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HAWKINS *v.* LAMB.

4-7882 194 S. W. 2d 5

Opinion delivered April 22, 1946.

Rehearing denied May 20, 1946.

L. A. Hardin, for appellant.

Buzbee, Harrison & Wright, for appellee.

HOLT, J. Appellant brought this suit against appellees, Lewis E. Lamb and Thelma W. Lamb, his wife, for specific performance of the following "Contract of Sale": "For and in consideration of the sum of six thousand dollars ($6,000) cash, I, the undersigned, hereby agree to sell and convey to R. E. Hawkins lots one and two (1 and 2) of the Capitol View Addition to the City of Little Rock, Pulaski County, Arkansas, commonly known as 2223 West Markham Street of Little Rock, Arkansas. The said R. E. Hawkins deposits the sum of two hundred and fifty dollars ($250) cash as earnest money, and the balance to be paid upon surrender of abstract of title and title to be approved by R. E. Hawkins' attorney and delivery of a warranty deed to said property by the said Lewis E. Lamb, and in the event of the failure to furnish good title to said property by the said Lewis E. Lamb, said earnest money is to be refunded, otherwise, said earnest money to act as liquidated damages in the event that said vendee should fail to comply with this agreement. I, the undersigned, agree to vacate said property by October 10, 1945, and reserve the right to remove all signs and displays thereon. Signed this the 10th day of September, 1945, Lewis E. Lamb, Vendor, R. E. Hawkins, Vendee."

Prior to the execution of the above contract, on December 31, 1943, Lewis E. Lamb entered into an "Agreement" with T. A. Darragh, the then owner of the two lots here involved, which contained, among others, the following provisions: "This agreement, by and between T. A. Darragh of Little Rock, Arkansas, hereinafter called the vendor, and Lewis E. Lamb of North Little Rock, Arkansas, hereinafter called the vendee, witnesseth: The vendor agrees to sell to the vendee and the vendee agrees to purchase from the vendor, the following property situated in Pulaski county, Arkansas: Lots one (1) and two (2) in Block one (1) of Capitol View Addition to the City of Little Rock, for a price of

three thousand dollars ($3,000) to be represented by one promissory note of the vendee with his wife as co-maker thereof, payable fifty dollars on principal together with six per cent. (6%) interest on the full unpaid principal balance of said note each month, beginning with February 1, 1944, and a like payment on or before the first day of each succeeding month thereafter until the purchase price together with interest thereon be paid. . . . Upon the full payment of said purchase price . . . the vendor will execute and deliver to the vendee at Little Rock, Arkansas, a good and sufficient deed conveying to the vendee, his heirs and assigns, the above described property, such deed to contain a covenant of warranty by the vendor against all liens and encumbrances. . . . (Signed) T. A. Darragh (Vendor), (Signed) Lewis E. Lamb (Vendee)."

On September 26, 1945, following the execution of the contract, *supra,* between Hawkins and Lamb, Lamb paid Darragh $2,000, the balance due on the purchase agreement, *supra,* between Darragh and Lamb dated December 31, 1943, and took title to himself and his wife, appellee, Thelma W. Lamb, as tenants by the entirety to the lots here involved. Appellees procured this $2,000 by mortgaging their home in North Little Rock, which they owned as tenants by the entirety.

Appellee, Thelma W. Lamb, refused to join her husband in a deed of conveyance of the two lots involved to appellant.

Appellant alleged in his complaint, and amendments thereto, that at the time he entered into the contract, *supra,* to purchase the two lots involved here, appellees were the owners of the two lots involved as partners and that in signing the "Contract of Sale" with appellant, appellee, Lewis E. Lamb, was acting as agent of this partnership, and that in the event the court should find that they were not partners, the only interest Thelma W. Lamb could have in the two lots would be that of dower, and prayed, first, that the court direct specific performance, or, second, in the alternative, that appellee, Lamb,

vendee under the contract, be required to execute deed to him to the lots in question, with an abatement of the purchase price to the extent of the value of the dower interest of Thelma W. Lamb, his wife.

Appellee denied every material allegation of appellant and further alleged that they owned the two lots, in question here, as tenants by the entirety.

Upon a trial, the court found the issues in favor of appellees, but offered to permit appellant to amend his pleadings so as to allege damages and to offer testimony on this issue. Appellant declined to amend or to submit further testimony, whereupon the court dismissed his complaint and amendments thereto for want of equity. This appeal followed.

In a suit such as we have here, the rule is that the buyer may sue for specific performance or for damages for breach of contract. Here, appellant has elected to sue for specific performance, which was his right. In *Hirschman* v. *Forehand,* 114 Ark. 436, 170 S. W. 98, this court held: (Headnote 2). "In an action for specific performance, where the seller's wife refuses to join in the deed, the buyer may refuse to accept the conveyance on account of the outstanding inchoate dower right and sue to recover damages for the breach of the contract, or he may accept the conveyance as far as it is within the power of the vendor to give, and have an abatement of the purchase price to the extent of the value of the contingent interest of the wife."

First, appellant earnestly contends that appellees were conducting a partnership business and owned the lots here involved as partners. We cannot agree to this contention.

After a careful review of all the testimony, we are of the opinion that the trial court's finding that they were not partners is not against the preponderance of the testimony. While appellant testified that Lamb represented to him that the property in question was the partnership property of appellee, Lamb, and his wife,

Thelma W. Lamb, appellant's father-in-law, J. H. Easley, testified that Lamb told him that he, Lamb, owned the property. Mr. and Mrs. Lamb both testified positively that Mr. Lamb owned the property. The contract in question here is between Lewis E. Lamb, vendor, and R. E. Hawkins, vendee. Mrs. Lamb did not sign this contract and she is not mentioned in it. The agreement between Mr. Darragh and Lewis E. Lamb, dated December 31, 1943, is signed by Darragh as vendor and Lewis E. Lamb as vendee, and under the terms of that agreement, Darragh agreed to convey to Lamb alone. Mrs. Lamb did not sign that agreement. There was no record evidence of a partnership. We think the evidence falls far short of establishing a partnership.

On appellant's second contention, we think there is merit and that the trial court erred in refusing to direct specific performance in accordance with appellant's alternative plea, *supra*. It is our view that in so far as appellant is concerned the only interest in the two lots here, which Mrs. Lamb had, was that of dower. While appellees insist that appellees owned the property as tenants by the entirety, we think the great preponderance, if not all the material testimony, is against this contention. As already indicated, at the time the contract in question here was executed between Hawkins and Lamb, there was an outstanding agreement between Darragh and Lamb whereby Darragh agreed to sell and Lamb agreed to buy the property here, and there was no record or other evidence of ownership of these two lots by appellees as tenants by the entirety as appellees claimed. The fact that appellees, some two weeks after the contract between appellant and Lamb was entered into, secured a deed from Darragh to them as tenants by the entirety adds no strength whatever to appellees' contention. Appellant was in the position of an innocent purchaser without notice and entitled to specific performance as against Lewis E. Lamb.

As indicated, when appellees took deed to these lots on September 26, 1945, they did so, obviously, with notice

of appellant's sales contract with Lewis E. Lamb dated September 10, 1945, which appellant seeks to enforce here. The principles of law announced in *Valley Planing Mill Company* v. *Lena Lumber Company,* 168 Ark. 1133, 272 S. W. 860, apply here. It was there held: (Headnote 4). "One who purchased land with full knowledge that the vendor had contracted to sell the land to another and that a cash payment had been made, and completion was awaiting the approval of an indorsement of the purchase money notes, held not an innocent purchaser, though he was informed by his vendor that the deal had fallen through, no inquiry from the other party having been made."

Appellees argue that the original agreement to purchase made by Darragh and Lamb in December, 1943, *supra,* was for the benefit of appellees jointly and that the deed subsequently issued to them jointly by Darragh was in furtherance of that agreement, and cites in support thereof *Roach* v. *Richardson,* 84 Ark. 37, 104 S. W. 538. We cannot agree that appellees' contention finds support in the Roach case. There, the issue was whether the bond for title was in both the husband and wife, or was in the husband's name alone, and the court's finding that it was in the name of both husband and wife was upheld by this court. It was there said: "Appellee, Ed Richardson, testified that he had seen and read a bond for title, or an agreement for the sale of the land in controversy, made by W. C. Gregson and S. E. Gregson to Sallie and John Whitson, and also two notes of two hundred each, executed by Sallie Whitson and John Whitson to Gregson for part of the purchase money; that these papers were in the possession of his wife, who was formerly Sallie Whitson, and that he and his wife, not considering them of any value, destroyed them. In view of this testimony, we cannot say that the finding of the chancellor was clearly against the preponderance of the evidence."

The facts here, however, are different. It is undisputed here that the contract before us was signed only

by T. A. Darragh as vendor and Lewis E. Lamb as vendee, and as indicated, we think the court's finding that Thelma W. Lamb had any greater interest in the lots than that of dower is against the preponderance of the evidence.

In the recent case of *Sebold* v. *Williamson,* 203 Ark. 741, 158 S. W. 2d 667, we reaffirmed our holding in the *Hirschman* v. *Forehand* case, *supra,* and said: "This court has held that 'if the vendee elects to accept the conveyance he can require an abatement of the price to the extent of value of the outstanding dower interests.' *Hirschman* v. *Forehand,* 114 Ark. 436, 170 S. W. 98. It was also there said that, in *Vaughan* v. *Butterfield,* 85 Ark. 289, 107 S. W. 993, 122 Am. St. Rep. 31, 'we followed the Iowa decisions on this point, which hold unqualifiedly that the vendee may require specific performance of his contract and an abatement of the purchase price. Citing cases. In *Thompson* v. *Colby,* 127 Ia. 234, 103 N. W. 117, it was held, in such a case, the court was authorized to decree a retention of one-third of the amount found due until the wife should make conveyance of her contingent interest, or until the further order of the court. We think it would be a difficult problem to determine, with reasonable exactness, the value of the wife's possibility of dower where the husband is still living, and that the court did not err in the amount of the abatement decreed to be withheld."

For the error indicated, the decree is reversed and the cause remanded with directions to enter a decree not inconsistent with this opinion.

GRIFFIN SMITH, C. J., dissents.

Opinion delivered April 22, 1946.

Rehearing denied May 20, 1946.

Lee Seamster, Karl Greenhaw and *O. E. Williams,* for appellant.

H. L. Fitzhugh, C. D. Atkinson and *Wallace Townsend,* for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether property owned by the School District, and other property against which it is alleged betterments were assessed when the Curb and Gutter District was formed in 1927-28, shall be subjected to the payment of bonds, interest, etc.[1] Each side has pleaded *res judicata.*

Curb and Gutter Board filed its complaint in August, 1945, alleging creation of the district, and issuance of five percent serial bonds maturing in November of each year, beginning with 1928 and ending with 1937. While caption of the complaint lists the Board as plaintiff, it is shown that in fact the suit was brought by H. E. Parrish, Trustee. The original pledge named American

[1] Although two districts—paving and guttering—were formed, the appeal we consider deals only with one, a stipulation being that the determination of issues here presented shall be binding on the other district. Curb and Gutter issued $21,500 in bonds. The paving district's bonds amounted to $35,000.

Southern Trust Company as trustee for the bondholders. The bank's subsequent insolvency incapacitated it regarding the matters at issue; but under authority expressly conferred by the pledge, Parrish, a citizen of Kansas, was appointed successor, and presumptively it was through the trustee's instrumentality that the suit filed in 1945 was brought. The prayer was that the property listed be charged with the amounts alleged to have been assessed as betterments; that statutory penalties be decreed, together with cost, interest, etc., and that the land be sold unless liens should be discharged in a timely manner.

The defendants (appellants here) tendered with their plea of *res judicata* the decree rendered by Washington Chancery Court in 1934, based upon an action filed in 1931. In that litigation it was found that the District was not legally formed, in that less than ten property owners signed the petition asking that the improvements be made in that manner. It was also decreed that there had been no valid assessment of benefits.

In 1939 Parrish, as Trustee, sued in the United States Court for the Western District of Arkansas, making the Curb and Gutter District a defendant. The District answered. Appellants have not abstracted the defense they sought to maintain in Federal Court, nor do we find the answer or essential pleadings in the bill of exceptions. Essence was that all matters pertaining to validity of the District and the assessments had been decided by the Chancery Court in 1934; hence the Federal Court could not inquire into any phase of the transactions other than to determine whether a money judgment should be rendered in favor of the Trustee. The Trustee contended the bondholders were not bound because he was not a party to the suit filed in 1931; nor was he, at any time before decree, made a defendant. Likewise bondholders were not served with process or notified that action involving their rights was contemplated. But if mere notice had been the policy pursued and its sufficiency contended for, as distinguished from service of process on the Trustee,

the fact remains that we are without information regarding pleas by the District in Federal Court other than those miscellaneously referred to or abstracted as bases for appellants' assertion that all the Trustee had a right to demand in the action of 1939 was a determination (a) whether the bonds had been issued, (b) whether they were unpaid, and (c) whether the holder was in fact the owner, or had a right to ask judgment. A Little Rock brokerage firm purchased the full issue and resold the individual bonds to others who had no information that infirmities would be alleged.

It is insisted that the District's Commissioners represented the landowners in certain respects; yet it is conceded that the decree of 1934 was predicated upon action by the Commissioners against the property—that is, the purpose was to foreclose the so-called benefits. Whatever the Federal District Court at Fort Smith may have had before it, the finding adverse to present appellants was appealed. In an opinion of April 2, 1940, the Circuit Court of Appeals, Eighth Circuit, affirmed the decree of Judge Heartsill Ragon. Its conclusions were that there was substantial evidence from which the trial court found (a) that all jurisdictional requirements incidental to creation of the District had been complied with; (b) that assessments were regularly made; (c) that proper notice as required by law had in all instances been given; (d) that there was no appeal to Chancery Court within thirty days—a procedure available to dissatisfied property owners;—(e) that following effective organization bonds were issued and sold to innocent purchasers; (f) that taxes or betterments were partially paid; (the opinion mentions "some $7,083" as having been collected) (g) that money realized from sale of the bonds had been applied in making the improvements contemplated; (h) that neither fraud nor collusive conduct entered into the transaction whereby a non-resident Trustee was selected in order to confer Federal jurisdiction, and (i) that the District Court's decree should in all things be affirmed. See *Curb & Gutter District No. 37 of*

City of Fayetteville, Ark., et al., v. *Parrish,* 110 Federal 2d 902.

