or the shotgun.

Murry testified that when he was unable to settle for the damage to the car they had struck, he thought it

would be funny to run away and not pay anything, and proceeded to do so, and only drove into Andrews' court because the hood of their car had blown off. They admitted that they attempted to put Andrews into their car, but stated their purpose in doing so was to turn him over to the officers of the law, because of the assault that he had committed on them.

The sheriff testified that when he drove up he saw evidence of the fight and told defendants they had beaten Andrews unmercifully, when Murry said he "wished he had killed the son-of-a-bitch." The defendants may not at any time have had the intention of killing Andrews, but we think it was a question of fact whether this was their intention when they assaulted and beat him. They denied any intention of robbing Andrews, and testified that they told him they did not want his money when he offered them $50 to leave him alone.

Murry admitted saying he was sorry he had not killed Andrews, but it is insisted that this was mere fighting talk, inspired by anger and resentment. It is designated as an extra-judicial confession which, standing alone, is not sufficient to prove the specific intent essential to constitute the offense of an assault with intent to kill.

The case of *Davis* v. *State,* 115 Ark. 566, 173 S. W. 829, is cited to support this contention. There a woman who had shot her husband remarked to the officer who had placed her under arrest that she was sorry she had not killed her husband. It was said in the opinion in that case that: "The essential ingredient of the crime under the plain language of the statute, cannot be proved by the confession of the defendant not made in open court, unless there is also other proof of such specific intent (to kill). In other words, under our statute, if there be no proof of the specific intent to take life except the extra-judicial confession of such intent, then the offense of assault with intent to kill is not established, and if this were the only proof of such intent, the accused would be entitled to an acquittal of that offense."

Here, however, this remark is by no means the only proof of the specific intent to kill Andrews, who was assaulted with a weapon admittedly capable of causing death, and Andrews was beaten in a manner which might well have produced that result. We conclude, therefore, that the testimony is legally sufficient to support the finding that a specific intent to kill Andrews existed.

The court gave numerous instructions fully and clearly declaring the law of the case, to the following effect: That to sustain a conviction it was essential that the jury find "that there was present in the minds of defendants at the time said assault was made a specific intent to take the life of the said Andrews" and further that the circumstances of the assault must have been such that had death resulted from it, the defendants would have been guilty of murder in either the first or second degree. The court also gave instructions numbered III, IV and VIII, at the request of the defendants, reading as follows:

No. III

"You are instructed that if you find that the defendants assaulted Verner Andrews with the intent to kill him, but that said intent arose without malice and as a result of a sudden heat of passion, brought about by a provocation apparently sufficient to make the passion irresistible, then the defendants would not be guilty of assault with intent to kill, but would be guilty of aggravated assault or of assault and battery, depending upon whether or not a dangerous or deadly weapon, instrument or thing was used by the defendants in making such assault."

No. IV

"You are further instructed that if you find from the evidence beyond a reasonable doubt that the defendants assaulted Verner Andrews without provocation or by reason of slight provocation with a dangerous or deadly weapon, instrument or thing with intent to inflict grievous bodily harm upon him, but without any specific intent to kill him, then you may not convict the defend-

ants of an assault with intent to kill, but you may convict them of aggravated assault. You are further instructed in this connection that if you have any reasonable doubt on the question of whether the defendants intended to kill the said Verner Andrews when they assaulted him, if, in fact, you find that they assaulted him at all, you are bound to give the defendants the benefit of said doubt and acquit them of the crime of assault with intent to kill."

No. VIII

"You are instructed that if you find from the evidence that the defendants, at the time they assaulted Verner Andrews, if in fact they did assault him, were in such a drunken or intoxicated condition that they were unable to formulate any specific intent to kill him, you may not convict the defendants of assault with intent to kill."

We think these instructions declared the law as favorably to defendants as they had the right to demand. Other instructions were asked, amplifying the declarations of law above set forth, but we think those given fully covered the subject, and it was not error therefore to refuse the additional instructions.

One of the instructions requested, which was refused, presents a question which requires consideration. It reads as follows:

No. IX

"You are instructed that in determining whether the assault, if any, committed upon Verner Andrews by the defendants, was malicious or was caused by a sudden heat of passion brought on by a provocation apparently sufficient to make the passion irresistible, you may consider whether or not the defendants were drunk or intoxicated to a degree whereby their passions were more easily inflamed or aroused than would have been the case had they been entirely sober."

In the excellent brief of counsel for appellant, it is conceded that no case was found which supports the

instruction, and we think there was no error in refusing it.

In the case of *State* v. *Treficanto,* 106 N. J. L. 344, 146 Atl. 313, the defendant was convicted of murder in the first degree. He admitted the killing, but interposed the defense that he was too drunk to form and entertain the specific intent to kill, and he insisted therefore that the grade of the offense was thereby reduced. In overruling this contention the Court of Errors and Appeals of New Jersey said: "Counsel for defendant Treficanto cites in support of his contention the case of *Wilson* v. *State,* (1897) 60 N. J. L. 171, 37 A. 954, 38 A. 428, and says that in that case the court laid down the rule: 'If the evidence is sufficient to satisfy the jury that the intoxication of the accused, at the time of the homicide, was so great as to prostrate his faculties and render him incapable of forming the specific intent to kill, which is the essential ingredient of murder of the first degree, the prisoner will not be entitled to acquittal, but his offense will be murder in the second degree.' This is to be found at page 185 of 60 N. J. L. (37 A. 958), and is an excerpt from the charge of Mr. Justice DEPUE in *State* v. *Martin,* in the Essex oyer and terminer in 1881; affirmed in Supreme Court 1883. It is pertinent to remark that the learned justice proceeded further to say: ' "You should carefully discriminate between that excitable condition of the mind produced by drink, which is not incapable of forming an intent, but determines to act on a slight provocation, and such prostration of the faculties by intoxication as puts the accused in such a state that he is incapable of forming an intention from which he shall act." 4 N. J. L. J. 339 (1881).' Mr. Justice VAN SYCKEL wrote the opinion in *Wilson* v. *State,* and he went on to say, at page 185 of 60 N. J. L. (37 A. 959): 'As observed by the learned judge in the Martin case, this rule should be applied with caution, that no undue or dangerous immunity or license be given to crime by persons whose passions are inflamed by drink.' And, further: 'So long as the mind of the criminal is capable of conceiving the purpose to kill, he must be held to the

responsibility of one who is sober, and that is the language of the cases upon this subject.' "

It is conceded that appellant was not too drunk to form the specific intent to kill. On the contrary, it is specifically conceded that "there is no question at all of appellant having reached that state of drunkenness." If this be true, and it is conceded to be, the appellant is not to be excused because he was under the influence of intoxicants. It is a matter of common knowledge that many of the most atrocious and deliberate crimes are committed by persons more or less under the influence of intoxicants, indeed in many instances, the intoxicant is used to supply the necessary fortitude to commit the criminal act, and if appellant was not intoxicated to the extent of being incapable of having the specific intent to kill, the fact that he was intoxicated, but in a less degree, is no defense.

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

ARKANSAS NATIONAL BANK OF HOT SPRINGS *v.* COLBERT.

4-7881 193 S. W. 2d 806

Opinion delivered April 15, 1946.

Wootton, Land & Matthews, for appellant.

Murphy & Wood, for appellee.

ROBINS, J. Appellee filed claim with the Workmen's Compensation Commission for disability caused by dermatitis which, she alleged, arose from her employment as teller in apellant bank. The commission awarded her compensation at the rate of $7.50 per week from March 1, 1943, to September 1, 1943, and from the latter date to July 12, 1944, at the rate of $20 per week, and also allowed her certain sums for medical expenses from June 20, 1943, to July 12, 1944. On appeal the circuit court of Garland county rendered judgment affirming all of the award made to appellee by the commission, increasing it so as to provide a payment of $20 per week from September 1, 1943, for permanent, total disability, and allowing all medical expenses in connection with her disability from June 20, 1943. To reverse that judgment the employer and its insurance carrier have appealed.

Appellants make two contentions: (I) That the disease suffered by appellee was not a type of dermatitis for which compensation is allowed under the Workmen's Compensation Law; and (II) that the lower court erred in finding that appellee was totally and permanently disabled and in making award to her accordingly.

I.

In that part of the Workmen's Compensation Law, dealing with compensation to employees for disability from certain occupational diseases, appears the following reference to dermatitis (subsection (5) of § 14, Act 319 of 1939): "The following diseases only shall be deemed

to be occupational diseases . . . 1. . . . 7. Dermatitis, this is, inflammation of the skin due to oils, cutting compounds or lubricants, dust, liquids, fumes, gases or vapors.''

Appellee, a lady sixty years of age, for a number of years had worked as cashier in various business offices, and from January, 1926, to April, 1943, had been employed by appellant bank as teller in charge of savings accounts and visitors' accounts. She first noticed the trouble with her hands during the summer of 1938, and in February, 1939, the condition of her hands became such that she was compelled to refrain from work at intervals, and from that time on she was unable to work regularly. She finally was forced to resign in April, 1943.

The beginning of her malady was the appearance of small blisters on her fingers. These blisters would break, causing the skin to become rough and raw and the hands red and swollen. The disease finally spread to her neck and arms. She consulted various physicians, and at first her trouble was thought to be caused by a food allergy. The Mayo Clinic, in 1941, determined that she was sensitive to the nickel coin. This diagnosis was confirmed by other physicians, two of whom found her allergic also to carbon paper. A specialist in Oklahoma City, to whom she was sent for examination by appellants, also found that her trouble was caused from handling nickel coins, but did not find the allergy to carbon paper.

Appellee's testimony that the dermatitis necessitated her resignation at the bank was corroborated by that of the institution's president.

Appellants do not argue that appellee did not suffer from the skin trouble nor do they seriously contend that this disease was not acquired by her in the course of her employment which required her to handle coins almost constantly. But appellants urge that it was not shown that the skin malady was caused by ''oils, cutting compounds or lubricants, dust, liquids, fumes, gases or vapors'' and that therefore appellee's disability is not com-

pensable under the terms of the Workmen's Compensation Act.

Dr. (Major) William F. Spiller, a specialist in dermatology, who examined and treated appellee, testified: "Q. Major, state whether or not you made any test to ascertain what was the cause of her trouble. A. Yes, I did some skin tests on her and found her sensitive to nickel and carbon, which were the principal ones. Let's see. I believe it was dust. Q. Look at that (referring to memorandum). A. Dust." This witness did not state that the "dust" referred to was from nickel or carbon paper, and there is language in the succeeding portion of his testimony that indicates that the witness might have been referring to dust in the ordinary usage of the word. But these two substances (nickel and carbon paper) necessarily give off some minute particles, and these particles may well be included in the term "dust." "Dust" includes in its meaning comminuted particles arising from metal, as well as from earth. "The word 'dust' . . . may include particles of iron and crystals created by and thrown off by an emery wheel." (Headnote 1) *Indianapolis Foundry Co.* v. *Lackey,* 51 Ind. App. 175, 97 N. E. 349. To the same effect, see *Indianapolis Foundry Co.* v. *Bradley,* 45 Ind. App. 530, 89 N. E. 505. The definition of "dust" given in Webster's New International Dictionary is "fine, dry particles of earth or *other matter* . . ." (Italics supplied.) Ordinary experience teaches that over a period of years the size and weight of all coins is materially reduced by handling; and this reduction is brought about by minute particles of the coins being constantly worn off by abrasive contact with the fiber of clothing, the leather of pocketbooks, the skin of human hands and with other substances.

We have frequently held that in construing the Workmen's Compensation Act its terms should be liberally construed, so as to provide compensation to an employee actually disabled, as defined by the Act, as a result of his occupation. "There should be accorded to the Workmen's Compensation Act a broad and liberal construction and doubtful cases should be resolved in favor

of compensation." (Headnote 4) *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113. Other cases exemplifying this rule are: *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *Williams Manufacturing Company* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380; *Mack Coal Co.* v. *Hill,* 204 Ark. 407, 162 S. W. 2d 906; *Bales* v. *Service Club No. 1. Camp Chaffee,* 208 Ark. 692, 187 S. W. 2d 321; *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956; *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961.

When the applicable portion of the Act is construed in the light of the rule laid down in the above authorities, and effect is given to the testimony adduced before the commission, we cannot say that the finding of the commission and of the lower court that appellee had been disabled by an occupational disease as therein defined was improper.

II.

It is not argued by appellants that appellee's ability to do the kind of work which she has been doing for more than seventeen years has not been destroyed by reason of the allergy, and the consequent return of dermatitis whenever she does any work that requires handling nickel or carbon paper. Appellants urge, however, that, because it was shown that appellee is an unusually intelligent woman, with a pleasing personality, she should be able to secure remunerative employment in some other business or profession. But there is no showing in the testimony that she could secure such employment; in fact there are very few occupations, open to a woman of her age and training, in which there would be no contact with the substances to which she has become allergic. Two of the physicians who testified stated that her disability was permanent. This testimony, not being contradicted by any substantial evidence, when taken in connection with appellee's age and lack of training in any line of work, other than the one in which she was disabled, was sufficient to authorize the finding that by reason of occupational disease appellee had become totally and perma-

nently disabled within the meaning of the Workmen's Compensation Law.