It will be seen from this record that the bondholders, through their Trustee, insist that the decree (Washington Chancery Court) of December 10, 1945, from which this appeal comes, should be affirmed because the Federal District Court's decree adjudicated the essential issues, and that the bondholders (Trustees) were not bound by the Chancery decree of 1934 because they were not parties. On the other hand, Curb and Gutter District insists it is not bound by the Federal Court decree because that proceeding was subsequent to the Chancery decree of 1934.

We think appellants somewhat overstate appellees' position when they say that the Chancellor on Exchange, in denying their plea of *res judicata,* ". . . held that the decree of the Federal Court, to which defendants were not parties nor privies, had reversed and set aside the decree of the Washington Chancery Court, which had invalidated said alleged District. . . ."

What the Federal Court held was that bondholders, who paid the market price for securities, and whose money was used by the District to construct improvements, could not be deprived of their property rights by a decree in respect of which they had no information, and therefore could not be heard in opposition to the nullifying act. Appellants contend that the defendants (appellants here) are the same parties, "or privies to the defendants in the former action"; "for," say counsel, ". . . if there is no authority to bring the Board of Improvement of said alleged district into court as active plaintiffs in this lawsuit, then same should be dismissed for want of a proper plaintiff, as the Trustee of the bondholders is not authorized to bring such an action in his own name."

The point appellants seek to impress by this discussion is that in things relating essentially to State jurisdiction: such, for instance, as foreclosures, purchase of

forfeited property, its sale, and like matters, duties of the Commissioners have been clearly defined; and while, as in the Federal Court case, bondholders may establish their right to payment, the judicial process by which satisfaction may be attained is domestic, and a Federal Court acts only by mandamus in appropriate cases.

Conceding this argument to be sound, it does not follow that appellants' plea of *res judicata* should have been sustained. The decree of foreclosure complained of in the instant appeal was not an act of the Federal Court. True, the Chancery Court disregarded the decree of the same Court wherein the District was held to be void; but this was necessary if Federal Court was correct in finding that valid bonds had been issued.

In entertaining the Trustee's suit Federal Court jurisdiction of necessity had to affirmatively appear. It cannot be denied that the complaint, *prima facie,* stated a cause of action. At trial the defendants, by their plea of *res judicata* and proof relating to organization of the District and failure to make assessments, subjected themselves to judicial inquiry regarding these controverted issues. The Federal Court found that securityholders had been ignored, and that as to them the proceedings initiated in 1931 and consummated by the Chancery decree of 1934 was valid only as to those things not adversely affecting material interests of bond-purchasers who had no opportunity to defend.

We are not, in the instant case, relegated to the doctrine announced in *Howard-Sevier Road Improvement District No. 1* v. *Hunt,* 166 Ark. 62, 265 S. W. 517, which, if literally applied, would *require* an improvement district when sued in Federal Court to plead invalidity of assessments on penalty that failure would thereafter bar a property holder from showing the assessment was void. In the appeal with which we are concerned the entire assessment was challenged in Federal Court. This action was taken by the Commissioners who represented the property owners as a class. The same issue was involved in the decree of 1934, but, as we have heretofore said, the

bondholders were omitted. If it should be conceded (and this is a phase we are not called upon to determine here) that the District was not required to plead invalidity of the assessment as a defense in Federal Court, yet that plea *was* interposed and the finding was against the Commissioners on an issue they advanced or defended.

Result of these conclusions is that the Court did not err in overruling appellants' plea of *res judicata,* and that it correctly sustained appellees' plea of former adjudication, and rightfully rendered judgment.

Affirmed.

BETTER WAY LIFE INSURANCE COMPANY *v.* GRAVES, INSURANCE COMMISSIONER.

4-7874 194 S. W. 2d 10

Opinion delivered April 22, 1946.

Rehearing denied May 20, 1946.

Appellant *pro se.*

Guy W. Williams, Attorney General, and *Cleveland Holland,* Assistant Attorney General, for appellee.

McHaney, Justice. These cases were consolidated in the trial court for trial and are briefed together here. The first is a suit by appellant for mandamus against the then Insurance Commissioner to compel him to issue to it a certificate of authority to do an insurance business in this state. The second is a suit by the State on relation of her Attorney General to have appellant declared to be insolvent and for the appointment of a receiver to wind up its affairs.

Trial resulted in a judgment denying the writ of mandamus in the one, and a finding of insolvency and the appointment of a receiver in the other, and the case is here on appeal.

Appellant was organized and incorporated on December 31, 1936, under Act 137 of 1925, as a stipulated premium life insurance company, with an authorized capital stock of $50,000, of which $10,000 had been subscribed and "actually paid in cash or acceptable securities," as stated in the articles of incorporation. It appears that the articles of incorporation were filed with, examined and conditionally approved by the Insurance

Commissioner on January 4, 1937, and a certificate of authority issued to appellant, which ran to March 1, 1937, when the authority was renewed to March 1, 1938. No certificate of authority has been granted since March 1, 1938.

Act 137 of 1925 provides, in subsection "Third" of § 2, that the authorized capital stock of such companies shall not be less than $50,000, "of which twenty (20%) per cent. thereof shall be subscribed and actually paid up in cash, and be in the custody of the persons named as the first Board of Directors; . . ." As a matter of fact no part of the capital was "actually paid up in cash," and, of course, not "in the custody of the persons named as the first Board of Directors." What happened was that R. V. Marlin, the president of appellant, and subscriber to nearly all its stock, as he says, at the suggestion of the then Insurance Commissioner, caused a certain tract of land in Poinsett county, Arkansas, to be conveyed to an unmarried "straw man" who gave a note to appellant for $12,500, and secured same by a mortgage on said land, and delivered same to the Commissioner, as a compliance with the above statute. The Commissioner refused to accept it as a compliance, and made other requirements which were never met, and even though a permit was issued for 1937, either temporary or otherwise, no renewal license has ever been issued by the department, from 1938 to the present time, and so far as we are advised appellant issued only one policy of life insurance, on which it sustained a loss of $2,000 and for which judgment was rendered against it and affirmed by this court. *Better Way Life Ins. Co.* v. *Linder, Admr.*, 207 Ark. 533, 181 S. W. 2d 467. The record reflects that this judgment was settled for $1,000 by Marlin with his own funds, the company having no cash with which to pay.

We think the Commissioner of Insurance properly refused to license appellant in 1944. The only asset it ever had was said note and mortgage, if they may be said to be an asset. It had no capital paid up in cash, as the

statute specifically requires, and it had no cash with which to pay operating expenses. It is well settled that the writ of mandamus will not be granted to review the exercise of any discretion of an officer or official board, but can only be invoked to compel the officer or board to exercise such discretion. *Satterfield, Mayor,* v. *Fewell,* 202 Ark. 67, 149 S. W. 2d 949.

In the second case, we think the finding of insolvency and the appointment of a receiver for appellant are amply sustained by the evidence.

Section 5 of said Act 137 provides that such a company shall be deemed to be solvent if its total assets are equal to or in excess of its paid-up capital stock, plus its bills payable and any insurance claims approved for settlement or established by decision of a court of competent and final jurisdiction of this state. If we assume that said note and mortgage paid up the $10,000 stock issued and left a surplus asset of $2,500, still appellant was insolvent when this suit was filed in 1944, because at that time there was a judgment against it for $2,000, plus costs, penalty and attorneys' fees in an amount undisclosed by this record, and bills payable of some $800 or more, in addition to its paid-up capital stock of $10,000, or a total in excess of $12,500, the amount of said note.

This is an additional reason why the Insurance Commissioner should not be required by mandamus to issue appellant a license, or his discretion be controlled by the courts.

The judgment in each case is correct and is accordingly affirmed.

PENNY *v.* PENNY.

4-7872 193 S. W. 2d 811

Opinion delivered April 22, 1946.

Wesley Howard, for appellant.

Boyd Tackett, for appellee.

SMITH, J. A decree rendered December 15, 1943, granted Laverne Penny a divorce from her husband, Pete Penny, which recited that the question of property rights had been settled by agreement, and that the parties had also agreed as to the custody of their only child, a boy named Charles William, then five years old, by the terms of which agreement the mother was to have custody of the child for certain periods of time, the father to have custody during the remainder of the time, with the right of visitation to each parent while the other had the custody of the child. This agreement as to custody was confirmed by the court, and the decree recites that: "It is further agreed by and between said parties that the father shall come after said child at all times when he is in the custody of his mother, and he, the said father.

desires to have him on week-ends as aforesaid agreed, and the mother shall go after said child at all times when he is in the custody of his father, and she, the said mother, desires to have said child according to the terms as aforesaid agreed."

On June 13, 1945, Mrs. Penny filed a petition praying that the decree be so amended as to allow her the exclusive custody of the child, subject to the right of visitation by the father at all reasonable times. It was prayed also that Mr. Penny be required to pay an arrearage of $20 of the money allowed by the decree to Mrs. Penny for the child's support, the provision of the decree in this behalf being that Mr. Penny should pay $20 per month to Mrs. Penny.

An extended hearing was had, at which time many witnesses testified, and in a decree rendered on this hearing the motion was denied and the proceeding "dismissed for want of equity." This decree recites that: ". . . since plaintiff and defendant entered into an agreement as to the custody and support of said child at the time the divorce was granted, and that same was approved and made a part of said divorce decree, by the court, the plaintiff's motion and petition to modify said decrees as prayed should be denied, and all costs of this proceeding should be paid by the defendant."

This decree as to the custody of the child, although rendered by consent, was not final in the sense that it was not subject to future modification, if it were shown that the child's welfare demanded that a change of custody be ordered.

In the case of *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012, Chief Justice HART said: "In this connection it may be said that, whatever the result of the agreement between the husband and wife with respect to the custody and support of their minor child, such agreement does not affect the right of a court of equity to award the custody of the child to either parent and to make reasonable provision for its support and education. The reason

is that the public has an interest in the matter, and that the interest of the child is the paramount consideration of the court."

Now, of course, the decree as to custody was a final decree when rendered, and it continued to be final unless and until the showing was made that conditions had changed, or that some fact was in existence when the decree was rendered of which the court was unaware at that time, and this is true whether the decree awarding custody of the child had been rendered by consent or not. It remains, therefore, to determine whether there has been any change of conditions which requires a modification of the decree in promotion of the child's best interest.

It was shown that the father drank intoxicants frequently and sometimes heavily, but it was shown also that he was addicted to drink both before and during his married life, but we think a greater indulgence was shown since the decree. Several witnesses testified that they saw Mr. Penny in an inebriated condition. On one occasion he fell asleep at a table in a cafe, and a few days later asked the proprietor of the cafe whether he had done anything out of the way while in the cafe, thus indicating that he had been very drunk. It was shown also that he drank liquor in the presence of his son, and on one occasion took from his son a bottle of Coca-Cola, which he had given him, and used the Coca-Cola as a "chaser" to a drink of liquor which he had taken; this meaning that he had washed the liquor down with the Coca-Cola.

It was shown that the child, while in Mr. Penny's custody, did not attend church or Sunday School, nor did Mr. Penny himself attend. There was a better environment in this respect when the boy was with his mother.

Neither the father nor the mother of the boy have homes of their own, and both live with their respective parents. The father's parents did not testify, although Mr. Penny testified that his parents were willing to have the boy with them. On the other hand, both the parents of the mother testified that they were willing and would

be glad to have the boy in their home. It occurs to us that there is a difference between the mere willingness to have the boy in their home and the desire to have him there.

The testimony showed a disposition on the part of Mr. Penny to annoy his wife when she went to his father's home to take the boy to her home. The boy frequently was not ready for the trip, and Mrs. Penny and her sister testified that Mr. Penny was more or less disagreeable when they came for the boy, and on one occasion Mr. Penny slapped Mrs. Penny's sister, who had gone with her for the child. Mrs. Penny sometimes sent her father for the boy, but was told by Mr. Penny that when she wanted the boy she would have to come in person for him. On the other hand, the testimony shows coöperation on Mrs. Penny's part in having the child ready for the father when he came for the boy.

The testimony on the part of Mrs. Penny was to the effect that when they did bring the child to her home he would be somewhat unruly, and the boy told his grandfather that he was not his boss, and that his father had told him that he did not have to obey his grandfather.

The paternal grandparents are both more than seventy years of age, while the maternal grandparents are much younger. Mr. Penny himself is not in good health and was unemployed at the time of the trial. There are four rooms in the home of the paternal grandparents, in which Mr. Penny and two brothers reside with their father and mother. There are five rooms in the home of the maternal grandparents in which the boy's mother and her brother reside with their father and mother.

The father's devotion to the boy is not questioned. He is good to the boy, possibly indulgent. He admitted his addiction to drink, but denied that he drank in the presence of his son. All the testimony is to the effect that either home would be a suitable place in which to rear a child. He would have school facilities at either place, but a school only five blocks from the home of his mother's father is more convenient.

The court made no order on the prayer that the father be required to pay a monthly installment of $20 due and unpaid. A payment of $5 was made on this arrearage, and Mrs. Penny testified that Mr. Penny said that this balance of $15 should be paid his mother for her attention to the boy. We think this request is significant. Under the original decree, which the court refused to modify, it was not contemplated that Mrs. Penny should use any part of the $20 allowed her for purposes of this kind. Under the original order Mrs. Penny has the custody of the child for the larger part of the time, and buys the boy's clothing. If any arrearage now exists Mr. Penny should be required to pay it.

Under the circumstances, as shown by the testimony, we think the weekly changes of the custody of the child are not to his best interests and that the permanent custody should be awarded to the mother, with the right of visitation to the father at all reasonable times. The monthly payments of $20 for the child's support to Mrs. Penny should be continued.

The decree will, therefore, be modified to award the permanent custody of the child to his mother, with the right of visitation by the father at all reasonable times, and he will be required to continue the monthly payments of $20 for the child's support.

COOK, COMMISSIONER OF REVENUES, *v.* WILSON.

4-7527 193 S. W. 2d 818

Opinion delivered April 22, 1946.

Herrn Northcutt, for appellant.

Murphy & Wood, for appellee.

ED. F. MCFADDIN, Justice. This is the same case as *Cook, Commissioner of Revenues,* v. *Wilson, et al.,* 208 Ark. 459, 187 S. W. 2d 7.

In the former opinion we allowed the state a partial recovery, but we held:

"That the appellees are not liable to the State for severance tax on timber severed by them from lands held by the United States as original owner (U.S.C.A. Title 16, § 471); and to that extent the decree of the chancery court is affirmed."

The Supreme Court of the United States granted certiorari, and held that the appellees were not entitled to immunity from severance tax merely because the timber severed by them was from lands held by the United States as original owner (U.S.C.A. Title 16, § 471). See *Wilson* v. *Cook,* 326 U. S. 685, 66 S. Ct. 663, 90 L. Ed. 402.

The mandate of the U. S. Supreme Court has now been filed in this court. By reason of that mandate we now recall so much of our former opinion as is in conflict with the opinion of the United States Supreme Court; and we now reverse in full the decree of the Garland chancery court rendered in this case on June 27, 1944; and we remand this cause to the Garland chancery court, with directions to render judgment in favor of the Commissioner of Revenues of the State of Arkansas, and against the appellees, not only for the $276.35 and interest as stated in our former opinion, but also for the additional tax, penalty and interest sued for and due, plus all costs of all courts, including the amount certified in the mandate of the United States Supreme Court.

JANSEN *v.* BLISSENBACH.

4-7878 193 S. W. 2d 814

Opinion delivered April 22, 1946.

[redacted]

R. C. Waldron, W. M. Ponder and *Smith & Judkins,* for appellant.

George M. Booth, for appellee.

MINOR W. MILLWEE, Justice. William Jansen, a resident of Randolph county, Arkansas, on February 7, 1921, executed his last will and testament devising and bequeathing all of his property to his sister, Barbara Blissenbach. Shortly before his death on January 31, 1944, William Jansen also executed and delivered a warranty deed to his sister, conveying an undivided one-half interest in two lots in the city of Pocahontas, Arkansas, for a recited consideration of $1,500. On the same date a similar deed was executed to his brother-in-law, Peter Blissenbach, husband of Barbara Blissenbach, conveying an undivided one-half interest in 40 acres of land in Randolph county for a recited consideration of $750.

On February 2, 1944, the will of William Jansen was admitted to probate and Barbara Blissenbach was appointed executrix to serve without bond as provided in the will. Appellants, Joseph Jansen of Pocahontas, Arkansas, and John Jansen of Poplar Bluff, Missouri, are the surviving brothers of William Jansen, deceased, and instituted this suit against appellees, Barbara Blissenbach and Peter Blissenbach, in the Randolph chancery court on January 25, 1945, to set aside the judgment of the probate court admitting the will of their deceased brother to probate and to cancel the two deeds to appellees.

The original complaint alleged the execution of the will and deeds, copies of which were made a part of the complaint. It was further alleged that appellee, Barbara Blissenbach, had filed no inventory or other report with the probate court, and that the consideration recited in the two deeds, if paid, was a small per cent. of the actual value of the property at the time it was conveyed. Appellants also charged in the complaint that the will was procured by fraud and undue influence of appellees in the following language: "That on Feby. 7th, 1921, and prior thereto, the alleged time of the execu-

tion of said will, the said defendants exercised undue and improper influence over the said deceased, with the fraudulent intent and purpose of unjustly and illegally getting his property at his death, and to cheat and defraud the plaintiffs, his brothers, out of their inheritance in his estate according to the law of descent and distribution.'' A similar charge of undue influence by appellees in obtaining execution of the two deeds was made in the complaint.

The prayer of the complaint was that the will be held to be ambiguous and fraudulent as to appellants; that the two deeds be canceled; and that appellants and appellee, Barbara Blissenbach, be declared tenants in common, and the property divided between them according to law.

On March 6, 1945, appellees demurred to the complaint on the grounds: first, that the court was without jurisdiction to contest a will; and second, that the complaint did not state facts sufficient to constitute a cause of action. On the same date appellees filed a motion to strike that portion of the complaint alleging mental incapacity of the testator and undue influence of appellees over him in the execution of the will. It was alleged in the motion that said will was probated more than six months prior to institution of the instant suit by appellants, and no appeal was taken from the judgment of the probate court admitting the will to probate.

On July 14, 1945, appellants filed an amendment to the complaint alleging that appellant, John Jansen, was a nonresident of this state; that the will was probated without personal service or notice to either of appellants; and, under § 14545, Pope's Digest, the judgment admitting the will to probate should be set aside and the probate court ordered to proceed with the contest of the will. Appellees filed their demurrer to the amended complaint.

At the hearing before the chancellor on appellees' demurrer and motion to strike, on September 4, 1945, the parties stipulated that the pleadings and files in the

probate court, involving the estate of deceased, "shall be admitted as evidence herein without objection from either side in this chancery court hearing of this cause." It was also admitted that the instant suit was filed more than six months after probation of the will; that one of the appellants was a nonresident, and neither of them was present or served with process in the probate court proceedings. The demurrer and motion to strike were sustained, and appellants declining to plead further, a decree was entered dismissing the complaint.

The principal argument of appellants on this appeal from the action of the chancery court in sustaining the demurrer and motion to strike is that they were prevented by an unavoidable casualty from appearing in the probate court, and that Act 448 of 1941, which authorizes the appointment of referees in probate, is unconstitutional. We find no allegations in the complaint in the instant case raising these questions. We do find a petition to vacate the order probating the will of William Jansen, deceased, which was filed by appellants in the probate court on March 24, 1945. This petition is a part of the records of the probate court which were introduced by agreement of the parties at the hearing on the demurrer and motion to strike. This petition apparently sought to vacate the order probating the will because of fraud practiced by appellees in obtaining the judgment, and for unavoidable casualty preventing appellants from appearing in the probate court action, under the provisions of § 8246, Pope's Digest. This petition has never been acted on by the probate court of Randolph county in so far as the record herein discloses.

This court has held that neither the adoption of Amendment 24 to our Constitution nor the enactment of Act No. 3 of 1939 resulted in a consolidation of chancery and probate courts. The two courts are wholly distinct and operate independently of each other. *Lewis* v. *Smith,* 198 Ark. 244, 129 S. W. 2d 229; *Wooten* v. *Pentuel,* 200 Ark. 353, 140 S. W. 2d 108. The trial court, sitting in chancery in the instant case, did not pass on the questions of unavoidable casualty and constitutionality of Act 448 of 1941 which are involved in the petition and

those questions are still pending before the probate court, and cannot, therefore, be determined on this appeal.

In their motion to strike that part of the complaint which sought to contest and set aside the will, appellees invoked the provisions of Act 401 of 1941, which provides that an heir of a deceased testator may, by complaint filed in the probate court, contest the probation or legality of a will admitted to probate in common form within six months after the probation of such will, but not thereafter. Appellants contend they had a year to appeal from the order of probate, and rely on the cases of *Morris* v. *Raymond,* 132 Ark. 449, 201 S. W. 116, and *Dial* v. *Trice, Executor,* 134 Ark. 481, 204 S. W. 219, where it was so held. However, these cases were decided prior to the enactment of Act 401, *supra,* and this court held in the case of *Manning* v. *Manning, Executor,* 206 Ark. 425, 175 S. W. 2d 982, that a petition to contest and set aside a will filed by an heir of the testator more than six months after an order admitting the will to probate was filed too late, and did not state a cause of action. Act 401, *supra,* was amended by § 18 of Act 297 of 1945 but the provisions of the latter act are made inapplicable to the proceeding herein under § 26 thereof.

In their amended complaint, appellants claimed the right to challenge the judgment of the probate court admitting the will to probate under § 14545 of Pope's Digest. This statute provides that nonresidents, or persons not served with process, may institute a suit in chancery court for the purpose of impeaching the probate judgment and retrying the question of probate, within three years after the final decision of the circuit court, on an appeal from probate court. Since Amendment No. 24 to the Constitution, appeals from probate are directly to this court. However, prior to the adoption of Amendment No. 24, when the circuit court had appellate jurisdiction from a judgment of the probate court admitting or refusing to admit a will to probate, this court construed § 14545, *supra,* as being inapplicable where there was no appeal to the circuit court within the time prescribed by statute. Mr. Justice Hart, in *Jenkins* v. *Jenkins,* 144 Ark. 417, 222 S. W. 714, said: "In the construc-

tion of this statute the court has held that a court of equity has no jurisdiction to review a decision of the probate court upon the probate of a will where there was no appeal to the circuit court within the time prescribed by the statute. The court held that if the appeal to the circuit court be barred, then no final decision of the circuit court can be had on the probate or a rejection of the will, and that the section is wholly inapplicable. *Mitchell* v. *Rogers,* 40 Ark. 91." There has been no appeal from the judgment of the probate court in the instant case, nor was that judgment attacked within six months as provided in Act 401 of 1941, *supra.* Under these circumstances, § 14545 is inapplicable, and this was the effect of our holding in the case of *Manning* v. *Manning, Executor, supra.*

The allegations of the complaint charging undue influence on the part of appellees in the execution of the will do not set out facts constituting such undue influence, or facts from which the use of undue influence might be inferred. This court is committed to the rule that fraud or undue influence, which is a species of fraud, cannot be charged in general terms and without stating the main facts or circumstances constituting it. *Twombley* v. *Kimbrough,* 24 Ark. 459; *Mock, et al.,* v. *Pleasants,* 34 Ark. 63; *McIlroy* v. *Buckner,* 35 Ark. 555; *McLeod* v. *Griffis,* 51 Ark. 1, 8 S. W. 837; *Fogg* v. *Arnold,* 163 Ark. 461, 260 S. W. 729; *Ledwidge* v. *Tatum,* 200 Ark. 447, 139 S. W. 2d 238. This rule is followed by a probable majority of the courts of other states. 17 Am. Jur., p. 909; 107 A. L. R. 832.

If it be conceded, however, that the allegations of the complaint are sufficient to amount to a charge of undue influence in obtaining the execution of the will, still there is no allegation in the complaint to the effect that a fraud was perpetrated on the court in procuring the order of probate. As was held by this court in *Gray* v. *Parks,* 94 Ark. 39, 125 S. W. 1023, "The fraud that would give a court of chancery jurisdiction to set aside the judgment of the probate court admitting the will to probate would be fraud that was practiced upon the court in obtaining the judgment." See, also, *Parker* v.

Sims, 185 Ark. 1111, 51 S. W. 2d 517; *Manning* v. *Manning, Executor, supra.* The chancellor, therefore, correctly sustained the demurrer to the allegations of the complaint charging fraud and undue influence in procuring the execution of the will.

Appellants do not argue the question whether error was committed by the trial court in sustaining the demurrer to that part of the complaint which sought cancellation of the two deeds and alleged undue influence in the procurement thereof by appellees. The same general rule, however, applies to these allegations as is applicable to the charge of fraud in the execution of the will. This rule is stated in 9 Am. Jur., Cancellation of Instruments, § 56, as follows: "A bill of complaint or a petition for cancellation of an instrument should aver the facts on which the right to relief is predicated. Thus, if fraud is relied upon as a ground of cancellation, it must be averred. No technical form of words is necessary in a bill to set aside a deed on the ground of undue influence or fraud, but such a state of facts must be asserted as will enable the court to draw inferences of undue influence or fraud, averments, which merely amount to conclusions on the part of the pleader as to its existence, being insufficient. It is not necessary, of course, to recite in the bill of complaint all the evidence that may be adduced to prove the fraud, it being sufficient merely to state the main facts or incidents which constitute the fraud."

When tested by the foregoing rule, the averments of the complaint charging undue influence upon the grantor in the execution of the deeds, without alleging the main facts constituting the undue influence, amounted to mere conclusions of the pleader. The complaint did not, therefore, state facts sufficient to constitute a cause of action for cancellation of the deeds, and the chancellor correctly so held.

The decree is affirmed.

4-7889 194 S. W. 2d 1

Opinion delivered April 29, 1946.

[redacted]

Boyd Tackett and *Tom Kidd,* for appellant.

J. H. Lookadoo and *Agnes F. Ashby,* for appellee.

ROBINS, J. The question posed by this appeal is: Did Act No. 314 of General Assembly of Arkansas, approved March 15, 1939 (fixing venue in actions for personal injury or death, in the county of plaintiff's residence or in the county where the injury occurred), repeal or amend § 1387 of Pope's Digest (restricting venue, in certain actions against public officers, to the county in which the cause of action arose), so as to permit bringing in the county of plaintiff's residence a suit for damages against an officer for an assault, committed by him while making an arrest in another county?

Appellant, Claude F. Moncus, a minor, resident of Pike county, while at Amity, Clark county, was arrested by appellee, Douglas Raines, marshal of the town, and deputy sheriff of Clark county. While making the arrest appellee struck said appellant, as appellants averred, without cause; and to recover damages for the alleged wrongful assault appellants brought this suit in Pike county circuit court, appellee being served with summons in Clark county. Motion to quash return on the summons, on the ground that the venue of the action was in Clark county, was filed by appellee. The lower court sustained the motion and dismissed the suit. This appeal followed.

Section 1387 of Pope's Digest is as follows: ". . . 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, or for a neglect of official duty."

By § 9799 of Pope's Digest it is provided that "the town marshal of incorporated towns shall be the principal ministerial officer of the corporation, and shall have the same power that sheriffs have by law, and his jurisdiction shall be coextensive with the county for offenses committed within the limits of the corporation." Appellee was therefore a "public officer" within the meaning of § 1387 of Pope's Digest, quoted above.

We have held that misconduct by a peace officer of the kind complained of in the case at bar is embraced within the provisions of the quoted portion of § 1387, *supra,* and that actions for damages therefor must be brought in the county where the cause of action or some part thereof arose. *Edwards* v. *Jackson,* 176 Ark. 107, 2 S. W. 2d 44.

The Supreme Court of Montana, construing a statute almost identical in language with our statute (§ 1387, Pope's Digest) said in the case of *State ex rel. Stephens* v. *District Court,* 43 Mont. 571, 118 P. 268, 24 Ann. Cas. 1912C, 343: "It is contended that the tortious acts (alleged improper treatment of a prisoner by a warden)

complained of were not committed by the defendant 'in virtue of his office'; but we think there is no force in the suggestion. It could only have been by reason of the fact that he was warden that opportunity was given to commit the alleged acts. If he could commit only legal acts 'in virtue of his office,' plaintiff would have no cause of complaint. We think the Legislature intended that an action against a public officer for a tort alleged to have been committed by him in the exercise of his authority as such officer should be tried in the county where the act was done."

Section 1 of Act 314, approved March 15, 1939, entitled "An Act to Fix the Venue of Actions for Personal Injury and Death," commonly called the "Venue Act," provides: "All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of injury, and provided further that in all such actions service of summons may be had upon any party to such action, in addition to other methods now provided by law, by service of summons upon any agent who is a regular employee of such party, and on duty at the time of such service." And § 2 of the same Act is as follows: "This act shall not repeal any provision for venue of actions except such as are inconsistent herewith and all laws and parts of laws in conflict herewith are repealed."

Appellants argue that this later Act repeals the above quoted sub-division of § 1387 of Pope's Digest, which was a part of the Civil Code adopted in 1868, in so far as the venue of actions such as the instant case is concerned, and that this suit, since it was for damages for personal injury, was properly brought in Pike county, the county of residence of the injured party.