The judgment of the lower court is accordingly affirmed.

Mr. Justice McFaddin dissents.

Ed. F. McFaddin, Justice, dissenting. I dissent on both the points decided by the majority, *i.e.*, I. The Basis of Recovery; and II. The Amount of Recovery.

I. *The Basis of Recovery.* The appellee claims that she suffered an occupational disease, and that her malady is compensable under § 14, subdivision 7, of the Workmen's Compensation Law, which is:

"Dermatitis, this is, inflammation of the skin due to oils, cutting compounds or lubricants, dust, liquids, fumes, gases or vapors."

It will be noticed from the above definition that dermatitis, to be compensable under our statute, must be caused either by oils, cutting compounds, lubricants, dust, liquids, fumes, gases or vapors. I emphasize that the statutory limitation of dermatitis does not include that form of dermatitis caused by *contact with solids.* The proof in this case is ample to show that the appellee suffered from dermatitis caused by *coming in contact with nickel,* which is a solid. It is doing violence to the legislative limitation of dermatitis to include a disease caused by *coming in contact with a solid.*

To bring the appellee within the statute, the majority has reached the conclusion—as a matter of law—that nickel coins pulverize to such an extent as to emit a dust. There is no proof of such a fact, and I do not believe our national coinage admits of such a conclusion. That coins wear thin and rub off, is true; but they do so by contact, not by pulverizing into dust particles. Nickel, of all minerals, does not pulverize. Webster's New International Dictionary, Second Edition (printed in 1944) says that nickel is "resistant to oxidation." See Encyclopaedia Britannica, 14th Edition, Volume 16, page 423; and Encyclopaedia Americana, 1937 Edition, Volume 20, page

321. In order to allow a recovery to the appellee in this case, the majority has reached a legal conclusion that is at direct variance with the laws of chemistry and physics.

It is certainly "stretching things" to say that a 5c coin emits a dust which would get on the hands of a person who came close to the coin, but without touching it. I cannot believe that the Legislature intended such effect to be given the statutory definition of dermatitis. The Workmen's Compensation Law should be liberally construed, but not extravagantly extended. It is for the Legislature to change the definition of dermatitis, rather than for the court to place itself in the position of holding that 5c coins emit nickel dust which causes dermatitis to anyone merely in proximity. The only coin that contains any nickel is the 5c coin dated prior to 1942. This stipulation appears on the record:

". . . the Director of the Mint would testify that the one-cent coin is composed of 95 per cent. copper and 5 per cent. tin and zinc that as of 1943 the one-cent piece was zinc coated steel; as of 1944 the one-cent coin is 95 per cent. copper and 5 per cent. tin and zinc; that the five-cent piece was in the past 75 per cent. copper and 25 per cent nickel; as of March, 1942, the five-cent piece is 35 per cent. silver, 56 per cent. copper and 9 per cent. manganese; that all United States silver coins are 90 per cent. silver and 10 per cent. copper."

II. *The Amount of the Recovery.* The Workmen's Compensation Commission found that the appellee's disability was temporary. The circuit court—on the same record—found that the disability was permanent. We are committed to the rule that the finding of fact by the Commission is entitled to the force and effect of a jury verdict. In *Hughes* v. *Tapley,* 206 Ark. 739, 177 S. W. 2d 429, we said:

"The rule is well established, under the Workmen's Compensation Act that 'Findings of fact made by the Workmen's Compensation Commission are, on appeal, given the same verity as attach to the verdict of a jury, and this applies on appeal to the circuit court as well as

to the Supreme Court from the circuit court.' (*J. L. Williams & Sons, Inc.,* v. *Smith,* 205 Ark. 604, Headnote 2, 170 S. W. 2d 82.) See, also, *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600.

"This rule was applied in the recent case of *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210. It was there said: 'It may first be said that the conflicts in the testimony are slight, and unimportant, but if the facts were otherwise, we would not disturb the findings of the commissioners, if there is substantial testimony to support their findings.' See, also, *Birchett* v. *Tuf-Nut Garment Manufacturing Company,* 205 Ark. 483, 169 S. W. 2d 584; *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *Solid Steel Scissors Company* v. *Kennedy,* 205 Ark. 958, 171 S. W. 2d 929; and *Baker* v. *Silaz,* 205 Ark. 1069, 172 S. W. 2d 419.

"The rule is also well settled that in testing the sufficiency of the evidence before the Commission, the circuit court, on appeal from the Commission, and this court, on appeal from the circuit court, must weigh the testimony in its strongest light, in favor of the Commission's findings."

There was evidence before the Commission to sustain its finding that the disability was temporary. In his additional deposition of February 2, 1945, Lt. Col. Spillers (a medical doctor) testified:

"Q. When you testified here that her hands were cleared up, you made a physical inspection of them, and you meant what you said at that time, didn't you?

"A Yes.

"Q. In other words, you testified that her hands were clear. Now, at that time, you made no attempt to say what the condition would be in three or six months, but at that time you stated her hands had cleared.

"A. The inflammation had subsided. I didn't mean by any means that this sensitivity was not still present.

"Q. I understand that. I am not asking you whether there remained a sensitivity or not. I asked you at that

time whether her hands were clear and you said they were. You meant that, didn't you?

"A. Yes, sir.

. . . .

"Q. Are you prepared to go on record and say that Mrs. Colbert, at the time you saw her in September and at the time you saw her today, was not and is not in her present condition capable of performing the ordinary tasks around an office.

"A. Yes, as long as she stays away from things she is sensitive to.

"Q. I am asking you about the condition in which you found her hands today—not attempting to describe what they will be in the future, but looking at the places as you saw them in September, and the condition in which you see them today, isn't it apparent to you that she could do the ordinary things around an office?

"A. Certainly."

By allowing permanent recovery in this case, the majority is overturning the Commission's finding on a question of fact. Our rule has always been to sustain the Commission's finding on a question of fact.

For the reasons stated, I respectfully dissent.

LAMAR BATH HOUSE *v.* MCCLOUD.

4-7880 193 S. W. 2d 809

Opinion delivered April 15, 1946.

Wootton, Land & Matthews, for appellant.

Ernest Maner, for appellee.

GRIFFIN SMITH, Chief Justice. Appellee is a masseur with fifteen years of experience, who received professional training at Cattlebery Institute in Chicago. June 28, 1944, he filed with Workmen's Compensation Commission a claim based upon injury occasioned by ". . . extensive use of hands . . . and use of alcohol, oils, etc., in treatment."

Substance of the testimony is that mineral oils, olive oil, cocoanut butter, and sometimes alcohol, were used as lubricants to prevent friction when a patient's body was massaged. Occasionally someone would ask for talc—a soft mineral in powdered form; a silicate of magnesium. It was not disputed that "good alcohol" was scarce, and that substitutes were frequently used. There was also testimony to the effect that it was quite difficult to procure high grade olive oil or cocoanut butter.

The Commission in its findings mentioned testimony of the claimant, who contended that for a period of two years before quitting his employment there were, at first, slight irritations, with gradual increase of discomfort and skin breakage, extending higher than the wrists. In an effort to remain at work appellee sometimes bandaged his hands to avoid the pain incident to contact with a patient's body. On at least two occasions appellee took short leaves, thinking rest would produce the relief he had otherwise been unable to find.

Dr. D. L. Cecil, a physician with the public health service at Hot Springs, testified that on his (Dr. Cecil's)

instructions McCloud was suspended because of the condition of his hands. The members ". . . were red from about the lower third of his arms to the ends of his fingers, [with] scaly eruptions." The same physician testified that the irritation was not of venereal origin or association.

Dr. Cecil, quoting from what he termed an authoritative text on diseases of the nature discussed, reached the conclusion that appellee was allergic to certain chemicals, or chemical components. Mention was made of "denaturing compounds" in alcohol. Dr. Cecil also testified that ". . . these allergic reactions are usually something a person acquires [and they ordinarily result in] lifetime reactions." Appellee was 65 years of age.

Appellant abstracts McCloud's testimony regarding efforts to procure relief through treatment by specialists. He went to Houston, Texas, and became the patient of Dr. Kirk. In consequence the eruptions virtually disappeared and it seemed probable a cure would follow. However, with resumption of the old occupation the malady recurred.

Appellant complains that the Commission based its award upon ". . . an accidental injury by trauma."

It is contended there is no testimony relating to accident, and that the award rests upon speculation and conjecture.

While it is true that the term "accidental injury" is used, yet in substance the claim with supporting testimony is that—due to the use of oils and other chemicals—there was a breaking down of what is sometimes spoken of as "skin," but more appropriately termed epidermis. Dr. Bernard S. Maloy's Medical Dictionary for Lawyers (1942) defines industrial dermatitis as "various types caused by substances used in the industries."

We agree with appellants that in the sense in which an accidental injury is ordinarily referred to, there was no specific time or segregated incident to which appellee

could point as marking the beginning of disability; nor could McCloud, with exactness, name the *thing* that in an operational way rendered his hands useless. But virtual professional uselessness did attend efforts to work even moderately, and the fact that irritation returned at such times created factual presumptions sufficient to require the Commission to take proof. Resulting evidence justified the finding that the use of one or more of the oils produced the crippling effects.

In Case No. 7881—*The Arkansas National Bank of Hot Springs et al.* v. *Jane Colbert, ante,* p. 1070, 193 S. W. 2d 806—decided as of this date—it is held that the Commission was without substantial evidence where it found that the claimant (a woman of advanced years handling coins containing nickel) was not incapacitated within the meaning of the Act.[1] In the instant case the findings were in favor of the claimant. We have repeatedly held that as to questions of fact determined by the Commission an award, or the refusal to make one, will not be disturbed if the action is supported by substantial evidence.

While the claimant thought of his trouble as traumatic, it would be a perversion of justice to say that a woman who acquired dermatitis through handling nickel coins (and upon whose contentions and evidence the Commission acted adversely)—it would be judicial quiddle to say that in circumstances like those shown in Case No. 7881 the claiming party might appeal to Circuit Court and procure relief, but that McCloud must be denied the Commission's findings merely because of differences in pleadings in matters not misleading.

If it be urged that appellee's susceptibility was unusual, and that the risk did not fall within the intent of subsection (1) of § 14 of the Compensation Act, ". . . the disease [must be] due to the nature of an occupation or process in which [claimant] was employed," answer is that the skin irritation with which McCloud is afflicted (in milder form) had been observed for many months and the employer had notice that disease threatened—

[1] Act 319 of 1939.

and presumptively because of the nature of appellee's occupation.

It is inconceivable that the legislature intended a worker should be compensated because of dermatitis—an ailment resulting from the disintegrating minutia flowing, falling or radiating from a coin, and that like relief should be denied an employe who acquired disability such as has been established, and that this denial be effectuated through what in law is characterized "contradictory pleadings," when in truth the contentions have been fully developed and there is substantial evidence.

Affirmed.

GUREIN *v.* STATE.

4404 193 S. W. 2d 997

Opinion delivered April 15, 1946.

Rehearing denied April 13, 1946.

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

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

Madison K. Moran, amici curiae.

SMITH, J. Appellants were jointly tried upon an information the material portions of which will be copied, and were found guilty, and each given a sentence of one

year in the penitentiary, and from those judgments is this appeal. The information charges the violation of Act 193, of the Acts of 1943, page 412, alleged to have been committed as follows: "The said defendants on the 15th day of September, 1945, in the Chickasawba District of Mississippi County, Arkansas, did unlawfully and with violence, force and threats prevent and/or attempt to prevent A. L. Cobb from engaging in the vocation of driving a bus, against the peace and dignity of the State of Arkansas."

Before the trial began objections were filed to the arraignment and trial of appellants, which motion, in effect, challenged the constitutionality of the act, for the alleged violation of which they were put on trial. Without waiving the objection, it was conceded that the constitutionality of the act was settled by the opinion in the case of *Smith and Brown* v. *State,* 207 Ark. 104, 179 S. W. 2d 185.

Objection was made to a trial before the petit jury, which had just been impaneled, on account of the report of the grand jury read in open court, and in their presence. This report recited that the grand jury had been in session only one day, and had examined no witnesses, and had found no indictments, but had inspected the courthouse and jail, and made a report on the condition of those institutions.

This report recited that: "This grand jury has had its attention called and has discussed the matter of frequent disturbances and the commission of misdemeanors as an outgrowth of union organization or strikes and find that frequently there are assaults and disturbances caused, such as rocks being thrown through windows or into crowded buses. We wish to recommend to the sheriff of this county that he make every effort to see that every such violation is investigated and the wrongdoer arrested and brought to trial."

This report made no reference to these appellants or any of them, and it does not appear that in impaneling the jury which tried appellants, any inquiry was made as

to whether any prejudice had been engendered by hearing the report read.

A demurrer to the information was filed upon the ground that the "defendants are not reasonably apprized of what offense, if any, they stand charged." The basis of the demurrer is that the information charges disjunctively and not conjunctively the commission of the separate offenses of preventing and attempting to prevent a person from engaging in a lawful occupation. Another objection to the information is that it was not alleged that Cobb was prevented from engaging in a lawful vocation.