The "Venue Act" did not expressly repeal the said sub-division of § 1387 of Pope's Digest, and, if such a repeal was effected, it must have been done by implication. In fact, § 2 of that Act provides that no existing

laws as to venue, unless inconsistent with the new Act, should be repealed.

Repeals by implication are not favored, and before a court may properly hold that a later Act repeals an earlier law it must appear that there is such a conflict between the two that both cannot stand, and, therefore, the later Act, being the last expression of legislative will, must prevail, or it must appear from the later Act that in enacting it the Legislature intended to take up and deal with all matters embraced in the purview of the prior Act.

In 50 Am. Jur., p. 542 *et seq.*, the rule is thus stated: "Repeals by implication are not favored, and there are many instances in which particular statutes are held not to be repealed by implication. As a general rule, the legislature, when it intends to repeal a statute, may be expected to do so in express terms or by the use of words which are equivalent to an express repeal, and an intent to repeal by implication, to be effective, must appear clearly, manifestly, and with cogent force. The implication of a repeal, in order to be operative, must be necessary, or necessarily follow from the language used. . . . The courts will not hold to a repeal if they can find reasonable ground to hold the contrary. . . ."

On page 548 of the same volume (50 Am. Jur.) it is said: "The criterion by which to determine whether there is an implied repeal, is whether or not there is irreconcilable conflict between an earlier and a later statute. . . . Indeed, it must appear that a later act is contrary to, or inconsistent with, a former act in order to justify the conclusion that the first is repealed. Since laws are presumed to be passed with deliberation, and with full knowledge of existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. Except where an act covers the entire subject-matter of earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the sub-

ject, a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot, by a fair and reasonable construction, be reconciled, made to stand together, and be given effect or enforced concurrently."

Mr. Endlich in his volume on Interpretation of Statutes, § 113, said: "One of these presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by unmistakable implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they were not really used."

In the case of *Rightsell* v. *Carpenter,* 188 Ark. 21, 64 S. W. 2d 101, we said: "Repeals by implication are not favored in the law. *Houck* v. *State,* 166 Ark. 613, 267 S. W. 127; *State* v. *White,* 170 Ark. 880, 281 S. W. 678; *Mays* v. *Phillips County,* 168 Ark. 826, 272 S. W. 62. This court held in *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649, that 'the repeal of any law merely by implication is not favored and the repeal will not be allowed unless the implication is clear and irresistible.' Again, this court held in *Gilliland Oil Company* v. *State ex rel. Attorney General,* 171 Ark. 415, 285 S. W. 16, that 'the presumption is against repeal of statutes by implication'."

"A law passed on one subject does not by implication suspend the operation of a law on a different subject, without mentioning the latter law." (Headnote 4), *McDonald* v. *Wasson,* 188 Ark. 782, 67 S. W. 2d 722.

There is no necessary or irreconcilable conflict between the two laws here involved.

In the first the Legislature was dealing with the venue of suits to enforce liability for official misconduct of officers. Such misconduct may consist of many things, such as (in case of peace officers) failure properly to serve legal writs, false imprisonment, and, as in the case at bar, the wrongful or excessive use of force in making an arrest. The Legislature determined that such actions against officers, for obvious reasons of public policy, ought to be brought in the county where the cause of action originated. There is no invincible repugnancy between the two laws. Both may stand and be permitted to operate within their respective orbits, as prescribed by the Legislature.

Nor can it be said that the later act showed intention by the legislature to take up and deal with the entire subject-matter of the prior statute. The former statute dealt with the venue of suits against public officers for all kinds of official misconduct, whereas the later act fixed venue in only one kind of action, that for personal injury and death. In a discussion of the question of repeal of a prior statute by a later act indicating legislative intent to deal with the entire subject-matter, it is said in Corpus Juris, vol. 59, p. 920: "In order to effect a repeal by implication on this ground it must appear that the subsequent statute covered the whole subject-matter of the former one, and was intended as a substitute for it."

We conclude that the lower court correctly construed the law. Its judgment is, therefore, affirmed.

SMITH, J., concurring. The opinion in the instant case is perfectly sound, but it is in irreconcilable conflict with the opinion in the case of *Chicago, R. I. & Pac. Ry. Co.* v. *Bone,* 203 Ark. 1067, 160 S. W. 2d 51, to which no reference is made. Convinced as I am, that the opinion in the instant case is correct, although in conflict with the opinion in the railroad case, *supra,* I concur in the opinion which correctly states the law.

When Act 314 of 1939 was passed, § 1387, Pope's Digest, was in effect, just as § 1394, Pope's Digest, was in effect. Section 1387 is the section which, as the ma-

jority say, localizes actions against a public officer for acts done in virtue of, or under the color of his office, and the majority say it was not repealed by Act 314. The argument leading to that conclusion is sound and decisive, but it cannot be reconciled with the railroad case, *supra,* which held that § 1394, Pope's Digest, localizing actions against railroads had been repealed, as being in conflict with Act 314.

In the dissenting opinion in the railroad case, *supra,* the question was asked, "Has this section, 1165, C. & M. Digest, now appearing as § 1387, Pope's Digest, been repealed by Act 314; and, if so, where are we in the matter of jurisdiction as to venue of personal injury accidents?" A distinction has been made between the railroad case and the instant case, where no difference between the two cases exists. The railroad case, like this case, was a suit for a personal injury. Certainly assaulting and beating another is a personal injury. Section 3, Ch. Torts, 52 Am. Jur. 362.

In the majority opinion in the railroad case, it is said that: "It appears to us that this language (of Act 314) is all inclusive. 'All actions for damages for personal injury or death by wrongful act' means just what it says, and that is that all personal injury actions shall be brought in one of the two counties named. (That is, in the county where the plaintiff resides, or where the injury occurred.) It does not say 'all actions, except as against railroad companies,' but 'all actions,' and we have several times so held." Neither does Act 314 say "all actions except actions against public officers."

It appears obvious to me that both § 1387, Pope's Digest, and § 1394, of that digest were repealed by Act 314, or neither was repealed by that act. The opinion in the instant case is conclusive that § 1387 was not repealed, and is equally conclusive that § 1394 was not repealed. It is certain that neither section was expressly repealed, and if either was repealed at all it was by implication, and the opinion in the instant case shows that this was not done.

It is inconsistent to hold that § 1394 was repealed but that § 1387 was not. Being of the opinion that neither section was repealed, I must, of course, concur in the holding that § 1387 was not repealed. The opinion in the railroad case is unsound and must sooner or later be overruled, if we adhere to the opinion in the instant case.

HOFFMAN *v.* EPPERSON.

4-7885 193 S. W. 2d 1008

Opinion delivered April 29, 1946.

John G. Moore and *J. M. Smallwood,* for appellant.

Charles L. Farish, for appellee.

McHANEY, Justice. Appellee brought this action against appellants to recover damages for the alleged wrongful conversion by them of his right to redeem certain bales of cotton pledged by him in 1938 to the Commodity Credit Corporation to secure certain promissory notes for money loaned to him by the C. C. C.

Only 37 bales of cotton are involved on this appeal. Appellee conceded in the trial court that, as to one of the bales, he did sell to appellants his right of redemption on April 30, 1941, and was paid $1 therefor. The only dispute between the parties as to this bale was whether the consideration was paid with a dollar bill, as testified to by him, or was paid by a check for $1, bearing that date, indorsed by him, and cashed in the bank, where the transaction took place, on the same date, as testified to by Oates. While appellee sued for the conversion of 41 bales, it developed that Morrilton Cotton Oil Co. acquired his equity in three of them, so these three bales are not here involved.

Trial to a jury resulted in a verdict and judgment against appellants in the sum of $660, but which was later reduced by the court to $595.59.

Only two questions are presented by this appeal: (1) that the court should have directed a verdict for appellants on their request so to do because the evidence conclusively shows that appellee sold and released his equity in the cotton to appellants; and (2) because the instruction on the measure of damages was not supported by any competent evidence, and that the verdict was based on speculation and conjecture.

1. On the first question, that is, whether appellee executed and delivered the appellants the written releases of his cotton to the C.C.C. appearing in the record, bearing his signature, we think an extended discussion is unnecessary. Appellee denied that he signed these documents and stated that the signatures thereon were good imitations of his signatures, but they were not his; that he had not sold any of his equities in this cotton to any one, except the one bale above mentioned; and that he did not know that his loan contracts had been taken up until he was notified that he had only one bale left which he sold to appellants. Mr. Oates for appellants testified he acquired this cotton on what he believed to be documents executed by appellee and in the usual course of business. We think the evidence on this dispute

made a question of fact for the jury. There are several facts and circumstances that lead us to believe that appellee may be mistaken in stating that he did not sign the documents in question and in stating that the so-called "blue sheets," which were carbon copies of his original contracts and obligations with the C.C.C., were destroyed by fire when his home burned on April 28, 1941. The "blue sheets" apparently were not destroyed by fire, but are in this record. But we are not the triers of the facts when they are in dispute, as they are here. The jury has found that he did not release his cotton to appellants, and we cannot say that this finding is not supported by any substantial evidence.

2. The court instructed the jury that if they found for appellee, he would be entitled to recover the market value of the cotton at the time he demanded restoration from appellants, plus interest, less the amount of the loan thereon, the storage charges, and any equity of appellants therein by reason of the purchase or acquisition of the warehouse receipts, if any. Appellants objected specifically to this instruction in allowing a recovery of the market value of the cotton, "for the reason that there is no testimony in the record as to the type, grade, class, or price of the cotton grown by Mr. Epperson."

We think this objection is well taken and that the court erred in giving said instruction without some proof of the kind or type of cotton it was, the grade, and the market value thereof. There is no such proof in this record. One witness testified that he was familiar with the type of cotton grown in this territory; that in 1938 the average loan contract made to the farmer was around 9 cents a pound; that in 1941 the average price of cotton in this territory was 17½ cents per pound. We think appellee was required to prove something more than this in order to establish a measure of damages. It was not shown what the staple of the cotton was or the grade or its condition, or its weights. All these facts could have been obtained from someone, perhaps from the compress company, perhaps from the C.C.C. or the Federal Reserve Bank, in Little Rock, or perhaps from appellants who bought the cotton, redeemed it from C.C.C., and received

the warehouse receipts therefor. These receipts showed the weight of each bale, and it is well known that the price of cotton is determined by the length of the staple and the grade or classification thereof as shown by the sample. We think appellee himself, or perhaps his landlord could testify as to the kind, staple and grade of his cotton. We are not without evidence of the weight of the cotton as some of the documents show the total weight of the bales covered by them. While this cotton was grown on river bottom land, it is also well known that such cotton varies widely in staple and grade, and, therefore, price. Nor is it proven what the cost was to redeem from the C.C.C. and what the warehouse charges were.

The evidence presented is too indefinite and does not furnish a substantial basis on which to base a verdict. The verdict and the consequent judgment are, therefore, based on conjecture.

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

WREN *v.* D. F. JONES CONSTRUCTION COMPANY.

4-7884 194 S. W. 2d 896

Opinion delivered April 29, 1946.

Rehearing denied June 24, 1946.

Ward Martin, for appellant.

Buzbee, Harrison & Wright, for appellee.

McFaddin, J. This appeal involves a claim filed under the Workmen's Compensation Law, which is Act No. 319 of 1939. The appellant is the widow of Doss Wren, and she seeks to recover compensation from appellee for the death of her husband. There are two questions presented on this appeal; and the facts will appear as we discuss these questions.

I. *Did Appellee, by its Failure to Promptly File Notice of Intention to Controvert the Claim, Thereby Lose its right to Make the Defense of Independent Contractor?* Doss Wren was engaged in hauling gravel for appellee, and was instantly killed while driving a truck

in Columbia county, Arkansas, on July 16, 1942. On July 21st, D. F. Jones Construction Co. filed the first report with the Workmen's Compensation Commission. Shortly thereafter the Commission received notice from an attorney (not now in the case), advising the Commission of the claim of the appellant. Then ensued a series of unexplained delays. The Commission set the hearing for October 15th, but instead of a hearing, Mrs. Wren advised the Commission, by letter of that date, that her present attorney was the only one authorized to represent her. The hearing was reset for November 13th; and then reset for December 3rd; and there was a still further delay. Finally, on March 12, 1943, notice of hearing was given for March 25, 1943; and on that notice the subject of the hearing was listed as "Dependency."

At the beginning of the hearing before the referee on the date last mentioned, appellant filed "Motion for Allowance of Compensation," which recited that Doss Wren was killed on July 16, 1942, and that notice of claim was given on July 21st in accordance with § 17 of the Workmen's Compensation Law; and "More than fourteen days have elapsed since the filing of such notice, and, under the provisions of such act (§ 19-d), respondents are precluded from controverting claimant's right to compensation. Respondents also failed to file form 9-A as required by the Commission." On the argument of this motion, appellee's attorney informed the referee, and it is in the record:

"The respondents state that on November 2, 1942, a letter was written to the Commission with a copy to Mr. Ward Martin, receipt of which he has acknowledged to me on many occasions, in which he was apprised of the nature of the defense. Since that time I, as attorney for the respondents, have talked with Mr. Martin not less than half a dozen times. He is fully acquainted with the defense of independent contractor. . . . At his request, on January 26, 1943, I met with him before the members of the Commission at Little Rock, at which time Your Honor was present, and the identical point now urged was raised. At his request a letter was written by the chairman of the Commission covering the point and

denying the point he is now raising. On January 24, 1943, a letter was written to Mr. Martin by the chairman, copy of which was sent me. I want this letter and all the other correspondence in the file to be made a part of the record in order to show that the point has been raised. . . ."

The referee then ruled:

"By the Referee: Those papers will be made a part of the record. And, although I am under the impression this point that is now being raised by the claimant has already been determined by the Commission in this case, I am going to again overrule the objection under provisions of § 19-d of the Act, which to my mind, is plain, that if the employer controverts the right to compensation he shall file certain notices, but the failure to file this notice will not prevent the employer raising any defense when the case or claim is subsequently filed by the employee, nor shall the filing of such notice preclude the employer from raising any additional defense."

From these excerpts from the record, it is thus clear that the appellee had all along controverted the claim, and appellant's counsel had been so informed. Even if the first notice to controvert was for some other ground than the defense of independent contractor, nevertheless, that point could be raised as late as the hearing. This is true because of § 19-d of the Act which concludes with these words: "nor shall the filing of the notice preclude the employer raising any additional defense." We, therefore, hold that, under the facts in this case, the defense of independent contractor could be raised as late as the hearing of March 25, 1943.

II. *Was Doss Wren an Independent Contractor at the Time and Place he was Killed?* Wren owned his own truck and was engaged in hauling gravel for appellee at $3 per load. Appellee loaded the truck at the gravel pit, and Wren hauled the gravel some 14 miles, and dumped the gravel at the place indicated by appellee. It was while Wren was driving his loaded truck on the public highway that another vehicle collided with his truck, and inflicted mortal injuries to Wren. As before stated, Wren was

compensated for the loads hauled. He was free to make as many or as few trips per day as he desired. The appellee made no deductions from Wren's pay for Social Security or Unemployment Compensation. Wren could buy gasoline wherever he desired; or for convenience, he could buy it at a designated station and sign a ticket which would later be charged against his pay.

The Commission held that Wren was an independent contractor and not an employee; and therefore denied recovery to the appellant. The Commission used this language:

"The decedent owned his own truck and worked to suit his own convenience. The employer merely loaded the truck and showed the decedent where to unload. The evidence shows that the conduct of the decedent and his manner and means of working were not subject to the control of the respondent employer. Held, therefore, that the decedent was not an employee of the respondent employer within the meaning of the Workmen's Compensation Law."

If Wren was an employee of the appellee, then Wren was protected by the Workmen's Compensation Law, and the appellant should recover. If Wren was an independent contractor, then he was not protected by the Workmen's Compensation Law, and appellant cannot recover. The definition of "employee" in § 2 of the Workmen's Compensation Law is authority for these statements. See *Irvan* v. *Bounds,* 205 Ark. 752, 170 S. W. 2d 674.

Whether Wren was an employee or an independent contractor is thus the decisive question; and it is a question of fact. In *Chapman & Dewey Lumber Co.* v. *Andrews,* 192 Ark. 291, 91 S. W. 2d 1026, it was insisted that the trial court should have decided *as a matter of law* whether the worker was an employee or an independent contractor; and, in denying that contention, this court said:

"We cannot agree with appellant that the court erred in refusing its request for a directed verdict in its favor. On the contrary, we are of the opinion that the

question was one for the jury. We have many times held that 'an independent contractor is one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own methods to accomplish it, and represents the will of the employer only as to the result of his work.' Headnote, *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. 2d 320. Also that such status is usually a question of fact for the jury. It is the duty of the court to define the relationship, and for the jury to determine its existence. *Ellis & Lewis* v. *Warner, supra.* In this case, the facts are sufficient to take the question to the jury."

In *Hobbs-Western Co.* v. *Carmical,* 192 Ark. 59, 91 S. W. 2d 605, in discussing the duty of the jury to decide whether the worker was an employee or an independent contractor, this court said:

"A reasonable inference to be drawn from the evidence is that Westmoreland intended to, and did, retain the right to give directions in regard to the details of the work. In the case of *Ice Service Co.* v. *Forbess,* 180 Ark. 253, 21 S. W. 2d 411, we said: 'The conclusion as to the relationship must be drawn from all the circumstances in proof, and where there is any substantial evidence tending to show that the right of control over the manner of doing the work was reserved, it became a question for the jury whether or not the relation was that of master and servant.' The circumstances proven in the case at bar raise a question as to the relationship of the truck driver to the Hobbs-Western Company to be determined by the rules announced in the cases cited, *supra,* which question the trial court properly submitted to the jury."

We have, also, held that when facts are made to appear, from which inferences are to be drawn and conclusions reached, then it is for the jury to draw the inferences and reach the conclusions. In *Grand Lodge* v. *Banister,* 80 Ark. 190, 96 S. W. 742, 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, I. M. & S. Ry. Co.* v. *Coleman,* 97 Ark. 438, 135 S. W. 338, 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, 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., 'Trials,' § 142; and see, also, 64 C. J. 346."

Under our Workmen's Compensation Law the Commission acts as a trier of the facts—*i.e.,* a jury—in drawing the inferences and reaching the conclusions from the facts. We have repeatedly held that the finding of the Commission is entitled to the same force and effect as a jury verdict. In *Ozan Lumber Co.* v. *Garner,* 208 Ark. 645, 187 S. W. 2d 181, in affirming the finding of the Commission to the effect that the worker was an independent contractor and not an employee, we said:

"We are not concerned here with the preponderance of the testimony. After a careful review of the entire record, we have reached the conclusion that there is substantial evidence presented to support the Commission's finding that appellee, at the time of his injury, was an independent contractor."

In *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620, in affirming the Commission's finding that the worker was an employee and not an independent contractor, we said:

"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., page 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."

There is no conflict of law between the last two quoted cases, because both cases held that the Commission determines the facts; and we give the Commission's findings the force and effect of a jury verdict. In the case at bar, if the Commission had reached the conclusion that Doss Wren was an employee at the time and place he was killed, then we would have affirmed the Commission on that finding, because it was a question of fact; and there was evidence from which the Commission could have found either way. The Commission could have likened the facts in the present case to those in any of these cases, to-wit: *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. 2d 320, and 182 Ark. 613, 32 S. W. 2d 167; *Delamar and Allison* v. *Ward,* 184 Ark. 82, 41 S. W. 2d 760; *Parker Stave Co.* v. *Hines, supra; Hobbs-Western* v. *Carmical, supra; Chapman & Dewey Lumber Co.* v. *Andrews, supra; Irvan* v. *Bounds, supra.* Or the Commission could have found (and did find) that the facts in the case at bar were more like the facts in *Ozan Lumber Co.* v. *Garner, supra,* and *Crossett Lumber Co.* v. *McCain,* 205 Ark. 631, 170 S. W. 2d 64. It was for the Commission to determine the facts; there is substantial evidence in the record to support the conclusion reached.

Therefore, we affirm the judgment of the circuit court, which affirmed the order of the Commission.

ROBINS, J., dissenting. I respectfully dissent.

In my opinion the evidence adduced showed that Wren was an employee of appellee, D. F. Jones Construction Company, and not an independent contractor.

The testimony, in which there was not the slightest conflict, established that:

(1) Wren was not hired to do any particular piece of work or to haul any specified amount of gravel. "Arrangement for definite quantity of work is held characteristic of independent contractorship, and lack of such definiteness tends to show that the worker is an employee, at least where payment is by the unit of work." 71 C. J. 470. *Warner* v. *Fullerton-Powell Hardwood Lumber Co.,* 231 Mich. 238, 204 N. W. 107; *Helmuth* v. *Industrial Accident Commission,* 59 Cal. App. 160, 210 P. 428.

(2) Under his employment agreement he could have quit work at any time and his employer could have discharged him at any time with or without cause. "The power of an employer to terminate the employment at any time is incompatible with the full control of the work that is usually enjoyed by an independent contractor." *Bowen* v. *Gradison Construction Co.,* 236 Ky. 270, 32 S. W. 2d 1014. "The power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists. 1 Thompson on Negligence, § 579." *Messmer* v. *Bell & Coggeshall Co.,* 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1. "By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. *Franklin Coal & Coke Co.* v. *Industrial Commission,* 296 Ill. 329, 129 N. E. 811." *Industrial Commission of Colorado* v. *Bonfils,* 78 Colo. 306, 241 P. 735. To the same effect are holdings in *Frost* v. *Blue Ridge Timber Corporation,* 158 Tenn. 18, 11 S. W. 2d 860; In re *James Murray,* 130 Me. 181, 154 Atl. 352, 75 A. L. R. 720; *Kelley's Dependents* v. *Hoosac Lumber Co.,* 95 Vt. 50, 113 Atl. 818; *Barclay* v. *Pudget Sound Lumber Co.,* 48 Wash. 241, 93 Pac. 430, 16 L. R. A., N. S., 140; *Nyback* v. *Champagne Lumber Co.,* 48 C. C. A. 632, 109 Fed. 732; *Evans* v. *Dare Lumber Co.,* 174 N. C. 31, 93 S. E. 430, 30 A. L. R. 1498.

(3) The employer controlled the methods of the work done by Wren. This is true because:

(a) The employer actually loaded Wren's truck at the gravel pit.

(b) The employer located the exact spot on the highway where Wren should unload the gravel.

(c) The employer furnished gasoline for Wren in the operation of the truck which hauled the gravel. While it is true that the employer collected the retail cost of this gasoline out of Wren's pay, yet it may well be inferred that the employer would not furnish gasoline indiscriminately to haulers without knowing that the fuel was being used solely in hauling gravel for the employer; and this would indicate a measure of supervision by the employer, not only of the loading and unloading, but of the actual operation of Wren's truck.

So we have here a case where a man was hired, not to carry out any certain project or any definite part thereof, and where he was, at all times, under the control and supervision of the employer, as to the methods of work—with the employer possessing further absolute control that necessarily inheres in the right of the employer to discharge him at any time.

The great weight of authority, as I find it, is to the effect that one working under the agreement and in the situation shown here as to Wren is an employee and not an independent contractor.

The cases cited below, all of which arose under Workmen's Compensation Acts identical with or similar to the Arkansas law, illustrate the trend of judicial decisions on this question.

A "rock contractor" was engaged under written contract to remove rock and other material (except coal) necessary to be removed in coal mining operations. He was to furnish all labor, material, tools and equipment necessary and was to be paid per cubic yard of excavation. The mine owner had the right to cancel the contract whenever the work was not satisfactory. It was held that this "rock contractor" was an employee, not an independent contractor. *Kelley* v. *Delaware L. & W. R. Co.,* 270 Pa. 426, 113 Atl. 419.

In the case of *Carr* v. *Krekeler,* 94 Ind. App. 508, 181 N. E. 526, the question was whether Krekeler, whose widow had filed claim for compensation, was the employee of Carr or an independent contractor. The evidence, as stated by the court, was to this effect: "The deceased was to be paid $1 per yard, and he was to furnish the truck, the driver, and to service the truck completely. There was no agreement that the deceased was to haul any certain or definite amount or quantity of stone; nor that he was to haul for any certain or definite length of time. His truck was one of several so employed by the appellants. It appears that he could quit at any time; could haul as many loads per day as he desired, and could be discharged, . . . at any time." The appellate court of Indiana held that Krekeler was an employee, not an independent contractor.

In the case of *Armes* v. *Williams Bros., Inc.,* 17 La. App. 555, 136 So. 160, it was held that a farmer who furnished three teams and drivers (of which he was one) to assist in construction of pipe line was an employee and not an independent contractor.

The supreme court of Michigan, in the case of *Tuttle* v. *Embury-Martin Lumber Co.,* 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664, held that Tuttle, who was employed to use his team in hauling logs at $2 per thousand, was an employee and not an independent contractor.

In the case of *Van Simaeys* v. *Geo. R. Cook Co.,* 210 Mich. 540, 167 N. W. 925, it appeared that Van Simaeys was employed by the Cook Company to haul a quantity of dirt to make a fill. He was to furnish wagon and team and was to receive 65 cents to 75 cents for each load hauled by him. He was held to be a workman, not an independent contractor.

Scheel owned his truck and kept up the repairs thereon. He hauled regularly for the Three Rivers Glass Company, but was allowed to carry freight for other people in his truck. Under these facts Scheel was held to be an employee and not an independent contractor.

Southern Surety Company of New York v. *Scheel* (Tex. Civ. App.), 49 S. W. 2d 937.

In the case of *Powell* v. *Spencer Bros.*, 5 La. App. 218, it was shown that Powell was employed by Spencer Bros., who had a contract to gravel certain highways, to haul gravel. Powell furnished the truck and was paid at a certain rate per yard. In that case the court said: "We are of the opinion, however, that the plaintiff, having been employed to haul the gravel with a motor truck, and the defendants having instructed him as to the places of loading and unloading, shows that defendants did have control of the means and manner by which the work was to be accomplished, and that they did have control of the plaintiff during the time he was working and the right to discharge him; hence that plaintiff was an employee rather than an independent contractor and the mere fact that he furnished and maintained the truck does not alter the situation."

Facts presented in the case of *Alexander* v. *Latimer*, 5 La. App. 41, were practically identical with those in the case at bar. The court held in that case that the hauler was a laborer, saying: "Defendant under his contract with the parish necessarily retained control of the plaintiff as to the delivery of the gravel, . . . and we do not think it would have been possible for him to have had greater control had the plaintiff been employed by the day."

In the case of *Beebe* v. *McKeithen Construction Co.*, 5 La. App. 179, the court thus stated the facts: "Plaintiff was employed by defendant to haul gravel for the construction of a public road. He owned and used his own truck. He was paid by the cubic yard for hauling the gravel. . . . He was not employed to haul any specific gravel nor was any quantity stipulated . . ." It was there held that plaintiff was a laborer and not an independent contractor.

In the case of *James* v. *Hillyer-Deutsch-Edwards*, 15 La. App. 71, 130 So. 257, it was held that one who was engaged to furnish, service and operate his truck, load

ties in the woods and haul them to the railroad right-of-way for 15 cents per tie was an employee and not an independent contractor.

The claimant in the case of *Bucher* v. *American Fruit Growers' Company,* 107 Pa. Super. Ct. 399, 163 A. 33, who furnished and drove his own truck in hauling apples from the producer's farm to the railroad station for shipment, was held to be an employee within the meaning of the Workmen's Compensation Act.

In the case of *Anderson* v. *Coca-Cola Bottling Co.,* 190 Minn. 125, 251 N. W. 3, involving a claim under the Workmen's Compensation Law of Minnesota, the supreme court of that state said: "Anderson was the owner of a Chevrolet truck, his sole business equipment. On June 29, 1931, he was engaged by relator the Coca-Cola Bottling Company to haul and deliver its bottled products by use of the truck at a compensation fixed at $1.25 per hour. The Coca-Cola beverage was transported in wooden cases each holding 24 bottles. The suggestion of relators that Anderson was an independent contractor and not an employee is not tenable. . . . His status could not be dignified to that of independent contractor."

The supreme judicial court of Maine, in *Mitchell's Case,* 130 Me. 516, 154 Atl. 184, held that Mitchell, killed accidentally while hauling gravel, was an employee and not an independent contractor, and sustained an award of compensation to his widow. The evidence showed that a contracting firm had employed Mitchell to haul gravel from a pit to a highway construction job. Mitchell had been engaged in the trucking business for several years, and under the agreement with the contractor he was to furnish his truck and to be paid on an hourly basis.

In the case of *Root* v. *Shadbolt & Middleton,* 195 Ia. 1225, 193 N. W. 634, it appeared that Root, who was killed by a cave-in at a gravel pit, had been employed to haul gravel from the pit to a highway job. Root furnished his own team, which he drove. He was not employed by the contractors, but by another farmer in his neighborhood who had been employed to take charge of the haul-

ing operation. His widow's claim for compensation was resisted on the ground that he was an independent contractor. The supreme court of Iowa held that he was an employee and not an independent contractor.