Answering the last objection first, it may be said that the information does charge that the appellants "did unlawfully and with violence, force and threats prevent and/or attempt to prevent A. L. Cobb from engaging in the vocation of driving a bus." Driving a bus is, of course, a lawful occupation, and alleging it to be so would be merely to state an obvious fact of which judicial notice may be taken.

A more serious question is that the information alleged that the defendants did "prevent and/or attempt to prevent" Cobb from engaging in a lawful vocation. Section 1, of Act 193, provides that: "It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this state."

It is therefore unlawful to prevent, or to attempt to prevent, any person by force or violence, or threats, from engaging in a lawful vocation, and inasmuch as the offense might be committed either by preventing, or by attempting to prevent a person from engaging in a lawful vocation, it was erroneous to charge these offenses disjunctively, although it is conceded that the offenses could have been properly charged conjunctively. The case of *Trout* v. *State,* 177 Ark. 1029, 9 S. W. 2d 237, is cited to support this contention, it being there stated that the general rule is that where a statute makes it a crime to

do any one of several things mentioned disjunctively, all of which are punished alike, the whole may be charged conjunctively, as a single offense, but that disjunctive allegations render a judgment of conviction invalid, for the reason that the accused is entitled to know certainly with what offense he is charged and to have the offense so charged that, upon acquittal or conviction, he may plead the same in bar of a subsequent prosecution for the same offense and establish his plea by the production of the former record.

Since the rendition of that opinion, there was adopted by the electors at the 1936* general election, Initiated Act No. III, entitled: "An Act to Amend, Modify and Improve Judicial Procedure, and the Criminal Law, and for Other Purposes." This act made numerous changes in the pleadings and procedure previously prevailing in the trial of criminal cases. Section 22 of that act entitled, "Contents of Indictments," provides in the last paragraph of that section that: "The State, upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction." If therefore the defendants had been of the opinion that the information was uncertain as to the offense charged, they had the right to request a bill of particulars to advise whether they were charged with preventing, or only with attempting to prevent a person from doing a lawful act. This they did not do; had they done so, the objection as to the indefiniteness could have been met by the simple expedient of striking out the word "or" appearing in the phrase "and/or."

Numerous cases are cited criticizing the use of this phrase "and/or" in either civil or criminal pleadings, the most temperate of the criticisms being that it is slovenly pleading. But the use of this phrase, which we too condemn, does not so far render the information meaningless as to require us to sustain a motion filed in arrest of the judgment upon the ground that the information did not charge a public offense. It was held in

* Acts 1937, p. 1384.

the case of *Williams* v. *State,* 99 Ark. 149, 137 S. W. 927, Ann. Cas. 1913A, 1056, that: "To carry out the general purpose and intent of a statute, either civil or criminal, the words 'and' and 'or' are convertible." The holding in the case of *Clark* v. *State,* 155 Ark. 16, 243 S. W. 865, is to the same effect. Having failed to ask for a bill of particulars, we think the right was waived to question the sufficiency of the information, inasmuch as it avers that appellants violated Act 193 by preventing and attempting to prevent Cobb from following a lawful vocation.

The testimony developed the fact that appellants were on strike against their former employer, the Blytheville Coach Lines, engaged in operating passenger busses on and along the streets of the city of Blytheville. Their right to strike is not involved and is not questioned. They could work or not as they pleased. The question that is involved is their right to prevent another person, who does wish to work, by engaging in a lawful vocation, from doing so, by threats or violence, and Act 193 declares they do not have that right, and makes the doing or the attempt to do so a felony, and as has already been said, we held this legislation was constitutional in the case of *Smith and Brown* v. *State, supra.*

The point most strongly relied upon for the reversal of the judgment of conviction is that the testimony is insufficient to show a violation of Act 193. The determination of this question will require a review of the testimony at some length, but in its determination we must give the testimony tending to support the verdict its highest probative value, this being the applicable rule in all cases, civil or criminal, where the sufficiency of the testimony to support the jury's verdict is raised.

There is no question but that Cobb was severely beaten, the particulars of which will presently be stated. Now beating Cobb was, of course, a violation of the law, but did not constitute a violation of Act 193, unless it was done in preventing or attempting to prevent Cobb from

following a lawful vocation. Does the testimony show that this was done?

Cobb was assaulted shortly after the noon hour on Saturday, September 15, 1945. He was first employed and entered service as a bus driver on the morning of that day. None of the strikers knew him or had any previous grievance against him. It was shown that all five of the appellants had at one time or another, and from time to time, walked a "picket line," which was being maintained in front of the bus station from which busses departed and to which they returned in transporting passengers. The route of the bus line extended to the city limits, where the busses would back up and turn around and return through the city.

Cobb testified that in making what was probably his second round trip, he drove the bus to a street corner where Bennie Overton, one of the appellants, was standing as if he intended to board the bus, and Overton, pointing a finger, said to Cobb, "You had better get off that bus." A block or two further down the street Tapps and Gurein, two other appellants, got on the bus and rode to the end of the bus route, and while Cobb was leaning over cleaning his change box, all the passengers got off except Tapps and Gurein, who came up behind him, grabbed him by his legs and dragged him out of the car. Oakley, Collins and Overton, the three other appellants, were standing on the outside. Cobb was thrown to the ground, and all five men began striking, kicking and stamping him. Both his eyes were blackened, his face was bleeding, and one of his ribs was broken, and he testified that he was sore all over. As he was dragged from the bus, some of his nickels and dimes were scattered over the floor of the bus. He further testified that all five of the defendants assaulted, beat and kicked him, and continued to do so until a Mr. Huey compelled them to desist.

Tapps, after boarding the bus, did not get off at the corner of the street where he lived, and explained this failure by saying that he just got to talking and was in

no hurry, and rode to the end of the bus route. Collins and Oakley went to the scene of the difficulty in a taxi, but testified that they were not present when the difficulty occurred, and had no part in it. The assault was terminated by the intervention of J. O. Huey, an elderly gentleman, whose home is near the place where the bus makes its turn-around. While he was standing there appellant Bennie Overton, accompanied by two men he did not know, passed him and Overton called him aside and said to him, "If you see anything, you don't see it." He did not know how the altercation started, but testified that after the bus stopped he looked up and saw some fellows had grabbed the bus driver and were dragging him out of the door of the bus and five got on him, and he said, "Well we can't stand for that, five on one," and he asked them to stop. He called his son who lived near by, but did not appear until the affray was over. But his grandson, who was 14 years old, did appear and one of the men made a motion as if to strike the boy, and Mr. Huey said, "Don't do that, but come on if that is what you are looking for, but I am not going to stand for this." The witness was asked, "Mr. Huey, are these the five men (pointing to the five defendants)?" And he answered, "Yes, sir." He was asked, "How many of these five men were engaged in the assault?" He answered, "Them five." He was asked, "All five?" and he answered, "Yes, sir, they had him stretched out really going to it, pouring it on him."

Mr. Huey's grandson substantially corroborated the testimony of his grandfather, and when asked, "How many of the five men were in that fight," answered, "All of them." Son Fisher, a 15-year-old boy, testified to substantially the same effect, except that he saw only four men beating Cobb, and Collins was not one of them.

Appellants stress the point that no proof of threats was shown. This is one method by which Act 193 might be violated, but it is not required to show its violation that threats were made. If the jury found, and the testimony would support the finding, that a conspiracy existed to prevent Cobb from working, it might further have

been reasonably inferred and found that appellants had agreed upon what they would do and proceeded to do it without preliminaries, or any apportionment of the respective parts they would play.

Appellants all denied that they made any attempt to keep Cobb from working, and that the altercation which occurred was a mere fight between Cobb and Gurein, which began when Cobb, without provocation and without anything having been said, kicked Gurein, who fell down the steps of the bus.

Tapps testified that it was against the rules of the bus company to fight on the bus, and for that reason he pushed Cobb off the bus when Cobb started the fighting. When asked why he pushed Cobb off the bus to enforce the rule of the company against fighting on the bus, he did not stop Gurein from fighting, he answered, "It didn't make me no difference, he needed it." Question: "He needed it when he started driving the bus?" Answer: "He knows he did too."

As to the other three appellants, proof of an alibi was offered, this being to the effect that they were not present when the affray began, nor until after its conclusion, and that they had no part in it, and made no attempt whatever to prevent Cobb from pursuing his employment. They were corroborated by the testimony of a witness referred to as Clara, who was Overton's cousin, and who lived in a small house near the scene of the affray with her nephew and sister. She testified that Collins, Overton and Oakley were in her kitchen eating dinner when the affray began, and they heard the commotion and went to see what the trouble was about, and they saw two men fighting, but they did not know how the trouble started, or what the men were fighting about. Oakley testified that Collins invited him to dinner at Clara's, but Collins testified that he had not been personally acquainted with Clara previously.

As appears from what has been said, this testimony is in sharp conflict with that offered by the state, and it was the province of the jury to determine what testimony

should be believed. Evidently the jury did not believe, but disregarded, this testimony, tending to prove the alibi, and under the facts stated, we cannot say that it was arbitrary to have done so. If the testimony on the part of the state is true, and its truth was of course a question for the jury, the conclusion is warranted that appellants assaulted Cobb because they were striking while he was working, and that it was their purpose and intention to prevent him from doing so. On his cross-examination Tapps testified as follows: "(Cobb) being a scab driver was the cause of the trouble? A. Yes, sir. Q. That is the cause of the whole trouble? A. I suppose it was."

The cause was submitted to the jury under instructions of which no complaint is made.

Cobb was taken by his employer off the bus and put to work in the bus company's repair shop, and some days after the affray one of applellants, while walking the picket line with some others, pointed his finger at Cobb and said, "Look at him, he looks like a nigger." This incident, occurring after the affray, would ordinarily not have been competent, but in view of the defense interposed that appellants made no attempt by threats or otherwise to prevent Cobb from working, was admissible to refute that contention, and to show that appellants had been in fact endeavoring to keep Cobb from working. However, if admitting this testimony was erroneous, the error was invited. On his cross-examination Cobb was asked: "Q. Up to this good minute they haven't said a word to you about anything, that they never opened their mouths to you at any time on that bus or after?" Thereafter on his redirect examination, the statement objected to was elicited.

Tapps on his cross-examination testified, "After I quit I didn't like him. He was still scabbing," (by which it was meant that Cobb had taken the place of an employee who was out on strike). Tapps admitted further that "We asked him (Cobb) why he didn't come on out of there and act like a human?" This testimony, while objected to, was nevertheless competent to show that ap-

pellants were in fact endeavoring to prevent Cobb from continuing his employment, the culmination of that purpose being the assault upon him.

Objection was also made, and exception saved, to the action of the court in permitting Mr. Huey to testify that Bennie Overton said to him, "If you see anything you don't see it." In admitting this testimony and in overruling the objection made to it, the trial judge said, "The jury will be told that such is not admissible against any of the defendants not present at the time this conversation occurred, for any purpose, but only against the one there at the time." The significance of this remark cannot be mistaken. It could mean only that something was about to happen which Huey was not expected to see. The testimony was clearly competent and the only error committed by the court in admitting it was to limit its consideration against the appellant who made the remark. The law is that if a conspiracy exists to do an unlawful act, any and all acts of any one of the conspirators in furtherance of the conspiracy is admissible against all persons shown to be parties to the conspiracy.

In the case of *Butt* v. *State,* 81 Ark. 173, 98 S. W. 723, 118 Am. St. Rep. 42, it was said that "when a conspiracy has been shown, then the acts and declarations of one conspirator in furtherance of the common design may be shown as evidence against his associates." A headnote in that case reads as follows: "If the acts of two or more persons were aimed toward the accomplishment of some unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected, indicating a closeness of personal association, and a concurrence of sentiment, a conspiracy may be inferred, though no actual meeting among them to concert means is proved." See, also *Hearne* v. *State,* 121 Ark. 460, 181 S. W. 291; *Sims* v. *State,* 131 Ark. 185, 198 S. W. 883; *Housley* v. *State,* 143 Ark. 315, 220 S. W. 40; and *Moss and Clark* v. *State,* 194 Ark. 524, 108 S. W. 2d 782.

We conclude that the testimony supports the verdict of the jury, and as no prejudicial error appears, the judgment must be affirmed, and it is so ordered.

GRIFFIN SMITH, Chief Justice, and MINOR W. MILLWEE, J., concur in part and dissent in part. ROBINS, J., dissents.

The Chief Justice concurs in so much of the opinion as affirms the judgment as to Gurein and Tapps, but dissents from the holding that there was substantial testimony showing violation of Act 193 by Collins, Overton and Oakley.

ROBINS, J., dissenting. We are dealing here with a criminal statute. It denounces the use of violence, or the threat thereof, to prevent "any person from engaging in any lawful vocation within this state." It does not make felonious such violence or a threat thereof merely because the person committing the violence or making the threat is a striker and the one assaulted or threatened is a strikebreaker; but, before the law is violated, the purpose of such violence or of the threat thereof must be to prevent some person from engaging in his "lawful vocation."