It appeared in the case of *Bristol & Gale Company* v. *Industrial Commission,* 292 Ill. 16, 126 N. E. 599, involving a claim asserted by the administratrix of the estate of George Johnson for an award under the Workmen's Compensation Act for the death of Johnson, that Johnson had contracted to haul for Bristol & Gale Company. He furnished his own wagon and team and a driver when he did not drive himself. He fed and cared for his horses. For his work and that of his driver and for use of his wagon and team he was paid a stipulated sum. The claim was resisted on the ground that Johnson was an independent contractor. But the supreme court of Illinois held that he was an employee and sustained the award.

In the case of *Standish* v. *Larsen-Merryweather Co.,* 124 Nebr. 197, 245 N. W. 606, it was shown that Standish was employed by a contracting company to haul gravel used by it in surfacing a public highway—the gravel to be hauled from a pit to designated places on the highway. Standish was to furnish and service his own truck and to be paid 70 cents for each load hauled. His claim for compensation was resisted on the ground that he was an independent contractor. It was held by the Nebraska Supreme Court that he was an employee, not an independent contractor.

The testimony in the case of *Western Indemnity Co.* v. *Prater* (Tex. Civ. App.), 213 S. W. 355, showed that Prater was employed by Athens Pottery Company to haul clay, Prater furnishing wagon and team and driver and receiving 36 cents per ton. It was held Prater was an employee and not an independent contractor.

The supreme court of Minnesota, in the case of *Rouse* v. *Town of Bird Island,* 169 Minn. 367, 211 N. W. 327, reversing an order of the State Industrial Commission, awarded compensation to the widow and children of

H. J. Rouse, a gravel hauler employed by the town of Bird Island. The sole defense to the claim was that Rouse was an independent contractor. The evidence showed that Rouse was employed to furnish his wagon and team and haul gravel at certain rates per wagon load. The court in that case said: "The fact that the men provided their own team, wagon and shovel is of no significance."

The majority of the court in their opinion say that if the commission had held that Wren was an employee and had made an award to his widow and orphan children the majority would have affirmed such a ruling. This means that in the opinion of the majority of this court the evidence adduced authorized a finding that Wren was not an independent contractor—and yet his widow and little children are denied compensation by us solely because the commission said Wren was an independent contractor.

The letter, as well as the spirit of the Workmen's Compensation Law, requires, whenever there is a doubt as to the propriety of a claim, that such doubt be resolved in favor of the workman or his dependent family.

"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. To the same effect, see, also, *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *Williams Manufacturing Co.* 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.

"In determining whether a workman is an employee or an independent contractor, the act is to be given a liberal construction in his favor, and any doubt is to be resolved in favor of his status as an employee, rather than as an independent contractor." 71 C. J. 449; *Domer* v. *Castator,* 82 Ind. App. 574, 146 N. E. 881.

As I view it, we are observing neither the letter nor the spirit of the rule in this case, because we are denying this widow and her children recovery in face of a finding by the majority in effect that the evidence would have justified such a recovery.

The purpose of this law was to distribute to some extent among all the citizens the tragic consequences of accidents that inevitably must come to many of those who do the hard and dangerous, but essentially necessary, work of the world. As the late Justice CARTER said in the case of *Birchett* v. *Tuf-Nut Garment Manufacturing Company,* 205 Ark. 483, 169 S. W. 2d 574, "the theory behind the Workmen's Compensation Act is this: Every industry exposes those engaged in it to certain risks of being hurt, such risks arising out of the mere fact of being engaged in that industry. The policy behind the Act is the decision of the people that it is fairer to charge as an expense of the industry (to be paid by the ultimate consumer just as he pays for the raw materials used by the industry) a part of the losses arising from the risks, to which those engaged in that industry are exposed by reason of being so engaged, than it is to let such losses fall entirely upon the employee who gets hurt."

When the admitted facts in the case at bar are weighed in the light of the established rules prescribing the status of an independent contractor and that of employee, it seems to me that there can be no doubt that Wren was an employee. But, if there is a doubt about the matter—and the majority in effect hold that there is such a doubt, because they say the question might have been decided either way—that doubt, under our own declarations, ought to be settled in favor of the claimants.

This court has not hesitated, even where a jury has found that one party was the servant of another, to declare that the undisputed evidence showed that the relationship of independent contractor, and not that of servant, existed. A recent example of this is the case of *Rice* v. *Sheppard,* 205 Ark. 193, 168 S. W. 2d 198, where we reversed a judgment in favor of Sheppard, based

on a jury's verdict for injuries caused by Smith, who was hauling certain lumber for Rice. The jury found in that case that Smith was Rice's servant, but we said that the undisputed testimony showed that Smith was an independent contractor. Another such case is that of *Moore and Chicago Mill & Lumber Company* v. *Phillips*, 197 Ark. 131, 120 S. W. 2d 722. Since we had the power and duty in those cases to upset a jury's finding that the relationship of master and servant existed, I submit that we have the same power and duty to overrule the erroneous legal inference drawn by the Workmen's Compensation Commission from the undisputed evidence in the case at bar.

I am authorized to say that Mr. Justice MILLWEE joins in this dissent.

PINSON *v.* STATE.

4406 194 S. W. 2d 190

Opinion delivered April 29, 1946.

Rehearing denied May 27, 1946.

Eugene Sloan, Norris Webb and *Bruce Ivy,* for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The information charges Pinson with having killed Charles Shelton and that the act was such as to constitute murder in the first degree. Appeal is from judgment on a verdict finding the defendant guilty and fixing his punishment at imprisonment for life.

Shelton was shot October 18, 1945, and died the following day. Chapman-Dewey Lumber Company owns Hatchiecoon Island and rents lands to various tenants. A large part of the area is timbered, and about 150 acres have been cleared. Pinson occupied one of the tenant houses and cultivated 46 acres. Shelton share-cropped a small tract and lived with his wife and two children[1] in a house "back in the woods." Pinson had operated a sawmill on Hatchiecoon and had employed Shelton as a laborer, but at the time Shelton was shot he was not employed by or making a crop for Pinson.

On the morning of the tragedy Shelton left his home for the purpose, as his wife explained, of "baiting" some wild hog traps. He carried a .22 rifle with a broken mainspring. The hammer or firing pin was operated with a rubber band.

Wes Mooneyham, deputy sheriff, testified that Pinson "flagged him down" in Lake City about 11:15 o'clock October 18 and said that he had just shot a man. With

[1] The oldest child was three years of age, the youngest nine months. Shelton was 37 years of age and weighed approximately 140 pounds.

another deputy and Dr. Edgar Ellington, Mooneyham left for the island. Shelton was found sitting on a porch near a point called Deep Landing, not far from the St. Francis river levee. Mrs. Pinson, with a neighbor named Tuttle, (apparently Henry Tuttle) had assisted the wounded man to a boat and they had rowed across a narrow strip of water. Shelton complained of being cold and asked to be allowed to sit in the sun. At that time he was able to walk, and to talk with extreme difficulty, but seemingly the loss of blood had made him sensitive to the October weather.

Assignments of errors are (a) that statements made by Shelton while crossing in the boat, while waiting for the doctor, and after the doctor arrived, (such statements having been testified to by Mrs. Shelton) were inadmissible as dying declarations; (b) that photographs and plats introduced by the State were not properly identified; (c) that there should have been an instructed verdict for the defendant, and (d) that the Court erred in refusing to grant a new trial because of newly-discovered evidence.

One of our latest cases on dying declarations is *Cross* v. *State,* 200 Ark. 1165, 143 S. W. 2d 530. The wounded man had stated to a cousin that he was "shot all to pieces" and could not live. In *Broughton* v. *State,* 199 Ark. 1187, 133 S. W. 2d 3, the injured man said, "I am dying [am I not?]." In *Clements* v. *State,* 199 Ark. 69, 133 S. W. 2d 844, the declarant told a nurse he was "pretty sick," adding, "I am going to have a hard time if I make it." See "Homicide," West's Digest, v. 10, § 200 *et seq.*

In the case at bar Dr. Ellington was asked regarding the patient's condition when he found him near Deep Landing. The answer was: "The whole side of his face was shot off. It was hanging down here on his shoulder."

Mooneyham testified that a third or a half of Shelton's tongue was shot off, and that he was getting weak: —"I could see he couldn't talk much, and we didn't bother him. . . . Later when he was taken to a hos-

pital [at Jonesboro] they put him to sleep to try to patch him up, but he never did regain consciousness."

Shelton had bought a cow on credit, having agreed to make payment in corn from his crop when it should be harvested. Mrs. Shelton testified that her husband, while in the skiff or canoe, asked Tuttle to pay for the cow, remarking, "I won't be coming home." Shelton had previously stated that Pinson shot him. Mrs. Shelton was permitted to testify that the wounded man told her there had not been a quarrel, but that "Pinson just stepped out and shot me." Shelton claimed that he did not see Pinson before the shot was fired.

To an impressive degree some of Mrs. Shelton's statements regarding what her husband had said were verified by Mooneyham, and by Dr. Ellington. While Shelton was waiting for transportation to a hospital, Mooneyham, Dr. Ellington, another deputy, and Pinson drove up. Pinson had been arrested when he reported to Mooneyham that he had shot Shelton.

Pinson contended that Shelton was the aggressor, and that he fired in necessary self-defense. Jim Trawick, who worked for Pinson, and in effect lived with him, claimed to have seen the entire transaction. He supported Pinson's version, but neither was believed by the jury.

According to Trawick, he and Pinson discussed whether Trawick should take his team of mules off the island, or wait until later. During this conversation Pinson said something about having found a beetree; and then, addressing Trawick concerning the mules, added: "While you are thinking it over we will go get a 'mess' of squirrels."

Trawick says that as they stood or walked near a path in the woods someone approached, and Trawick recognized Shelton. Later Shelton and Pinson began arguing, the effect of Shelton's attitude being that he was going to set wild hog traps "all over the island."

Trawick contends that after considerable conversation had taken place between Shelton and Pinson—and during this interval Trawick sought to distract attention

by asserting he thought there was a squirrel nearby—Shelton got behind a tree and told Pinson that one of them had to die. Not until Shelton raised his rifle in a threatening manner, according to Trawick, did Pinson shoot. He used a twelve-gauge shotgun and fired from a distance of twenty-five feet. Shelton fell, apparently dead, and Pinson left immediately with Trawick.

The State introduced evidence from which a fair inference might be drawn that it was nearly an hour before Pinson left for Lake City. The State's theory is that Trawick and Pinson acted in concert, and that each thought Shelton had been instantly killed. When they later found he had sufficiently overcome the shock to walk for help, the idea then occurred to Pinson that an account of the transaction differing from what he and Trawick might tell would be forthcoming. At least this is the State's construction of the circumstances.

The principal consideration upon which so-called dying declarations are admitted is that one who realizes death is inevitable in consequence of the injury inflicted speaks with solemnity and will not resort to fabrication in order to unjustly punish another. But in all cases there must be an abandonment of hope and a definite expectation that life is a matter of but short duration. We think these conditions concurred in respect of Shelton's outlook. The shock must have been terrific, and he had bled profusely. Physical evidence showed where he had lain on the ground near the tree. His hat was found not far from there, and the sack in which he carried corn to bait hog traps was also recovered. It was not speculation in a legal sense when the jury inferred that Shelton, in asking Tuttle to pay for the cow, was thinking of the nine-months-old infant and the three-year-old child, and was worrying about their status when he asked Tuttle to see that the cow was paid for; neither did members of the jury have to go beyond their own practical experiences to conclude that comments and remarks by Dr. Ellington, who told Mooneyham and Mrs. Shelton he could do nothing for the wounded man, were overheard by the unfortunate husband and father who was within easy speaking distance.

While the newspaper reporter who took the photographs was not called as a witness, the exhibits were definitely identified as those to which witnesses referred. Some who testified even identified themselves in the photographs. There was no contention that the views were a reproduction of the actual shooting, or that the exposures were made from a particular angle. No prejudice resulted from the use made, or from introduction of the rough sketch or plat for the purpose of illustrating a point. Exactness was not claimed, nor was there any contention that distances indicated were sufficiently at variance with actuality to create prejudice.

In the motion for a new trial it is asserted that ". . . the gist of said newly-discovered evidence is to the effect that at various times, including the evening before the shooting took place, . . . the deceased had made, both direct and indirect, threats on the life of this defendant, and in so many words had stated to these newly-discovered witnesses that he intended to kill this defendant."

There was direct evidence of threats made by Shelton—(repeated three times within a few minutes, according to Trawick)—that an intent to kill became an overpowering passion with Shelton when he began talking to Pinson. Tuttle had formerly testified (apparently at a preliminary hearing) regarding his knowledge of Pinson-Shelton relations, but failed to say anything concerning threats. One of the affidavits presented by appellant is signed by Tuttle. His explanation of former silence is that he was not asked. Another proposed witness whose affidavit was filed says that soon after the killing he went to California, and had only recently returned.

Granting or refusing a new trial because of newly-discovered evidence is a matter within the Court's discretion. If that discretion is abused an appellate court will reverse and remand; but where, as here, the defendant and his principal witness admit that they have served terms in penitentiary, and had engaged in questionable conduct as a matter of habit, the Court had a right to

consider such anti-social deportment in determining what credit should be given the testimony tendered.

Trawick, insofar as memory was of service, thought his initial brush with the law occurred in Alabama in 1926 "when they got me on top of an 800-gallon cooker." For this, on a plea of guilty, he was sentenced to a year and a day in the penitentiary. On cross-examination, when seemingly confronted with documents showing that the transaction occurred in 1929, reply to a question was, "I thought it was in 1926; I don't know." Neither did Trawick know the names of two men he shot in Arkansas in 1938, (Richard Hopkins and Willie Fields) but the charge was assault with intent to kill and he served in the Arkansas Penitentiary. On another occasion he was "locked up" on account of public drunkenness. Most of the testimony of this nature was brought out by attorneys for the defendant.

Pinson, too, had not been without his day in court. In 1930 he was convicted on a charge of operating a still and sent to the penitentiary. After serving seven months of a three year sentence a parole relieved the tension. He was in Federal Court, charged with owning and operating a still, possession of [untaxed] liquor, and transporting. All of this trouble, the defendant asserted, grew out of the same primary transaction. Pinson could not recall the number of times he had been arrested for drunkenness.

We think there was substantial testimony for the jury's consideration and that the Court did not err in refusing to give an instructed verdict, or in its rulings upon the admissibility of evidence. There is no showing that discretion was abused.

Affirmed.

4-7896 194 S. W. 2d 203

Opinion delivered May 13, 1946.