As I read the record in this case there is no *proof* that the purpose of the violence was to cause Cobb, the prosecuting witness, to desist from his work. In order to find appellants guilty the jury must have presumed that the acts of violence done by appellants were committed with intent to prevent Cobb from working. But it could as well have been presumed that the assault on Cobb was the result of malice toward him because of his strikebreaking activities or enmity toward him for some other reason; and, if such was the motive, the acts of appellants amounted only to an unlawful assault and not to a violation of the statute invoked by the state. As was said by Judge WOOD in *Martin* v. *State,* 97 Ark. 212, 133 S. W. 598: "Between conflicting presumptions, that which is in favor of the innocence of the accused prevails."

In a prosecution for a felony the state could be required to prove all the material elements of the crime charged, and, in my opinion, this was not done in the instant case.

CITY OF HARRISON *v.* BRASWELL.

4-7904 194 S. W. 2d 12

Opinion delivered April 15, 1946.

Rehearing denied April 13, 1946.

J. Smith Henley, for appellant.

Virgil D. Willis, for appellee.

McHaney, Justice. Sometime in 1945, the date not being shown, the city council of the city of Harrison, a city of the second class, passed ordinance No. 371, entitled "An ordinance to provide for the health and safety of the inhabitants of the city of Harrison, Arkansas, by improving, enlarging, extending, repairing, altering, correcting and rebuilding the present water and sewer systems of said city; to authorize the issuance of water and sewer revenue bonds of said city, including the refunding of sewer revenue bonds of said city now outstanding; pledging water and sewer revenues for the payment of the bonds herein authorized; and declaring an emergency."

The preamble to the ordinance sets out a number of reasons for its enactment, some of them being, (a) that the city owns a debt-free waterworks system which is inadequate and is supplied by an inadequate water source, and that the council has determined the need of improving same, has caused plans and specifications to be made for such improvements, and that the cost thereof will be $140,000; (b) that it also owns a sewerage system which is inadequate, but on which it owes a balance of $97,000 in sewer 4 per cent. revenue bonds to the R. F. C., which has agreed to sell same to the city at a substantial discount and without accrued interest, a great saving to the city, and reciting the imperative need for enlarging and extending same, according to plans already made, at an estimated cost of $175,000, an amount sufficient to refund the R. F. C. debt and to make the improvements contemplated; and (c) that the council believes "the two improvements can be carried on as one project, although their respective costs can be separately determined and charged to each operation, but the city will receive a better offer for its bonds and will receive the advantage of a lower interest rate if it can sell the two issues to-

gether or join the two issues into a combined water and sewer revenue issue."

The ordinance contains 13 sections, the last being the emergency clause. The other sections provide (1) for the expansion of the existing waterworks system at an estimated cost of $140,000; (2) the improvement and extension of the existing sewer system at an estimated cost of $175,000, including the refunding of the debt to R. F. C.; (3) finding the value of the present water system to be $40,000, and of the improved system to be $180,000; (4) finding the present value of the sewer system to be $97,000, and of the proposed improvements to be $78,000, or a total value of $175,000, when improved; (5) appoints a water and sewer committee, naming them, to have charge of construction of improvements and of operations after completion for both projects. Section 7 provides for advertising the sale of bonds under three alternatives: "(1) a sale of water revenue bonds separately; (2) a sale of sewer revenue bonds separately; and (3) a sale of a joint issue of water and sewer revenue bonds." It provides the form of the advertisement, setting out the date of the proposed issues (May 1, 1945) and the maturities each year to 1975 for each alternative. It also provides for the following in the advertisement: "If separate revenue bonds are issued, they will be separately secured by a pledge of the revenues from the respective operations for which they are issued, but with the additional provision that the surplus in each operation will be pledged, if necessary, to meet any deficiency in the revenues of the other operation, and if the bonds are combined in a joint issue, then the revenues of the two operations will be treated as a single fund and will be pledged to the payment of the joint revenue issue."

Section 8 of the ordinance pledges the city to use, when necessary, any available net surplus revenue of either system to pay the bonds and interest of the other, or the whole net revenue if the two are combined, in accordance with said advertisement. Section 9 provides the city will pass the necessary ordinance or ordinances for the execution and delivery of the bonds, including the pledging of revenues of the systems, "the granting of

the statutory mortgage on the systems, with all the rights and remedies provided by the statutes for the enforcement and collection of revenue bonds," and will fix adequate rates for the services to pay said bonds and interest thereon, the reasonable expenses of the operation and maintenance of the plants, with provision for depreciation and replacement, which rates shall never be reduced while any of said bonds issued are outstanding, but may be increased, if necessary. Section 10 provides that all bonds issued "shall be payable solely from the revenues pledged—and shall not constitute an indebtedness of the city of Harrison within any constitutional or statutory limitation."

Appellee, a resident property owner, taxpayer and user of both the sewer and water systems of the city, brought this action to have said ordinance declared invalid and to enjoin its enforcement on several grounds, some of which will be hereinafter discussed. The city answered admitting the allegations relating to the status of appellant and that the water system of the city is debt free, that the sewer system owes $97,000, and that the above ordinance had been passed. It denied all allegations of invalidity of said ordinance. Further answering, the city set up certain affirmative defenses and prayed that the complaint be dismissed. Appellee demurred to said answer upon the ground that it did not state a defense to the complaint. The court sustained the demurrer, holding that said ordinance is unconstitutional and that the city should be restrained from proceeding under it. The city declined to plead further and its answer was dismissed. This appeal followed.

It appears to be conceded, and it must be admitted, that the city can make the proposed improvement to its debt-free waterworks system and issue $140,000 in revenue bonds payable solely from the net revenues from such system under the provisions of Act 131 of 1933, as amended by Acts 3, 96 and 107 of 1935 and Act 178 of 1943; and the same thing is true with reference to the sewer system under the provisions of Act 297 of 1937, that is, it can issue a combined series of refunding and new construction sewer revenue bonds to pay R. F. C. and

make the proposed improvements to the sewer system, payable solely out of the net revenues arising from the operation of the sewer system. *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5. A number of other cases have cited and followed the Jernigan case. See Shepards Arkansas citations.

Appellee contends, however, that the city of Harrison, while it has the power to pledge the net revenue from each system to the payment of the revenue bonds issued by each it does not have the power to pledge or to apply any surplus net revenue of one system to payment of the bonds of the other system. In other words, that if there be any surplus net revenue arising from the operation of the waterworks, the city may not use such surplus to pay bond obligations of the sewer system and *vice versa.* We cannot agree that this is true. A case in point to the contrary is *Johnson* v. *Dermott,* 189 Ark. 830, 75 S. W. 2d 243, where it was held that the city of Dermott might lawfully pledge and use "the profits derived from the operation of these plants" (water and light) as security for bonds issued to build a city hospital. Act 178 of 1943, which amends Act 131 of 1933, provides in § 1: ". . . ; and if a surplus shall exist in the bond and interest redemption account, the same may be applied by the legislative body in its discretion, subject to any limitations in the ordinance authorizing the issuance of bonds or in the trust indenture, (a) . . . ; (b) . . . ; (c) . . . ; or (d) to any other municipal purpose." We think this language authorizes the proposed pledge of net surplus of one system to pay the bonds of the other. It is well known that many municipalities use the surplus revenue arising from utilities owned and operated by them to finance many municipal purposes. We do not think the case of *Mathers* v. *Moss,* 202 Ark. 554, 151 S. W. 2d 660, relied on by appellee, is in point here. This decision was prior to Act 178 of 1943, hereinafter referred to, and supplied the authority the court said was lacking.

We are also of the opinion that the city may, if it so elects, combine the two systems and issue water and sewer revenue bonds with a pledge of the net revenue

of both as the sole security therefor. It must be borne in mind, however, that § 2 of said Act 178, which amends § 10 of said Act 131, as amended, provides that the value of the existing water system shall be declared and also the value of the property proposed to be constructed, and that the revenues from the entire system when completed shall be divided according to such values, "and that so much of the revenue as is in proportion to the value of such betterments and improvements as against the value of the previous existing plant as so determined, shall be set aside and used solely and only for the purpose of paying the revenue bonds issued for such betterments," together with costs of operation and depreciation, or shall provide that all or any part of the surplus in the bond and interest redemption account, as provided for in § 1, shall be used for the same purpose.

If the city can issue two separate series of revenue bonds and support each issue by a pledge of the surplus revenue for the other, as we have already held, we fail to see why the two proposed issues may not be combined into one issue with a pledge of the entire net revenue of both systems to support the revenue bonds issued for both. Nor does the fact that the water system improvements will be financed under the provisions of said Act 131, as amended, and the sewer system under said Act 297, affect the city's right and power to combine the two proposed issues into one. Both properties belong to the city, and it appears to be logical and reasonable to operate them as one project. A sanitary sewer system without water would be a total loss, and a water system without a sanitary sewer system would be impractical, if not entirely useless. So each complements or supplements the other. The demurrer admits that the combination of the two will effect substantial savings in costs of operation—clerical hire, collections of bills for service charges, office space, etc. Also, that the combined issue may be sold at a much lower rate of interest on its bonds, and for a better price than if sold separately. We see no constitutional or statutory objection to a combined issue.

Appellee argues that a pledge of the surplus revenues of one to pay the bonds of the other would be an

unlawful diversion of funds. We cannot agree. It must be remembered that we are not here dealing with the question of the power of the city to divert funds arising from taxation to a purpose other or different from that for which the tax was levied. Nor can it be said that the security of any creditor of the city is in any manner impaired. Payments by the users for the service rendered is not a tax within the meaning of the constitutional provision of art. 16, § 11.

We have several times held that the revenue bonds issued pursuant to the acts here involved payable solely from the revenues, do not constitute debts of the municipalities. *McCutcheon* v. *Siloam Springs, supra.*

Appellee also contends that said Ordinance No. 371 is unconstitutional because it contemplates the placing of a lien or mortgage on the debt-free water system, in violation of amendment No. 10. Appellant, the city, denies that it is its purpose to encumber the existing water system. The ordinance in § 9 does provide, among other things, for "the granting of the statutory mortgage on the systems, with all the rights and remedies provided by the statutes for the enforcement and collection of revenue bonds, . . ." This clause in the ordinance is, in effect, a mere repetition of the language used in § 7 of said Act 131, which provides: "There shall be and there is hereby created a statutory mortgage lien upon the water-works system so acquired or constructed from the proceeds of the bonds hereby authorized to be issued," etc. We construe this language to mean that the statutory mortgage lien shall extend to and cover only the new and additional betterments to the water system constructed with the funds allocated to this purpose, and that such lien does not cover the existing plant. In this view amendment No. 10 cannot be involved, as the city incurred no liability payable out of its revenues or existing property. *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223; *Jernigan* v. *Harris, supra.*

Other incidental questions have been argued, all of which we have carefully considered and find them without merit.

Our conclusion is that the court erred in sustaining the demurrer to the answer and in dismissing same. The decree is reversed, and the cause is remanded with directions to overrule the demurrer to the answer and for further proceedings not inconsistent with this opinion.

ED. F. MCFADDIN, Justice, dissenting. The majority holding is revolutionary! The reasons for my dissenting opinion:

1. The rule has always prevailed in Arkansas that a municipality possesses and can exercise only such powers as are granted in express words, or such powers as are necessarily implied from or incident to the powers expressly conferred, or such powers as are essential to the accomplishment of the declared objectives and purposes of the municipality. *Bennett* v. *City of Hope,* 204 Ark. 147, 161 S. W. 2d 186; *McGehee* v. *Williams,* 191 Ark. 643, 87 S. W. 2d 46; *Cumnock* v. *Little Rock,* 154 Ark. 471, 243 S. W. 57, 25 A. L. R. 608; *Argenta* v. *Keith,* 130 Ark. 334, 197 S. W. 686, L. R. A. 1918B, 888; *Merrill* v. *Van Buren,* 125 Ark. 248, 188 S. W. 537; *LaPrairie* v. *City of Hot Springs,* 124 Ark. 346, 187 S. W. 442; *Willis* v. *City of Fort Smith,* 121 Ark. 606, 182 S. W. 275; and *Bain* v. *Fort Smith Light & Tr. Co.,* 116 Ark. 125, 172 S. W. 843, L. R. A. 1915D, 1021. See, also, 37 Am. Juris. 722.

There is no statute in Arkansas that allows a municipality to combine water improvement bonds with sewer refunding and improvement bonds. So, the majority, in allowing the City of Harrison to so combine its bond issues, is giving the City of Harrison a power that the Legislature has never granted. That the majority is doing this very thing is shown by the following quotation from the majority opinion: "We are also of the opinion that the city may, if it so elects, combine the two systems, and issue water and sewer revenue bonds with a pledge of the net revenue of both as the sole security therefor."