W. T. Mills, V. D. Willis and *W. S. Walker,* for appellant.

N. J. Henley, for appellee.

ROBINS, J. Appellees sued appellant in the lower court for damages to their fencing, meadow and orchard in the sum of $941.40, alleged to have been caused by a fire said to have been started by the operation of appellant's locomotive. On trial to a jury the verdict was in the sum of $450 in favor of appellees. From judgment entered on the verdict appellant prosecutes this appeal.

These grounds of reversal are urged by appellant: First, that there was not sufficient evidence to establish liability, under § 11147 of Pope's Digest, of appellant for the damage done by the fire; and, second, that there was

no definite evidence to show damages in the amount fixed by the jury.

I.

The evidence tended to establish that the meadow on appellees' farm, which adjoined the right-of-way of appellant, caught fire shortly after one of appellant's trains had passed; that the fire first caught near the right-of-way and then spread to other parts of the farm; that appellant's section hands were summoned to fight the fire; and one of them testified that a certain train (of appellant) had started the fire. No other cause of the fire was suggested. This testimony was sufficient, under the rules heretofore laid down by us, to justify a finding by the jury that the fire was caused by one of appellant's locomotives. *Missouri & North Arkansas Railroad Company* v. *Phillips,* 97 Ark. 54, 133 S. W. 191; *Missouri Pacific Railroad Company* v. *Campbell,* 206 Ark. 657, 177 S. W. 2d 174.

II.

Appellee, Eugene Treece, testified that he looked over the land the next day after the fire; that 132 fence posts of the value of twenty cents each had been destroyed by the fire; that 22 acres, seeded in lespedeza in 1940 or 1941 and again in 1942, was burned over; that the wire in the wire fence was damaged by the fire; that fifty-nine apple trees were destroyed by the fire. Appellee, Francis Treece, testified that he had driven by the farm, which was unoccupied at the time of the fire, some time after it was burned over; that all the trees in the orchard were dead or dying; that approximately seven acres were in the orchard; that when he was home (he had been commissioned in the army in 1938 and on active duty since 1941) it was a good bearing apple orchard; that it was last sprayed in 1939. John J. Jones testified that he owned land adjoining appellees' farm and that his land was damaged by the same fire; that the apple trees on the Treece land were good thrifty trees fifteen to eighteen years old, and that many of them were killed by the fire; that the wire in the fence was damaged by the heat. Martha Acree testified that the Treece orchard was a

good one up until 1942; that all the trees were destroyed by the fire.

No witness attempted to fix any sum as representing the damage resulting to the wire in the fence, to the orchard or to the lespedeza field by reason of the fire. The evidence disclosed that for the burning of six trees in the same orchard in January, 1944, appellant had paid appellees $75 or $12.50 per tree, but it is manifest that, even if it could be said that a sum paid in compromise of a claim of this kind represented the fair value of the trees, it does not follow that this would properly fix the damage for trees destroyed in the same orchard some nine months later.

"To authorize recovery of more than nominal damages in an action in tort, facts must exist which afford a basis for measuring the plaintiff's loss with reasonable certainty and the evidence must be such that the jury may find the amount of the loss by reasonable inferences from established facts, and not by conjecture, speculation, or surmise." 15 Am. Jur., p. 796.

We have frequently held that verdicts of juries may not be based on conjecture or speculation. *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 Company* v. *Jones,* 174 Ark. 905, 298 S. W. 342.

In the case at bar there was no definite proof as to the value of the trees or of the lespedeza field at the time of destruction thereof by the fire. No witness testified as to the value of the farm before the fire and the value thereof after it had been damaged by the fire; nor did any testimony adduced furnish a guide to the jury in accordance with the rules laid down by us in these cases: *Missouri Pacific Railroad Company* v. *Nichols,* 170 Ark. 1194, 279 S. W. 354; *St. Louis, Iron Mountain & Southern Railway Company* v. *Ayers,* 67 Ark. 371, 55 S. W. 159; *Missouri & North Arkansas Railroad Company* v. *Phillips,* 97 Ark. 54, 133 S. W. 191; *Missouri Pacific Railroad*

Company v. *Benham,* 192 Ark. 35, 89 S. W. 2d 928. So, as to any part of the damages allowed by the jury, aside from the proven value of the fence posts, $26.40, the verdict was without substantial evidence to sustain it.

The lower court, therefore, erred in not granting appellant a new trial. The judgment of the lower court is accordingly reversed and the cause is remanded to the lower court with directions to grant appellant a new trial.

TOMLINSON *v.* WILLIAMS.

4-7892 194 S. W. 2d 197

Opinion delivered May 13, 1946.

Wils Davis and *T. J. Crowder,* for appellant.

Bruce Ivy, Myron T. Nailling and *A. F. Barham,* for appellee.

HOLT, J. Appellee, L. H. Williams, December 10, 1942, sued Hugh D. Tomlinson, Susie M. Tomlinson, Harold and D. Ohlendorf, and Hugh Dillahunty, in the Mississippi Circuit Court, Osceola District, for possession of a 400 acre tract of land. He alleged in his complaint that he was entitled to possession under the terms of a written lease dated June 28, 1940, for three years, beginning January 1, 1941, for a cash rental of $10 per acre, payable October 1st of each year, and that under the terms of the contract, he was required to pay, and paid $500 to the Tomlinsons for the year 1941. He alleged that the

Tomlinsons breached the lease by refusing to surrender possession and by leasing the land to the Ohlendorfs subsequent to the aforesaid lease to him. Dillahunty was a tenant of the Ohlendorfs. Appellee prayed for possession, and damages in the amount of $10,000, for the alleged unlawful detention and breach of contract.

Appellants' answer was as follows: "1. Defendants deny each and every of the material allegations of the complaint. II. The defendants for further answer allege that the plaintiff, L. H. Williams, had no personal interest in the alleged contract between himself and the defendants, Hugh D. Tomlinson and Susie M. Tomlinson, and any rights which he may have taken by reason thereof were held by him solely and in trust for the use and benefit of his son, Lan Williams, and Hugh T. Ross who had formed a partnership for the purpose of engaging in the farming business, and the acceptance of said contract in the plaintiff's name was for the special use and benefit of said partnership, and these defendants never at any time had any dealings with the plaintiff except when he was acting as the agent of the said Lan Williams and Hugh T. Ross. III. Defendants Hugh D. Tomlinson and Susie M. Tomlinson for further answer allege that the contract mentioned in the complaint was by mutual agreement between them and said partnership canceled. Said contract should have been so written as to show that L. H. Williams was in truth and fact acting as trustee for Lan Williams, his son, and Hugh T. Ross for it was so understood. Therefore said contract should now be reformed to show said facts. Wherefore, defendants pray that this answer be treated also as a motion to transfer this cause to the chancery court and upon a hearing said contract be reformed to show L. H. Williams trustee for the use and benefit of Lan Williams and Hugh T. Ross. That upon a final hearing of this action, the complaint be dismissed, and for general and equitable relief."

On the same date, December 10, 1942, appellee brought a similar action against appellant, Beulah A. Ross, the Ohlendorfs and Dillahunty, the Ohlendorfs and

Dillahunty being tenants. The same allegations in effect were made in this complaint as in the Tomlinson suit. The lease contract sought to be enforced covered a 400 acre tract of land; however, it was to run for three years beginning January 1, 1942, and appellee advanced to Mrs. Ross $400 to apply on the 1942 rental. The rent per acre was the same. Similar allegations of breach of the contract were alleged and there was a prayer for possession and damages in the amount of $12,000, and for the return of the $400 advanced to Mrs. Ross. Appellants filed the same answer in effect as in the Tomlinson case, in fact, it was identical except for the necessary change in the names of defendants.

The two causes were transferred to equity in accordance with appellants' prayer and consolidated for trial. Upon a hearing, the court found the issues in favor of the plaintiff (appellee), and, quoting from the decree, "that the contracts entered into between the plaintiff, L. H. Williams, and the defendants, Hugh D. Tomlinson and Susie M. Tomlinson, and between the plaintiff and the defendant, Beulah Ross, were and are rental contracts between him and said defendants and that said contracts were not made by the plaintiff as trustee or for the benefit of Hugh T. Ross and Lan Williams, but were made by the plaintiff for his sole use and benefit. The court further finds that the defendants, Hugh D. Tomlinson and Susie M. Tomlinson, breached their contract with the plaintiff, as alleged in his complaint, thereby damaging him in the sum of $1,800, and that the defendant, Beulah Ross, breached her contract with the plaintiff as alleged in his complaint, thereby damaging him in the sum of $1,800, which said sums, with interest thereon at six per cent. per annum from this date, and his costs herein expended the plaintiff is entitled to recover of and from said defendants."

A decree was entered in accordance with these findings and this appeal followed. Appellee also has appealed, but only from that part of the decree which limited his damages in each case to $1,800.

Appellants say the issues are: "(1) Is the contract dated June 28, 1940, valid? (2) Is the contract dated July 17, 1940, valid? (3) In the consummation of the aforesaid contracts, was the plaintiff, L. H. Williams, acting as a trustee for Lan Williams and Hugh Ross? (4) If the contracts are valid and breached by the defendants, then what is the measure of damages for the breach?"

(1) and (2)

Appellants argue that both contracts were invalid because neither was signed, or executed, by certain trustees who they say controlled and managed the two tracts involved; and that the Ross contract, although it designated Beulah A. Ross, Hugh Ross and Ruth Ross as lessors and appellee as lessee, was signed by Beulah T. Ross and Hugh Ross as lessors and appellee as lessee, and that the Tomlinson contract was signed by Susie M. Tomlinson and Hugh D. Tomlinson as lessors and appellee as lessee, and does not mention other alleged owners in common of the land and, as above noted, was not executed by certain trustees. We think all of these contentions untenable for the reason that we are unable to find from the record before us, or the abstract, any competent evidence that any designated trustees, by will or otherwise, were empowered and authorized to control and handle the two tracts of land in controversy here or that appellants executed the contracts without right. The contracts make no mention of trustees or the extent of the interest of the lessors therein. It also appears clear from the defenses interposed in appellants' answers and from the decree, *supra,* that the causes were presented and tried on the theory presented by appellants under (3) and (4), *supra.*

(3)

On the third proposition, appellants contend that when appellee, L. H. Williams, entered into the contracts with appellants, he was acting as trustee for his son, Lan Williams, and Hugh T. Ross, and not for himself individually, that such was the intention of the parties and that the contracts should be reformed to correct this

mutual mistake. We cannot agree with this contention. The terms of both contracts are plain and unambiguous. Both are signed by L. H. Williams, lessee, in his individual capacity. Nothing was said in either contract indicating that he was acting as trustee for anybody. "To entitle a party to reform a written instrument upon the ground of mistake, it is essential that the mistake be mutual and common to both parties; in other words, it must be found from the testimony that the instrument as written does not express the contract of either of the parties. It is also necessary to prove such mutual mistake by testimony which is clear and decisive before a court of equity will add to or change by reformation the solemn terms of a written instrument." *Corey* v. *The Mercantile Insurance Company of America,* 205 Ark. 546, 169 S. W. 2d 655.

"Equity will reform written instruments only where there is a mutual mistake or where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the other party." *Loutre Lumber Co.* v. *Kinard,* 158 Ark. 642, 236 S. W. 817.

In *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52, this court, quoting from Bishop on Contracts, § 708, said: "In no case will a court decree an alteration in the terms of a duly executed written contract, unless the proofs are full, clear, and decisive. Mere preponderance of evidence is not enough. The mistake must appear beyond reasonable controversy." Also, there is quoted with approval from the Circuit Court of the United States in *United States* v. *Monroe,* 5 Mason 577: "In cases of asserted mistakes in written instruments, it is not denied that a court of equity may reform the instrument, but such a court is very slow to exercise such an authority, and it requires the clearest and strongest evidence to establish the mistake. It is not sufficient that there be some reason to presume a mistake; the evidence must be clear, unequivocal, and decisive."

Again, in *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511, Judge

FRAUENTHAL, speaking for the court, said: "It has been uniformly held that where a written contract is plain, unambiguous and complete in its terms, parol evidence is not admissible to add to or vary it. It has been said by this court: 'Antecedent propositions, correspondence and prior writings, as well as oral statements and representations, are deemed to be merged into the written contract which concerns the subject-matter of such antecedent negotiations when it is free of ambiguity and complete.' . . . But, to entitle a party to reform a written instrument upon the ground of mistake, it is essential that the mistake be mutual and common to both parties; in other words, it must be found from the testimony that the instrument as written does not express the contract of either of the parties thereto. It is also necessary to prove such mutual mistake by testimony which is clear and decisive before a court of equity will add to or change by reformation the solemn terms of a written instrument."

Here, no fraud or inequitable conduct on the part of appellee has been shown,—in fact, no fraud has been alleged. While appellants testified that it was understood that appellee in the execution of the contracts was acting as trustee for his son and Hugh T. Ross, appellee stoutly contradicted their testimony. It is significant, as above noted, that no mention is made in either contract of a trustee. There was nothing on the face of either contract to indicate that appellee was acting otherwise than for himself as an individual. Here, all parties to the contracts, as far as the evidence discloses, were capable of contracting and were dealing at arms length. As we view the evidence, it falls far short of being of that clear, full, decisive and convincing character that the law requires to entitle appellants to reformation of the contracts.

(4)

On the fourth proposition, the rule for the measure of damages for breach of contracts, such as are presented here, was announced by this court in *Person* v. *Williams*, 125 Ark. 174, 187 S. W. 1063, as follows: "The books

agree that in the action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises, the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term." This is in accord with the general rule given by the annotator in 104 A. L. R. in a note to *Weiss* v. *Revenue Bldg. & Loan Association,* 116 N. J. L. 208, 182 A. 891, subdivision III, a-1: "It is clearly the general rule that the damages recoverable for a lessor's failure to put his lessee into possession under a lease of real property are measured by the excess, if any, of the rental value of the premises for the term demised over the rent agreed upon in the lease; or, as it is sometimes expressed, the fair value of the use of the premises," and in support of the text, seven Arkansas cases are cited, including the early case of *Rose* v. *Wynn,* 42 Ark. 257, the case of *Person* v. *Williams, supra,* and *Howell* v. *Duty,* 178 Ark. 1196, 10 S. W. 2d 857.

The evidence on the amount of damages was in irreconcilable conflict. However, after a careful review of it all, we have reached the conclusion that the trial court's findings are not against the preponderance thereof. In weighing the testimony, it should be borne in mind that the contracts here were executed in 1940, prior to our entrance into World War II, and we take judicial notice that rental values of farm land materially increased during the subsequent years covering the term for which the two tracts were leased by appellee.