The Legislature has always kept water works bonds separate and distinct from sewer system bonds. Witness the fact that Act 131 of 1933 refers to water works

and Act 132 of 1933 refers to sewage systems. If the Legislature had intended for the two systems to be combined, it would have passed one act instead of two. Witness also the fact that in the various amendments to Act 131 of 1933 (some of such amendments are: Acts 3, 96 and 107 of 1935; Act 135 of 1939; and Act 178 of 1943) the water works act was kept separate from the sewage act. Witness also the fact that Act 297 of 1937 (which is the revenue bond refunding act) specifically preserves the distinction between Act 131 of 1933 and Act 132 of 1933. Thus, I submit that the majority is allowing the city to combine separate systems into one bond issue, in entire disregard of the legislative effort to keep the systems separate.

2. There is no statute in Arkansas allowing a city to pledge a debt-free water works system to secure an already existing bond issue on the sewer system, yet that is exactly what the majority is permitting the City of Harrison to do in the case at bar. As long as the water works system remained debt-free (or bonded only for its own improvements under Act 131 of 1933, and amendments there) then the city would have available a source of revenue to meet its other municipal requirements, under Amendment No. 10. Now, the majority is permitting that source of revenue to be mortgaged away to secure defaulted sewer bonds.

3. To sustain the pledge of excess net revenues of the water system to pay the sewer bonds, the majority cites the case of *Johnson* v. *Dermott,* 189 Ark. 830, 75 S. W. 2d 243. But the situation existing in the reported case does not exist in the case at bar. The net revenue of the Dermott Water Works went into the general revenue of the city and was expended therefrom. In holding that the City of Dermott might pledge the excess revenue from the water works system, we said: "But this power may not be exercised in violation of Amendment 10 to the Constitution. Any contract which the city makes in regard to uncollected revenues from any source must be construed with reference to this amendment. Parties cannot, by pleadings or stipulations of any kind, abro-

gate this amendment which will be read into any contract which the city may make."

In the case at bar the revenue from the water works will be pledged first to secure the $140,000 of revenue bonds, and the excess net revenue from the water works, when pledged over against the sewer bonds, must be governed by Amendment 10 to the Constitution, even under the case of *Johnson* v. *Dermott, supra,* relied on by the majority.

Furthermore, the case of *Johnson* v. *Dermott*—in so far as it allowed the City of Dermott to pledge the net excess of water works revenue as security for the hospital bonds—has been considerably weakened by the later case of *Mathers* v. *Moss,* 202 Ark. 554, 151 S. W. 2d 660. In that case we held that the revenues from the water system could not be devoted or appropriated to the payment of the cost of operation of the sewer system. Hence the language: "Act 132 of 1933, appearing as §§ 9977, *et seq.,* Pope's Digest, contemplates that revenue bonds authorized to construct sewers will be paid from the revenues derived from that service. Likewise, act 131 of 1933, appearing as §§ 10001, *et seq.,* Pope's Digest, contemplates that the revenue bonds authorized to construct waterworks shall be paid from the revenues derived from that system. There is nothing in either act which authorizes any part of the revenues derived from one system to be devoted and appropriated to pay the cost of construction or operation of the other."

This quoted language says that the revenues from one system are not authorized to be devoted or appropriated to the cost of the operation of the other system; and yet in the face of this quoted language the majority is granting the City of Harrison a right that was denied the City of Dumas in the reported case.

4. Finally, the majority says that Act 178 of 1943 "authorizes the proposed pledge of net surplus of one system to pay the bonds of the other," and cites that act as changing the rule of *Mathers* v. *Moss, supra.* Act 178 of 1943 clearly states that the determination of excess

revenue should be made *each year*. The act uses the expressions as, (a) "during the remainder of the fiscal year then current," (b) "during the fiscal year then next ensuing," (c) "during the then next present fiscal year," (d) "the next ensuing fiscal year," and other similar expressions which, beyond the peradventure of a doubt, show that the determination of whether there is a net surplus, must be made on a yearly survey; and that it is only after such annual determination has been made for *the then existing fiscal year and next ensuing fiscal year,* that any part of the net surplus from the water works can be used for any purpose except the retirement of the bonds. In the face of this language in Act 178, the majority in the case at bar is allowing the present city council of Harrison to make a determination *now* that will pledge all the excess revenues, and bind all succeeding councils for *the next thirty years*—since the bonds proposed to be issued have a final maturity extending for thirty years. I submit that Act 178 of 1943 does not reasonably admit of the interpretation given it by the majority.

For these reasons, I respectfully dissent.

GRIFFIN SMITH, Chief Justice, dissenting. Express provisions of Pope's Digest, § 10005—the so-called Water Act—are that bonds ". . . shall be payable solely from revenues derived from the waterworks system." Section eight of Act 297 (Pope's Digest, § 11358) carries the provision that bonds ". . . shall be payable from and secured by a lien upon the revenues of the enterprise." It is my view that if effect is given these enactments the obligation to pay bonds binds only revenues arising from the particular system the securities are issued to finance.

The majority opinion in the appeal before us appears to rest upon the precarious proposition that if the city wishes to accomplish a purpose thought to be desirable by those who have acted officially, the result should not be impaired for want of legal authority.

Johnson v. *Dermott,* 189 Ark. 830, 75 S. W. 2d 243, held that the municipality might pledge profits earned

by a water and light system and thereby secure bonds sold for the purpose of building a city hospital, and this case is cited by the majority. But there the bonds were not issued under provisions of a statute. Effect of the decision was to say that Dermott had power to take the questioned action regardless of the General Assembly's failure to legislate in that respect, conditioned that Amendment No. 10 should not be invaded.

The City of Harrison-Braswell opinion says that Act 178 of 1943, amending Act 131 of 1933, permits a city council to authorize application of net surpluses to any municipal purpose. I think there is a fundamental distinction between *applying* excess funds as a matter of administration, and in *pledging* such revenues. In the first case the money is used at the instance of the council as necessity may from time to time require; but where there is an irrevocable pledge, as proposed here, *all* surpluses are tied to the transaction consummated by the pledging council. No future administration may touch the fund, or interfere with what its predecessor has done.

Certainly there is nothing in Act 132 of 1933, (the Sewer Act) or in Act 297 of 1937, authorizing a pledge of surplus funds for the payment of securities issued by a water system; nor does Act 178 of 1943 appear to have contemplated that result. Neither was it loosely written with the idea that an avenue of entry could be found by resort to "construction" or implication, judicially invoked.

The majority says that Act 178 of 1943—this being an amendment to the Water Act of 1933—provides in Section 1 that ". . . if a surplus shall exist in the bond and interest redemption account, the same may be applied . . . to any other municipal purpose."[1] This statement is followed by the expression: "We think this language authorizes the proposed pledge of net surplus of one system to pay the bonds of another."

This is a transposition or transportation of language so much clearer to the majority than it is to me that, in

[1] There is no similar provision in Act 297 of 1937 or any other act.

attempting to follow its lead, I feel more secure in hesitating where the law has stopped, and beyond which there does not appear a tangible implication. Indeed, to concur in the result would require acquiescence in an operation sometimes spoken of as engraftation; for, after holding that surplus funds from the sewer system may be pledged as security for water bonds, the opinion applies a parity process and creates a community of interest when it says: "If the city can issue two separate series of revenue bonds and support each issue by a pledge of the *surplus* revenue for the other, we fail to see why the two proposed issues may not be combined into one issue with a pledge of the *entire net revenue* of both systems to support the revenue bonds issued for both."

The primary difficulty would seem to be that neither statute contains such a provision.

In holding that contracts such as the one now being approved are not in violation of Amendment No. 10 it is said that prior decisions sustain the point. The cases cited were decided before Acts 131 and 132 of 1933 were passed. The Dermott decision was the court's construction of the law *after* the 1933 legislation became effective. Mr. Justice BUTLER, speaking for the court regarding excess revenues arising from operation of the water and light systems, said:

"But this power must not be exercised in violation of Amendment No. 10 to the Constitution. Any contract which the city makes in regard to uncollected revenues from any source must be construed with reference to this amendment. . . . This amendment [provides that] no allowance shall be made 'for any purpose whatsoever in excess of the revenues from all sources for the fiscal year in which said contract or allowance is made.' Beyond this inhibition there is a lack of power to contract."

The Dermott case was heard on demurrer. It admitted that the city would not exceed its budget through use of revenues in the manner they were sought to be applied.

SKELLY OIL COMPANY *v.* JOHNSON.

4-7843 194 S. W. 2d 425

Opinion delivered April 15, 1946.

Rehearing denied June 10, 1946.

[redacted]

J. E. Gaughan, A. R. Cheatham, S. E. Gilliam, C. E. Wright, J. K. Mahony, Harry Crumpler, H. S. Yocum, Emon A. Mahony and *A. F. House,* for appellant.

McRae & Tompkins and *McKay & Anderson,* for appellees.

Ed. F. McFaddin, Justice. This appeal involves the title to the surface and to the minerals of three 40-acre tracts in Columbia county. Even though the tracts are contiguous, there are different matters concerning the title of each; so it will make for clarity to consider each tract separately.

Tract No. 1—SE¼, NW¼, Sec. 35

Before detailing the onset and result of the litigation in the chancery court, and before considering the questions here at issue, we will give, by numbered paragraphs, the history of the title of this tract up to the trial in the chancery court.

Title History of Tract No. 1.

1. Calvin Mower is the common source of title, to both the surface and the minerals. On November 1, 1918, Mower conveyed the surface and the minerals to Frank Doss by warranty deed, with a vendor's lien reserved by Mower, in the deed, to secure the balance of the pur-

chase money. This balance was evidenced by a series of eleven notes, each for a different amount, due serially and annually on November 1st of each year 1919 to 1929, inclusive. The notes (but not the deed) provided that failure to pay any note at maturity would mature the entire series. The deed from Mower to Doss was duly recorded on December 6, 1918.

2. On April 4, 1921, Doss executed a deed purporting to convey to F. K. Couch an undivided one-half interest in and to all oil, gas and other minerals in and under the land. This deed was duly recorded on April 5, 1921, and is referred to herein as "the Couch mineral claim." F. K. Couch died intestate in 1937, and his widow and heirs are parties to this litigation. In 1941, they executed oil and gas leases to S. G. Jean, who in turn assigned the leases to Skelly Oil Company. Jean and Skelly Oil Company are parties to this litigation.

3. On May 24, 1921, Doss executed a deed purporting to convey to F. W. Henker an undivided one-half interest in and to all oil, gas and other minerals in and under the land. This deed was duly recorded on July 7, 1921. Henker has made partial conveyance of some of his mineral interests to Birnbach. Both Henker and Birnbach are parties to this litigation; and their claim is hereinafter referred to as "the Henker-Birnbach mineral claim."

4. On August 24, 1921, Doss executed a deed purporting to convey to Miss Bettie McMorella an undivided 39/40ths interest in and to all oil, gas and other minerals in and under the land. This deed was duly recorded on August 27, 1921. Again, on September 3, 1921, Doss executed a deed purporting to convey to Miss Bettie McMorella an undivided 19/40ths interest in and to all oil, gas and other minerals in and under the land; and this deed was duly recorded on September 3, 1921. On February 21, 1944, Miss Bettie McMorella conveyed to C. M. Crumpler all her right, title and interest in and to the oil, gas and other minerals in and under this land. Miss McMorella and C. M. Crumpler are both parties to this

litigation and their claim is referred to hereinafter as "the McMorella-Crumpler claim."

5. Some time prior to October, 1923, Calvin Mower filed suit against Frank Doss, in the Columbia chancery court, to foreclose the vendor's lien retained in the deed from Mower to Doss as mentioned in paragraph 1, *supra.* Frank Doss was the sole defendant in that suit. No grantee from Doss was made a party. The decree of October 23, 1923, recites that eight of the original vendor's lien notes were filed in the cause. It will be recalled that there were originally *eleven* of these notes. At the foreclosure sale, under the decree, the lands were purchased by Mower for the amount of the eight notes as stated in the decree. The sale was reported to, and approved by, the court; and Mower received, on January 29, 1924, the duly approved commissioner's deed, which was duly recorded on May 2, 1924. There is nothing in the record before us to show that any *lis pendens* notice was ever filed showing this foreclosure proceeding.

6. Some time prior to October, 1927, Calvin Mower departed this life, testate, a resident of the State of Illinois. His will was recorded in Columbia county, Arkansas, in 1928. His widow, as beneficiary under the will, executed a general warranty deed dated June 12, 1929, purporting to convey the lands to Clarendon Mower. This deed neither excepted nor mentioned the minerals, and was duly recorded on January 7, 1930.

7. On January 29, 1930, Clarendon Mower executed a general warranty deed to Camille Lombardo, purporting to convey tract No. 1, and neither mentioning nor reserving the minerals. This deed was not recorded until August 19, 1939; and the delay in recording is worthy of note. On February 14, 1945, S. G. Jean (one of the parties to this litigation, as previously mentioned) obtained a quitclaim deed from Camille Lombardo, which deed was duly recorded on March 2, 1945. The claim of Jean under this deed is called "the Lombardo claim."

8. The minerals were never separately assessed until 1935, when Miss Bettie McMorella assessed a part of the minerals in her name; and she has paid the taxes

for such minerals, so assessed, each year from 1935 through 1944. The taxes on the land were regularly paid through 1929, but the state and county taxes were unpaid and delinquent on this land for 1930; and at the collector's delinquent tax sale, held on June 8, 1931, R. S. Foster purchased the land for the delinquent taxes of 1930. Foster received and recorded, on June 15, 1933, a clerk's tax deed, purchasing, and holding title, for Foster-Grayson Lumber Co., a partnership composed of Foster, Grayson and Lee, each of whom is a party to this litigation. The claim of this partnership (under this tax sale, tax deed, possession, and the instrument mentioned in paragraph No. 9, next below) is referred to herein as "the Foster-Grayson claim"; and the partnership and its members will be referred to as "Foster-Grayson."

9. On July 5, 1935, Clarendon Mower (the grantor in the deed to Camille Lombardo mentioned in paragraph No. 7 above) executed a quitclaim deed to Foster-Grayson; but the correspondence between Mower and Foster-Grayson shows that Mower at all times informed Foster-Grayson that Mower had previously conveyed away all of his interest in this land.

10. In April, 1936, Foster-Grayson, as first parties, contracted to sell to I. C. Johnson the land herein, "excepting and reserving to first parties and heirs and assigns an undivided one-half interest in all oil, gas and mineral rights in said land . . ." Johnson immediately went into possession of the land, and has so remained; and, having paid in full the contract price, Johnson received from Foster-Grayson a quitclaim deed on April 24, 1943, purporting to convey the land, but with the same reservation of oil, gas and minerals as recited in the contract, and as just quoted. This quitclaim deed was duly recorded on January 12, 1945; and on the same date Johnson and wife executed to J. B. Warmack an oil and gas lease on the half of the minerals claimed by Johnson. Warmack is a party to this litigation, along with Johnson and wife; and their mineral claim is called "the Johnson mineral claim." Johnson's claim to the surface is called "the Johnson surface claim."

This Litigation

The above is a chronological history of the title. Now, for the onset and result of the litigation, which we give in lettered paragraphs.

A. On January 24, 1945, Johnson and wife and Warmack filed suit in Columbia chancery court, claiming that Johnson owned all the surface and one-half of the minerals of this tract of land, and that Warmack was the lessee of Johnson on the minerals. Plaintiffs claimed title beginning with the 1931 tax sale and clerk's tax deed to Foster-Grayson (mentioned in title history, paragraph No. 8), the quitclaim deed of Clarendon Mower to Foster-Grayson (mentioned in title history, paragraph No. 9), the contract and deed from Foster-Grayson to Johnson (mentioned in title history, paragraph No. 10), and the continued adverse, etc., possession of Johnson from 1936 to the filing of the suit. Claiming that Foster-Grayson owned the remaining one-half interest of minerals in this land, plaintiffs prayed that the following claims be canceled as clouds on the plaintiff's title, to-wit: the Couch mineral claim and the Skelly lease referred to in title history, paragraph No. 2, *supra;* the Henker-Birnbach mineral claim referred to in title history, paragraph No. 3, *supra;* the McMorella-Crumpler mineral claim referred to in title history, paragraph No. 4, *supra;* the Lombardo claim as referred to in title history, paragraph No. 7, *supra.*

B. Foster-Grayson intervened and set up title to the half of the minerals reserved in the deed to Johnson, claiming the said minerals by the same chain of title as deraigned by Johnson and Warmack; and Foster-Grayson sought relief against the same parties as prayed by Johnson and Warmack.

C. In appropriate pleadings, the defendants named in the complaint and intervention (*i.e.,* Couch claim, Henkler-Birnbach claim, McMorella-Crumpler claim, and Lombardo claim) set up their respective claims and defenses which we will not detail here, as these will be discussed in this opinion.

D. A trial in the chancery court resulted in a decree awarding the plaintiffs and interveners the full relief sought; and each and all of the defendants have appealed. All appellants united in one abstract; and then each filed a separate brief. Also, there is the issue between the McMorella-Crumpler claim as against the Couch mineral claim and the Skelly Oil Co. leases.

Opinion

We now proceed to dispose of the questions concerning this tract in six Roman-numbered topic headings as follows: I—Effect of mineral deeds by Doss. II—Effect of, and result from, Mower's omission to make the record-title claimants as parties to the 1923 foreclosure suit. III—The 1931 tax sale for the delinquent taxes of 1930. IV—The quitclaim deed from Clarendon Mower to Foster-Grayson. V—The asserted right of the junior title claimants to yet redeem from the 1923 foreclosure. VI—The McMorella claim v. the Couch claim.

I. *Effect of Mineral Deeds by Doss.* We start with the surface and mineral interests united in Mower when he conveyed to Doss in 1918. In 1921, Doss executed various mineral deeds to Couch, Henkler, and McMorella, conveying all of the minerals. In fact, on the face of the record, these mineral conveyances covered 98/40ths of the minerals, but this overselling will be mentioned later. The effect of these mineral deeds being placed of record was to constitute a constructive severance of the minerals from the surface and to make two titles: one, the surface, and the other the mineral title. There is both legislative and judicial recognition of such constructive severance. Section 13600, Pope's Digest, recognizes that a conveyance of minerals—as distinguished from the surface—constitutes a constructive severance from the surface of such conveyed minerals; and a tax sale of the surface (land) does not carry the minerals. This court in a long line of cases has recognized and declared the rule of constructive severance of the minerals from the surface. One such case is *Huffman* v. *Henderson Co.*, 184 Ark. 278, 42 S. W. 2d 221. In that case we said:

"We have held, . . . that a conveyance of the mineral or the timber rights, or a reservation of such rights in a deed conveying the surface rights, creates, in one case and reserves in the other, a separate estate, and the statutes quoted (§§ 9855 and 9856, Crawford & Moses' Digest) make this estate separately taxable. *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 46, 254 S. W. 345, 29 A. L. R. 578; *Claybrooke* v. *Barnes,* 160 Ark. 678, 22 S. W. 2d 390, 67 A. L. R. 1436."

It is therefore clear that when the mineral deeds executed by Doss were placed of record, such recordation constituted a constructive severance of the minerals from the surface.

II. *Effect of, and Results from Mower's Omission to Make the Record-Title Claimants as Parties to the 1923 Foreclosure Suit.* When Mower conveyed the entire surface and mineral title to Doss in 1918, Mower reserved a vendor's lien for the payment of the balance of the purchase money. In 1921, Doss executed the mineral deeds to Couch, Henker and McMorella. The holders of these mineral deeds were junior title claimants to Mower. In some cases such persons are called "junior lienors"; but the more apt expression is "junior title claimants." When Mower foreclosed he failed to make these junior title claimants as parties to the suit. They therefore had a right to redeem their respective mineral interests from the foreclosure sale, just as a junior lienor has such a right to redeem when omitted from the foreclosure suit of the senior lienor.

We have held that when a senior mortgagor fails to make a junior mortgagor a party to the foreclosure suit, the junior mortgagor has the "right to redeem." One of our cases so holding is *Dickinson* v. *Duckworth,* 74 Ark. 138, 85 S. W. 82, 4 Ann. Cas. 846. In that case the appellee, Duckworth, had failed to make the appellants (Dickinson and Sikes) parties to the foreclosure suit. The question arose as to what were the rights of the said appellants, who were junior lienors. Mr. Justice McCulloch, speaking for this court, said:

"It must be conceded that appellants were necessary parties to the foreclosure suit under which appellee Duckworth obtained title, and their rights in the property were not cut off by the sale. Having been omitted from the foreclosure proceedings, what remedy, therefore, remained to them in the assertion of their rights? A right merely to redeem from the lien which had been foreclosed, upon the payment of the debt, or the right to require a foreclosure order and a sale thereunder? While there is some conflict in the authorities, we think that by the decided weight of authority it is settled that a subsequent lienor, or holder of the equity of redemption, after foreclosure against the original mortgagor, can only claim the right to redeem, where he has been omitted from the foreclosure suit. Wiltsie, Mortg. Foreclosures, § 160; *Wiley* v. *Ewing,* 47 Ala. 418; *Corpentier* v. *Brenham,* 40 Cal. 221; *Hodgen* v. *Guttery,* 58 Ill. 431; *Gower* v. *Winchester,* 33 Iowa 303."

The rule of *Dickinson* v. *Duckworth* has been applied in *Longino* v. *Ball-Warren Comm. Co.,* 84 Ark. 521, 106 S. W. 682; *Harrison* v. *Bank of Fordyce,* 178 Ark. 760, 12 S. W. 2d 400; and *Foster* v. *Taylor,* 187 Ark. 172, 58 S. W. 2d 675. Likewise, we have held that when the subsequent grantee of the mortgagor is not made a party to the foreclosure proceedings brought by the senior mortgagee, then such subsequent grantee has a right to redeem. *Purcell* v. *Gann,* 113 Ark. 332, 168 S. W. 1102; *Prouty* v. *Guaranty Loan & Trust Co.,* 174 Ark. 19, 294 S. W. 362.

This rule of "right to redeem" was applied to a junior mineral claimant in the case of *Rowland* v. *Griffin,* 179 Ark. 421, 16 S. W. 2d 457, which presented a situation most similar to the case here. In *Rowland* v. *Griffin* the facts were: In 1920, Alderson and wife, as owners, executed a mortgage to Rowland, which was promptly recorded; in 1921, Alderson and wife executed to Griffin a deed for ⅛th of all minerals, and the mineral deed was promptly recorded; in 1923, Rowland foreclosed his mortgage, but failed to make Griffin a party to the foreclosure suit; Rowland purchased at the foreclosure

sale and obtained a deed; in 1926, Griffin instituted suit against Rowland to redeem his mineral interest. This court held that Griffin had a right to redeem, and had not lost the right by laches in that case. The opinion by Mr. Justice Wood is lucid and scholarly.

In the case at bar, it is clear that the only effect of the omission of the mineral claimants from the 1923 foreclosure suit was to give such omitted junior title claimants the right to redeem. The difficulty arises when we are called on to say for how long a time this right to redeem continued to exist. We have no statute covering this specific right to redeem, and our cases say that equity will allow redemption "within a reasonable time." What is "reasonable" depends on the pleas interposed, and the facts and equities in each case. If a junior title claimant had actual knowledge of the foreclosure proceedings and thereafter suffered a change of circumstances to occur, then, on a plea of laches, a short period might be reasonable. In *Rowland* v. *Griffin, supra,* there was a plea of laches, but the junior title claimant showed that he had no knowledge of the foreclosure proceedings; and knowledge or notice is sometimes an ingredient to the plea of laches. 21 C. J. 210.

In the case at bar, there are no facts showing laches. At the time of the trial there was a producing well offsetting this land, but there was never any oil activity of consequence on or near this land until after 1943. In the absence of circumstances supporting a plea of laches, we think the equitable rule of stale demand would afford the best guide for determining a reasonable time, in the event that the senior mortgagee resists redemption. In 21 C. J. 211 it is stated:

"A stale demand or claim in its proper sense is one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length . . . as to create a presumption . . . that it has been abandoned. . . . It is an inherent doctrine of jurisprudence that nothing less than conscience, good faith, or reasonable diligence can call courts of equity into activity, and they will not grant aid to a

litigant who has negligently slept on his rights and suffered his demand to become stale, where injustice would be done by granting the relief asked." See *Davis* v. *Harrell,* 101 Ark. 230, 142 S. W. 156; and *Hill* v. *Wade,* 155 Ark. 490, 244 S. W. 743. See, also, 30 C. J. S. 521. A junior title claimant cannot close his eyes and ears for an indefinite time and thereby be heard to say that he never knew of the foreclosure and so did not have to exercise his right to redeem.

In the light of this principle of stale demand, let us examine the facts here: in the deed from Mower to Doss the eleven notes were listed as due serially and annually, from November 1, 1919, to and including November 1, 1929. There was no provision in the recorded deed stating that the maturity of the notes could be accelerated by failure of Doss to make any payment. If any of the junior title claimants had examined the record, such a one could have presumed that the Mower deed would not be totally past due until November 2, 1929, and that the last of the mortgage notes would not be barred by limitations until November 2, 1934; but by November 2, 1934, if no marginal indorsement had been made, or if no suit had been filed, then the deed of Mower would have been apparently barred by limitations. So a junior title claimant purchasing the mineral deed from Doss before the foreclosure could reasonably have presumed from the record that such purchaser would, until November 2, 1934, be in danger of foreclosure by Mower. It seems that in analogy to the period of limitation of Mower's right to foreclose, the junior title claimants could not claim a right of redemption from the senior claim of Mower for a period of time longer than the greatest extent of the period of limitation of the senior claim of Mower as shown by the record when the junior title claimants received their deeds. This is applying the rule of stale demand in analogy to the period of limitations allowing the senior mortgagee to act as disclosed from the face of the record when the junior title claimants acquired their interest. This seems equitable, since equity, in applying stale demand, frequently does so in analogy to the statute of limitations. 21 C. J. 251, and 19 Am. Juris

345. We therefore hold that under the facts in this case the junior title claimants had a right of redemption until November 2, 1934. In other words, Mower, by his foreclosure, set in operation against the junior title claimants the running of the equitable principle of stale demand, and the junior title claimants had until November 2, 1934, to exercise the "right to redeem"; and until that time their mineral interests would not have been lost to Mower under his foreclosure and their failure to redeem.

In stating that the junior title claimants would have lost their interest to Mower on November 2, 1934, we are not giving any weight to the holdings of the Louisiana Supreme Court to the effect that a mineral estate is a mere servitude to the surface estate, and may be lost by non-user. Such a Louisiana case is *Frost-Johnson Lumber Co.* v. *Sallings,* 150 La. 756, 91 So. 207. Our holdings are entirely contrary to the Louisiana holdings on this point. As stated by Chief Justice McCulloch in *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578, we hold that a mineral estate is not a mere servitude, but is a separate estate and may exist in perpetuity and "is not lost by non-user nor by adverse occupancy of the owner of the surface under the same claim of title, and that the statute can only be set in motion by an adverse use of the mineral rights, persisted in and continued for the statutory period." Minerals constructively severed are subject to separate sale for taxes. See § 13600, Pope's Digest. We are not weakening the holding in *Bodcaw Lumber Co.* v. *Goode, supra,* and other similar cases, when we hold, as we do here, that a junior title claimant may lose his right and title by failure to exercise his right to redeem within a reasonable time.

Now, all this discussion, about when the junior title claimants, in the case at bar, would have lost their right to redeem, is only for the purpose of showing that the right to redeem had not been lost at the time of the tax sale in 1931 or the tax deed in 1933 as discussed in section III, *infra.* As between the junior title claimants herein and Jean (the holder of the Mower title), there is a stipu-

lation concerning redemption as shown in section V, herein. The learned chancellor, in rendering the decree herein, was of the opinion that the tax sale in 1931 carried the mineral interest of the junior title claimants; and we have dwelt at length on this point to demonstrate that the minerals were still constructively severed from the soil until several years after the 1931 tax sale.

We may, therefore, sum up the points, on the effects of and results from Mower's omission to make the record title claimants parties to the 1923 foreclosure suit, as follows: (a) the junior title claimants had only the right to redeem; (b) this right existed for a "reasonable" time before it was lost; (c) while it existed, the minerals were still constructively severed from the surface; (d) at the expiration of the reasonable time the purchaser at the foreclosure—or his grantee—acquired the right and therefore the title of the junior title claimants; (4) under the facts in this case the junior title claimants continued to have the right to redeem until November 2, 1934. Thus, the minerals at all times remained constructively severed from the surface until November 2, 1934.

III. *The 1931 Tax Sale for the Delinquent Taxes of 1930.* The basis of the Foster-Grayson claim and also the Johnson claim to the minerals in this land is the 1931 tax sale and the tax deed issued in pursuance thereof. Section 13600, Pope's Digest, (so far as involves mineral rights) is a copy of § 9856 of Crawford & Moses' Digest. These sections result from Act No. 30 of 1897 and Act No. 221 of 1929. Section 13600, Pope's Digest, reads as follows:

"When the mineral rights (and) or timber rights in any land shall, by conveyance or otherwise, be held by one or more persons, and the fee simple in the land by one or more other persons, it shall be the duty of the assessor when advised of the fact, either by personal notice, or by recording of the deeds in the office of the recorder of the county, to assess the mineral rights (and) or timber rights in said lands separate from the general property therein. And in such case a sale of the mineral rights (and) or timber rights for non-payment of taxes

shall not affect the title to the land itself, nor shall a sale of the land for non-payment of taxes affect the title to the mineral rights (and) or timber rights. When any mineral rights (and) or timber rights assessed as above set out, become forfeited on account of non-payment of taxes, same shall in all things be certified to and redeemed in the same manner as is now provided for the certification and redemption of real estate upon which taxes duly assessed have not been paid."

When the tax sale was held in 1931 for the taxes of 1930, the minerals under this land had been constructively severed from the surface and the mineral holders still had a right to redeem, which kept alive the constructive severance, so all that was sold at the tax sale was the surface rights; and that was all that Foster purchased. The tax sale and deed are the basis of the Foster-Grayson claim, and the Johnson claim. There were many irregularities in the tax sale, and it was voidable. But in 1933 (while the minerals were still constructively severed) Foster received the tax deed which contained a sufficient description to constitute color of title, and which supports the claim of Johnson to the surface, but not the claim of Foster-Grayson and Johnson to the minerals. (This matter of the tax sale will be mentioned in discussing tract No. 3, *infra.*)

The case at bar is similar to the case of *Huffman* v. *Anderson Co.,* 184 Ark. 278, 42 S. W. 2d 211. In the cited case this court was construing § 9856 of Crawford & Moses' Digest which, in so far as here involved, is identical to § 13600, Pope's Digest; and we held in the cited case that after a mineral deed had been placed of record and the minerals constructively severed from the surface, then the subsequent tax purchaser received only the surface and not the minerals. That is the identical situation here. Foster-Grayson received only color of title to the surface. The effect of § 13600, Pope's Digest, on § 13873 makes it certain that the only rights that passed to Foster-Grayson were surface rights.

Adverse possession of the surface can never, in itself, constitute adverse possession of constructively severed

minerals. To constitute adverse possession of such minerals, there must be continuous use of the minerals for the statutory period. Even sporadic use is not sufficient. *Claybrook* v. *Barnes,* 180 Ark. 678, 22 S. W. 2d 390. Adverse possession of the surface by Foster-Grayson and Johnson, for however long continued, would never, in itself, ripen into adverse possession of the minerals. If, after the tax sale, any junior title claimant had wanted to redeem the minerals from the foreclosure sale, then such junior title claimant would have been obliged to seek out Calvin Mower or his successors in title, in order to effect such redemption. We have repeatedly held that adverse possession of the surface can never in itself make adverse possession of the minerals. To constitute adverse possession of the minerals, there must be continuous user of the minerals for the statutory period. Even sporadic user is not sufficient. *Claybrook* v. *Barnes,* 180 Ark. 678, 22 S. W. 2d 390, 67 A. L. R. 1436.

To sum up: the effect of the tax deed in 1933 based on the voidable 1931 tax sale was to give Foster-Grayson color of title to the surface only; and with the junior title claimants still holding their right of redemption, and the mortgagee and his grantee holding the right of the mineral claimants after the expiration of the period of redemption.

IV. *The Quitclaim Deed from Mower to Foster-Grayson Lumber Co.* Evidently, recognizing this situation as detailed in III, *supra,* Foster-Grayson undertook to obtain a deed from Mower. A valid deed from Mower to Foster-Grayson would have allowed Foster-Grayson "to stand in the shoes of Mower," and to assert against the junior title claimants that they had lost the right to redeem. 42 C. J. 379. But Mower clearly and frankly advised Foster-Grayson that he had transferred his title to someone else. Foster-Grayson was buying from Mower several hundred acres of land in Columbia county, Arkansas, and in the deed included the land here involved. The correspondence is in the record, and it shows, beyond peradventure of a doubt, that when Foster-Grayson received from Clarendon Mower, in 1935, the quitclaim deed to the land here involved, Foster-Grayson accepted the deed

with knowledge that Mower had transferred his title to another. This knowledge is equal to or greater than the notice that would have been accomplished if the deed from Mower to Camille Lombardo had all the time been of record. *Brown* v. *Hanauer*, 48 Ark. 277, 3 S. W. 27. A person taking a deed with knowledge of a prior unrecorded deed to another is in the same situation as though the prior deed had all the time been of record. *Halbrook* v. *Lewis*, 204 Ark. 579, 173 S. W. 2d 171.

The effect of our recording and constructive notice statutes (§§ 1846-47, Pope's Digest) is to deny protection to subsequent purchasers who already have knowledge of a prior deed. As is said in 39 Am. Juris., 234: "Of course when a person knows of a thing he has 'notice' thereof, as no one needs notice of what he already knows. In other words, actual knowledge supersedes a requirement of notice." See, also, *St. L.-San Francisco R. R. Co.* v. *State*, 179 Ark. 1128, 20 S. W. 2d 878. So, Foster-Grayson, in taking the quitclaim deed from Mower did so with knowledge that Mower had already transferred his rights to another; and that knowledge prevents Foster-Grayson, and its grantee, Johnson, from being the beneficial grantee from Mower, to the extent of asserting stale demand against the junior title claimants.

The end of the whole matter, so far as Foster-Grayson is concerned, is that it never had, and does not now have, any minerals in and under the 40 acres here involved. Likewise, the plaintiff Johnson never had, and does not now have any minerals in and under the 40 acres here involved. Johnson does own the surface of this tract because of continuous adverse, etc., possession since 1936. We do not recite the acts of adverse possession of the surface, because we do not understand that Johnson's claim to the surface is seriously questioned. The serious matter is who owns the minerals; and this we will now discuss.

V. *The Asserted Right of the Junior Title Claimants to yet Redeem from the 1923 Foreclosure.* In section II, *supra*, we stated that the right of these mineral holders to redeem would not have been lost until November

2, 1934. That was demonstrated to show that the 1931 tax sale did not carry the minerals. Subsequent negotiations between the junior title claimants and the successors in title of Mower have extended the redemption period for the junior title claimants. It will be recalled that Calvin Mower's widow and beneficiary executed a deed to Clarendon Mower, who, in turn, executed a deed to Camille Lombardo in 1930 (before the tax sale); and she conveyed to Jean in 1945. The effect of these conveyances was to pass to each grantee, in turn, the rights of Mower as against the junior title claimants. 42 C. J. 379. So, if the junior title claimants are to redeem from anyone, then such a one now is S. G. Jean, who is a party to this suit. In the abstract made by all of the appellants in this court (and Jean, the Couches, Henkler, Birnbach, McMorella, and Crumpler are such appellants), there is this statement on page 10:

"As Jean obtained a deed from Camille Lombardo Becker, he, of course, succeeded to all of the equities of Calvin Mower, deceased, but there is no controversy between him and the other appellants; and if appellants prevail he will permit them to redeem their mineral interests from the foreclosure sale."

By this statement, it is evident that Jean has agreed (1) that he will not claim limitations, laches, stale demand, or any other such plea against the junior title claimants, and (2) that he will allow them to redeem from him, even though their rights would be lost if he should interpose the appropriate plea. We see no reason why Jean could not make such an agreement; and with this agreement by Jean in the record, it necessarily follows that the Henker-Birnbach claimants are entitled to one-half the minerals as against all parties except Jean, and are entitled to redeem from Jean under the quoted language. The Crumpler and McMorella claimants have conceded in the briefs that the Henkler-Birnbach claimants are entitled to half the minerals. The ownership of the remaining one-half of the minerals is dependent on the dispute between the McMorella title and the Couch title, which we now discuss.

VI. *The McMorella Title v. Couch Title.* This is a substantial controversy in itself, and requires considerable detailing of facts. As was stated in paragraphs number 2, 3 and 4 of the title history, *supra,* Doss executed: (a) a deed to Couch on April 4, 1921, covering half of the minerals; (b) a deed to Henker on May 24, 1921, covering half of the minerals; and (c) two deeds to Miss Bettie McMorella (dated August 27, 1921, and September 3, 1921, respectively) covering 58/40ths of the minerals; and Miss McMorella has conveyed to Crumpler. Doss had apparently conveyed all of his minerals before he made either of the conveyances to Miss McMorella. So, on the face of the record, Doss had nothing to convey to Miss McMorella. She and Crumpler conceded that Henker received half of the minerals because his deed was of record prior to Miss McMorella's deed; but she joins with her grantee, Crumpler, in an attack on the mineral deed from Doss to Couch because of alleged equities and matters known to Couch, and which prevented him (and therefore his heirs) from owning the minerals purporting to have been conveyed in the deed from Doss to Couch. Regarding her own conveyances from Doss to her, reciting 58/40ths of the minerals, Miss McMorella claims that the fractions used in her deeds were placed there by her lawyer through inadvertence. She and Crumpler only claim one-half of the minerals, and that claim is against the Couch heirs. The chancery court held against the Crumpler-McMorella parties, and they have appealed, seeking: (a) to have the Couch minerals vested in Crumpler; and (b) to set aside the oil and gas leases executed by the Couches and now held by Skelly Oil Co.

Miss McMorella testified: that Frank Doss was a negro who lived in the same community (Mohawk) where she operated a store for several years before and after 1921; that Doss consulted with her about the Couch mineral transaction; that she discussed the matter with Couch; that after Couch agreed that he had no interest or claim under his purported deed, then Miss McMorella took her two deeds and expended money and paid taxes in reliance on Couch's statement that he had surrendered

his claim. The Crumpler-McMorella parties thus presented an issue of estoppel against the Couch heirs; and, in effect, claim that Couch was only a trustee for Doss in the mineral conveyances, and that the Couch heirs should be decreed as having held the mineral title in trust for Miss McMorella, since she claims by conveyance from Doss.

There are some facts (supported by documents) which stand out like mountains and which substantiate the McMorella-Crumpler claim. We mention them:

(1) The mineral deed from Doss to Couch was dated April 4, 1921. There was introduced in evidence an instrument reading as follows:

"AGREEMENT

"April 4, 1921

"By and between F. K. Couch and Frank Doss:

"Whereby F. K. Couch agrees to pay a certain land note now held by Farmers Bank, Emerson, Arkansas, of about $144, also to pay to Frank Doss the difference between $500 and the amount of this note. Frank Doss agrees to deliver to F. K. Couch mineral deed to one-half interest in 80 acres of land located as follows: SE¼ of NW¼ and SW¼ of NE¼ all in Sec. 35, Township 19, R. 20. This balance payment is due and payable upon opinion of attorney that Frank Doss has right to convey this mineral deed. This agreement will expire should more than sixty days be consumed in completing same unless by consent of both parties or unless some court proceeding must be used in clearing this title or unavoidable delays.

"F. K. Couch

"Witness

"John McNeill, Jr."

This instrument shows that Couch's right to the mineral deed was not only dependent on payments to be made, but would expire in sixty days unless certain things happened, to-wit, attorney approved title, or court

proceedings caused delays. John McNeill, Jr. (who witnessed Couch's signature to this instrument), is not a litigant in the present proceedings, and is apparently a disinterested witness. McNeill testified that he and Couch were partners in 1921, and that McNeill had a silent interest in this Doss transaction; that Couch and McNeill were unable to find a buyer for the minerals and never did fulfill their agreement with Doss; that shortly before this suit, McNeill made a quitclaim deed to Crumpler to attest the fact that Couch and McNeill had never fulfilled their agreement with Doss. The written agreement supports McNeill's testimony.

(2) Miss Bettie McMorella claimed that, to protect her mineral interest, she paid three of the vendor's lien notes that Doss executed to Mower. She introduced in evidence the original note from Doss to Mower due November 1, 1920, and also the one due November 1, 1921, but she could not find the other note which she claimed she paid in 1922. When we remember that there were eleven original vendor's lien notes, and that in the foreclosure suit in 1923 only eight notes were claimed by Mower to be unpaid, then the fact that Miss McMorella had two of the original notes which she introduced in evidence, affords substantial support to her testimony that she paid the notes in reliance on her mineral claim. Certainly, she would not have made such payments with the Couch title valid and outstanding.

(3) Beginning in 1935 and continuing through 1944, Miss McMorella assessed in her name, and paid a tax on, part of the minerals under this land—as distinct from the surface. This assessment and payment does not constitute adverse possession, but does show a continued claim for Miss McMorella to a portion of the minerals. The certificate was introduced in evidence, showing the assessment and payment of these taxes on the mineral interest.

These three numbered items supported by documentary proof lend full support to the testimony of the disinterested witness—McNeill—to the effect that F. K.

Couch never claimed any interest in the minerals after the failure by Couch and McNeill to fulfill their part of the written agreement with Doss as previously copied herein. This leads to our conclusion, that Couch held the legal title to these minerals as a mere trustee for Doss and for Miss McMorella, Doss' grantee; and that Couch's heirs should not prevail against the claim of Crumpler, grantee of Miss McMorella.

But during the time that Couch held the legal title to the minerals as trustee, he died; and his widow and heirs made the leases to Jean, who assigned to Skelly Oil Co. There was nothing of record to notify Jean, Skelly Oil Co., or anyone else, that the Couch heirs were other than true owners of the interests shown by the record. So Skelly's lease is valid against Crumpler. This is because of the rule that a constructive trustee conveys a good title to an innocent third person who buys for value and without notice or knowledge of imperfections or secret equities affecting the power of the trustee. *Woodrow* v. *Riverside Greyhound Club,* 192 Ark. 770, 94 S. W. 2d 701, and cases there cited. See, also, 54 Am. Juris. 209, *et seq.* It follows, therefore, that the Skelly leases are valid, but all the mineral interest of the Couch widow and heirs—remaining after the Skelly leases—is divested from the Couch widow and heirs and quieted in Crumpler, grantee of McMorella.

Tract No. 2, SW¼ NE¼ Sec. 35

The title history of this tract is identical with Tract No. 1 down to and including paragraph No. 9 in the title history of tract No. 1. The litigation on this tract is the same as detailed in paragraphs B, C and D in the litigation history of tract No. 1. Foster-Grayson has made no conveyance of this tract; and therefore claims all of the surface as against Jean, and claims all of the minerals as against Couch, Henker, Birnbach, McMorella, Jean, and Skelly Oil Co. All of the questions concerning the ownership of this tract have been discussed in the opinion in tract No. 1; so, we may succinctly apply those holdings to this tract.

Mineral ownership: Since Jean has agreed to redemption as heretofore stated, then, after such redemption, the minerals in tract No. 2 are decreed to be owned: one-half by Henker and Birnbach; the other one-half by Crumpler, but subject to the oil and gas leases held by Skelly Oil Co.

Surface ownership: Jean challenges (1) the validity of the clerk's tax deed of 1933 to Foster-Grayson, and (2) the nature and character of Foster-Grayson's possession of the land. These contentions of Jean will be considered and answered when we discuss tract No. 3, *infra*. The chancery court held that Foster-Grayson had acquired title to the surface of tract No. 2; and we affirm that holding.

Tract No. 3, NW¼ NE¼ Sec. 35

On this tract we give the title history and litigation history before announcing our opinion.

Title History

1. Calvin Mower is the common source of title to both the surface and the minerals. Some time prior to October, 1927, he departed this life testate, a resident of Illinois. His will was recorded in Columbia county, Arkansas, in 1928. His widow, as beneficiary under the will, executed a general warranty deed to Clarendon Mower, dated June 12, 1929; and the deed was duly recorded on January 7, 1930, and did not reserve any minerals.

2. On January 29, 1930, Clarendon Mower executed a general warranty deed to Camille Lombardo, which deed was not recorded until August 19, 1939, and which contained no reservation of minerals. On February 14, 1945, Camille Lombardo executed a quitclaim deed to S. G. Jean, which deed was recorded on March 2, 1945, and contained no reservation of minerals.

3. The state and county taxes were unpaid and delinquent for the year 1930; and at the collector's delin-

quent tax sale, held on June 8, 1931, R. S. Foster purchased the land for said delinquent taxes. Foster received and recorded, on June 15, 1933, a clerk's tax deed (under § 13872, *et seq.*, Pope's Digest) which contained a valid legal description of the land. Foster purchased and held title for Foster-Grayson Lumber Co.; a partnership which has been previously described herein, and which is referred to as Foster-Grayson.

(4) On July 5, 1935, Clarendon Mower (the grantor in the deed to Camille Lombardo mentioned in paragraph 2 of this title history) executed a quitclaim deed to Foster-Grayson, who took with knowledge that Mower had previously parted with his title.

This Litigation

In seeking to have quieted its title to the surface and minerals as against the claim of Jean, Foster-Grayson claimed: (a) under the tax sale of 1931, (b) the tax deed of 1933, (c) the two-year statute of limitation (§ 8925, Pope's Digest), (d) the payment of taxes for seven years on wild and unenclosed lands under § 8920, Pope's Digest, and (e) actual possession under § 8918, Pope's Digest. In resisting the Foster-Grayson intervention, Jean claimed: (a) that the tax sale was void for irregularities, (b) that the tax deed was void on its face, (c) that there was no actual possession of the land by Foster-Grayson, and (d) that the constructive possession by tax payments was not sufficient under the facts in the case. The chancery court entered a decree granting Foster-Grayson full relief, and Jean has appealed.

Opinion

At the outset, we point out that there has never been any constructive or actual severance of the minerals from the surface insofar as this tract is concerned; so § 13600, Pope's Digest, has no application. The owner of the surface is also the owner of the minerals insofar as this tract is concerned.

I. *The Tax Deed of 1933 Was Color of Title.* Jean insists that the tax sale in 1931 was void for various rea-

sons, and in this we agree; but the invalidity of the tax sale does not prevent the tax deed from being color of title. *Charis* v. *Henry,* 205 Ark. 163, 168 S. W. 2d 610; *Bradbury* v. *Dumond,* 80 Ark. 82, 96 S. W. 390, 11 L. R. A., N. S., 772.

Jean contends that the clerk's tax deed, issued in 1933 on the 1931 tax sale, was void on its face because several tracts were included in the deed for which a gross amount was shown. This contention is settled against Jean by § 13887, Pope's Digest, which is Act 235 of 1927. This act was before this court in the case of *Evans* v. *F. L. Dumas Store, Inc.,* 192 Ark. 571, 93 S. W. 2d 307; and Mr. Justice BUTLER, in disposing of an identical contention, said: "It is next contended that the tax deed is void on its face because several tracts of land were included in the deed for which a gross amount was paid. This objection would be well taken under the rule announced in *Cocks et al.* v. *Simmons,* 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28, and *Campbell* v. *Sanders,* 138 Ark. 94, 210 S. W. 934, but for the fact that this rule has been changed by statute now found as § 10108, Castle's 1927 Supplement to Crawford & Moses' Digest, which permits one owning more than one certificate of purchase, or having a certificate of purchase for more than one tract of land purchased at any one sale to have included in one deed any number of such tracts sold at the same sale."

Jean also contends that the said clerk's tax deed is void because it recites that the land was sold for the taxes of 1931, instead of 1930. But this defect does not prevent the deed from being color of title. In *Nixon* v. *Norton-Wheeler Stave Co.,* 207 Ark. 838, 183 S. W. 2d 300, Mr. Justice KNOX said: "We are convinced that the deed from the Commissioner of State Lands to appellee's predecessor in title was color of title notwithstanding the fact that it recited a forfeiture and sale for the year 1922, a year when because of the forfeiture for the previous year title was already apparently in the state, and the land apparently not taxable because of such fact. *Beard* v. *Dansby,* 48 Ark. 183, 2 S. W. 701; *Osceola Land Co.* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 1, 103 S. W. 609; *Holub*

v. *Titus,* 120 Ark. 620, 180 S. W. 218; *Black* v. *Brown,* 129 Ark. 270, 195 S. W. 673; *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193; *Riddle* v. *Williams,* 204 Ark. 1047, 166 S. W. 2d 893. The state deed here being regular on its face was sufficient to constitute color of title although it might have recited forfeiture for taxes due for wrong year. *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681; *Hunt* v. *Boyce,* 176 Ark. 303, 3 S. W. 2d 342."

We have repeatedly held that a deed, based on a void tax sale, but on the face of the deed describing the land, and purporting to convey it, is color of title within the two-year, as well as the seven-year statute of limitation. *Bradbury* v. *Dumond,* 80 Ark. 82, 96 S. W. 390; *Osceola Land Co.* v. *Chicago Mill & Lumber Co.,* 84 Ark. 1, 103 S. W. 609; *Black* v. *Brown,* 129 Ark. 270, 195 S. W. 673; *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681; *Hunt* v. *Boyce,* 176 Ark. 303, 3 S. W. 2d 342; *Kilpatrick* v. *Kilpatrick,* 204 Ark. 452, 162 S. W. 2d 897.

II. *The Nature and Extent of Foster-Grayson's Possession.* The chancery court made detailed findings; and, regarding this tract No. 3, said: "The tax record shows various irregularities, but the deed is not void on its face, and is therefore color of title. I. C. Johnson went into possession of a portion of this property under permission of Foster-Grayson, and his possession was their possession, and after two years from the date of the tax deed, that possession ripened into a valid title. The interveners paid the taxes on these lands for eleven or twelve years which would also vest a legal title in them."

Johnson testified that, as tenant of Foster-Grayson, he fenced, and used for pasture purposes only, eighteen acres of this tract; that he continued this possession from 1936 until 1940; that thereafter the pasture fence completely disappeared; and that no part of the land was ever in cultivation, but was uncultivated timber. Such is the extent of the evidence regarding actual possession. Foster-Grayson paid the taxes on this tract, before they were past due, each year from 1934 to 1944.

If the extent to which the land was used for pasture purposes from 1936 to 1940 was sufficient to constitute "actual adverse possession" (which we do not decide), then the chancery court was correct in awarding the land to Foster-Grayson under § 8925, Pope's Digest. If the extent to which the land was used was not "actual adverse possession" under § 8925, then when the fences disappeared from the land in 1940 and only uncultivated timber remained, the land became "wild and uninclosed" within the purview of § 8920, Pope's Digest; and the payment of taxes for seven years would be constructive possession.

In *Gaither* v. *Gage,* 82 Ark. 51, 100 S. W. 80, we held that payment of taxes on wild and uninclosed land for less than seven years could be joined with immediate subsequent actual possession of the land to make the full statutory period. In other words, actual possession may be tacked to constructive possession. See, also, *Miller* v. *Chicago Mill & Lbr. Co.,* 140 Ark. 639, 215 S. W. 900. Applying the principle of these cases to the case at bar, it is clear that the chancery court was correct in awarding this tract No. 3 to Foster-Grayson; and that part of the decree is affirmed.

Conclusion

As regards tract No. 3, the decree of the chancery court is affirmed in awarding the surface and minerals to Foster-Grayson.

As regards tract No. 1 and tract No. 2, the decree of the chancery court is reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

This, being an equity case, we are free to determine the costs in conformity with equity; and we adjudge all the costs of both courts against the parties, as follows: Jean—4/12ths; Foster-Grayson—5/12ths; Johnson and Warmack—1/12th; Couch widow and heirs—2/12ths.