In *Reiman* v. *Rawls,* 188 Ark. 983, 68 S. W. 2d 470, this court held that we take judicial notice of matters of common knowledge such as "a period of great depression and that land values have decreased" (headnote 1), and in *Jefferson* v. *Souter,* 150 Ark. 55, 233 S. W. 804, it was held (headnote 4): "It is a matter of common knowledge that lands appreciated greatly in value between January, 1912, and January, 1917."

In 23 C. J., p. 59, § 1810, the text writer says: "Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowl-

edge of every person of ordinary understanding and intelligence."

In this connection, it is of some significance that the great majority of appellants' witnesses, numbering some fifteen, testified that the rental value of the two tracts was approximately $10 per acre (the same as reserved in the two contracts, *supra*) for the years 1941, 42, 43 and 44, making no allowance for increased values due to the war emergency. The testimony of appellee's witnesses, on the other hand, (some ten in number) who were situated in as good, if not better, position to judge values, in the circumstances here, placed the average rental values over the rent term at approximately $17 per acre. Hugh Dillahunty, a subtenant on parts of the two tracts of land in controversy here, testified that he had farmed in the south end of Mississippi county since 1933 and was familiar with the fair rental values of the Tomlinson and Ross lands for 1942, 43 and 44, and it was $15 per acre, which was the amount that he was paying as a subtenant.

It could serve no useful purpose to comment at length on the testimony. It suffices to say that we have reached the conclusion that the findings of the trial court, as above noted, are not against the preponderance of the testimony, and accordingly, the decree on both appeals is affirmed, appellants to pay all costs.

ROSS, DISBURSING AGENT, *v.* RICH.

4-7900 194 S. W. 2d 297

Opinion delivered May 13, 1946.

Guy E. Williams, Attorney General, and *Cleveland Holland,* Assistant Attorney General, for appellant.

Heartsill Ragon, Ben McCray, Thomas Gaughan, A. R. Cooper and *Crumpler & O'Connor,* for appellee.

SMITH, J. A writ of garnishment issued out of the Saline Circuit Court, which recited that one Sam Rich had obtained a judgment in the circuit court of Saline

county on March 22, 1944, in a suit for damages, against Mrs. Med Bursey, in the sum of $120, with costs of the suit, which judgment remains unsatisfied. It was further recited that Dr. T. T. Ross, as disbursing agent for the Arkansas State Board of Health, is indebted to the defendant, Mrs. Bursey, or has in his hands and possession certain moneys, credits and effects belonging to her.

The sheriff of the county was therefore commanded to summon the said Dr. Ross, as disbursing agent for the Arkansas State Board of Health, to appear in 20 days after the service of the writ, and answer what credits, moneys, or effects he has in his hands or possession belonging to Mrs. Bursey, to satisfy the judgment aforesaid.

Dr. Ross answered as follows:

"Comes now Dr. T. T. Ross, Disbursing Agent of the State Board of Health for the State of Arkansas, and for his answer herein states:

"1. That in his individual capacity he does not owe the defendant, Mrs. Med Bursey, any amount whatever, and he does not have in his possession or control any goods, chattels, moneys, or credits of any kind belonging to the said Mrs. Med Bursey.

"2. That the said Mrs. Med Bursey is an employee of the State of Arkansas, being an employee of the State Board of Health; and that her salary is one hundred forty dollars ($140) per month; that the State of Arkansas now owes her for services rendered salary for the month of October in the sum of one hundred forty ($140) dollars, less withholding tax due to the Federal Government.

"3. The garnishee further states that all funds under his control as Disbursing Agent for the Arkansas State Board of Health are public funds belonging to the State of Arkansas; and that he is required and has given a bond to the State of Arkansas under which he is required to faithfully account for all public moneys coming into his possession or control and whereunder he is made

liable if he should unlawfully pay out or expend any of said funds; and that he further states that under the Constitution of the State of Arkansas such funds are not subject to garnishment and that he cannot legally disburse said funds under the writ of garnishment herein; and that he therefore declines to pay said money into court under said writ of garnishment."

The cause was heard in the circuit court on these pleadings, from which the court found that the judgment against Mrs. Bursey was unsatisfied, and that so much of the salary due her, less the Federal withholding tax, as was necessary to satisfy said judgment, should be impounded, and paid into the registry of the court. Act 44 of the acts of 1945 is cited as authority for the court's judgment, and from that judgment is this appeal.

This Act 44, approved February 14, 1945, consists of three sections, and reads as follows:

"Section 1. Any indebtedness, goods and chattels, moneys, credits or effects belonging to a defendant in a civil action and in the hands or possession of the State of Arkansas, any subdivision thereof, institution, department, special district or instrumentality of the State of Arkansas, shall be subject to garnishment as is now provided by law.

"Section 2. Any writ of garnishment sued out in pursuant hereto shall be served upon the individual representing the State of Arkansas, subdivision thereof, institution, department, special district or instrumentality of the State of Arkansas, who has such indebtedness, goods and chattels, moneys, credits, or effects in his custody and he shall answer such writ and satisfy the garnishment as now provided by law.

"Section 3. A writ of garnishment shall be sued out pursuant hereto only after judgment."

For the reversal of the judgment based upon this Act 44, it is insisted that the act is unconstitutional, as violative of § 20, Art. 5 of the constitution which reads as follows: "The State of Arkansas shall never be made

defendant in any of her courts." It is argued that this act is violative of the state's public policy as declared in former opinions of the court, and so it may be, but even so, it must be remembered that courts do not make the state's public policy. It is their function to declare what it is, while the power inheres in the General Assembly of the state to declare what shall be the public policy of this state.

In the case of *Wilson* v. *Walters,* 19 Cal. 2d 111, 119 P. 2d 340, the Supreme Court of California said: "The declaration of public policy is essentially a legislative function and although the courts occasionally invade that field, a declaration by the legislature is paramount." In that opinion it is further said: "Making it possible for a judgment creditor to realize upon the obligations justly owed by his debtor is certainly a sound and just policy. It cannot be said to be detrimental to the public interest to expect the same integrity and duty with respect to satisfying his judgment obligations of a constitutional officer as of any other officer or any other person. To draw the implication that the Constitution, by creating an office, thereby exempts the salary of the incumbent from payment of his debts, it is necessary to assume a condition will exist that is more imaginary than real. It would have to be accepted that by merely permitting his salary to be garnished his effectiveness in office will be destroyed, and that the office so created will be to an extent, at least, impaired and destroyed. That assumption is manifestly highly speculative and conjectural. In this connection it is worthy of note that by a process of reasoning quite analogous with that urged by defendant, it was long the rule that the salary of a state officer or employee was not subject to federal taxation and vice versa. See *Collector* v. *Day,* 11 Wall. 113, 20 L. Ed. 122; *McCulloch* v. *Maryland,* 4 Wheat 316, 4 L. Ed. 579. The basis of that rule was implied from the United States Constitution on the theory that the power to tax involved the power to destroy, and that one sovereignty could not impair the exercise by the other of its powers, and that a taxation of the salaries of employees or officers, of one

by the other, would have that result. The premise has been abandoned by the Supreme Court of the United States and is no longer the law."

It cannot, therefore, be said that the act is violative of the state's public policy.

It is further, and more earnestly insisted, that the act permits what is in effect a suit against the state. If it does, it is unconstitutional. It was definitely decided in the case of *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. 2d 993, that it was beyond the power of the General Assembly to authorize the maintenance of a suit against the state, it being there said that ". . . it is perfectly evident that it was the purpose of the framers of the Constitution of 1874 to withdraw all power and authority theretofore existing in the Legislature to grant permission for the state to be sued by individuals or corporations in her courts." We therefore proceed to a consideration of the question, whether this is a suit against the state.

Certainly the state was not named as a party defendant, but this omission is not the test to apply in the determination of that question. It would be a suit against the state although the state was not named, as a party, if its purpose and effect was to impose some obligation upon the state. But has it done so?

The judgment defendant is an employee of the State Board of Health, and Act 99 of the Acts of 1945 made the appropriation for the maintenance of this department. This appropriation is disbursed on vouchers drawn by the disbursing agent of the State Board of Health, which, after a preaudit by the Comptroller's office, are delivered to the Auditor of State, upon whose warrants payment of the salaries of the employees are made by the State Treasurer. The disbursing agent of the department is under a bond conditioned that he shall be liable for issuing or approving any voucher for salary, or wages, unless there has been an express appropriation.

Here the salary of the judgment defendant, which has been impounded, was for services which had been

rendered, and the salary is now due, and it is no concern of the state as to whom payment shall be made, unless indeed by paying it to someone other than the employee who performed the service, the orderly administration of the state's business had been, or will be impaired, and its public policy thereby contravened. But as we have shown, this is a question for the General Assembly and not for the court.

In the case of *Bull* v. *Ziegler,* 186 Ark. 477, 54 S. W. 2d 283, it was said: "We have held, in several cases, that where contracts have been fully completed for certain governmental agencies, and nothing remains to be done except to pay the contract price due the contractor, the creditors of such contractor, if he be insolvent, may, by equitable garnishment, impound the money due him and subject it to the payment of their demands against him. The following are cases of this kind: *Henslee* v. *Mobley,* 148 Ark. 181, 230 S. W. 17; *Riggin* v. *Hilliard,* 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113. See, also, *First Nat. Bank* v. *Mays,* 175 Ark. 542, 299 S. W. 1002. These cases appear to have no application to the facts in this case."

The theory on which these cases were decided, was that while the governmental agency was engaged in the performance of the work for which it had been created, the agency was not subject to garnishment, yet when the work was completed the agency was no longer concerned in the distribution of money which had been earned in the progress of the work, and therefore equitable garnishment might be maintained.

These cases stem from the case of *Plummer* v. *School Dist. No. 1 of Marianna,* 90 Ark. 236, 118 S. W. 1011, 134 Am. St. Rep. 28, 17 Ann. Cas. 508, where an insolvent contractor had completed his contract to erect a school building, and an equitable garnishment was sued out against the school district. In sustaining the garnishment Judge Wood there said: "In *Boone County* v. *Keck,* 31 Ark. 387, this court held that public municipal corporations are not subject to the process of gar-

nishment. The court said: 'Public policy, indeed public necessity, requires that the means of public corporations, which are created for public purposes with powers to be exercised for the public good, which can contract alone for the public, and whose only means of payment of the debts contracted is drawn from the corporators by a special levy for that purpose, should not be diverted from the purposes for which it was collected, to satisfy the demands of others than the parties contracted with.' This was said in a case where the interests of a county were involved. But the rule and the reason for it are the same in the case of a school district. So that the appellants were remediless at law to have the funds in the hands of the directors applied to the payment of their debts against the contractors. They would be likewise without any remedy in equity, and for the same reason, if the question were one of diverting the public funds from the channel to which they have been turned by public authority. But, as the school building has been completed and the purpose consummated for which the fund was raised, the public interest cannot be injuriously affected by further withholding the fund from distribution to those who are justly entitled to it."

Here the work for which the salary was due, as has been said, has been performed, and Act 44 has removed the necessity of proceeding by way of an equitable garnishment.

Here not only is the state not a party to this litigation in name, or in fact, but its disbursing officer is not a party to the litigation. In the Chapter on Garnishment, 38 C. J. S. 200, where many cases are collected and cited on the nature of a garnishment proceeding, it is said: "The defendant, properly so called, is the party whose property or effects in the hands of the third person, the garnishee, are sought to be reached, and not such third person or garnishee. The garnishee is not technically a 'defendant,' except in those jurisdictions where garnishment is considered to be a new action." That it is not so considered in this state was decided in the opinion in the case of *Vaughn* v. *Screeton,* 181 Ark. 511, 27 S. W. 2d 789,

where it was said: "The proceedings by garnishment are only ancillary or additional rights to remedies of a creditor against his debtor, and it is not necessary to make garnishees parties to the suit or to pray relief in the complaint against them. *Tiger* v. *Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 130 S. W. 585, 30 L. R. A., N. S., 694, Ann. Cas. 1912B, 488."

The statement is made in the brief that an increasing number of states are enacting legislation similar to Act 44, and that Arkansas is the thirty seventh state to enact such legislation. That statement, which we assume to be true, without verifying it, may not add much to the argument, as suits against the state are not prohibited in the constitutions of some of the states, while in others authority is given to the Legislature to permit such suits.

But Alabama has a constitutional provision substantially identical with that of our constitution which reads: "That the State of Alabama shall never be made a defendant in any suit of law or of equity." Section 14, Art. 1, of the 1901 Constitution of Alabama. Notwithstanding this inhibition the General Assembly of Alabama in 1923 passed an act now appearing as § 1032 of the 1940 Alabama Code, which reads as follows: "Salary of officials or employees of state, county, or city may be garnished. Money due officials or employees of a city, county, or state government, or any department or institution thereof, as salary for services performed for or on behalf of said city, county or state, or any department or institution thereof, may be garnished."

This section was involved in ten cases, cited in the briefs, decided by the Supreme Court of Alabama, the last being *Daves* v. *Rain,* 230 Ala. 304, 161 So. 108, which case cites some of the intermediate cases. The constitutionality of this Act of 1923 does not appear to have been questioned in any of these cases, for the reason, no doubt, that the garnishment proceedings authorized by the Act were not thought to be suits against the state.

Section 9 of Act 99, *supra,* provides that: "It is hereby declared to be illegal for any officer, agent, de-

partment or person upon whom is imposed the duty of administering appropriated funds, to authorize, by voucher, or otherwise, the payment to any person of an amount in excess of the sum appropriated specifically as salary or wages; nor shall money appropriated for maintenance, travel expense, or for any purpose other than payment of wages or salaries be used for the payment of wages or salaries."

It is not contended that the issuance of the voucher here ordered to be issued will be in excess of the available appropriation, nor is it a diversion of the appropriation to apply the judgment defendant's salary to the satisfaction of the judgment against her. The salary will have been paid when thus applied.

It is provided in § 2 of Act 44 that the state's agencies there named "shall be subject to garnishment as is now provided by law." Section 6129, Pope's Digest, provides: "If any garnishee, after having been served with a writ of garnishment ten days before the return day thereof, shall neglect or refuse to answer the interrogatories exhibited against him on or before the return day of such writ, the court or justice before whom such matter is pending shall enter judgment against such garnishee for the full amount specified in the plaintiff's judgment against the original defendant, together with costs."

It is argued that these statutes read together permit a money judgment to be rendered against the state agency furnishing the employment. But this legislation must not only be read together, but must be read in connection with Act 99 of the Acts of 1945, and when all are read together, authority is not found to render a money judgment against the state agency, the disbursing officer, in this case. Under this Act 99 the disbursing officer does not have in his hands any money belonging to the employee, and therefore no money judgment could be rendered against him. It is our duty to give legislation any reasonable construction which renders it constitutional. If there is any conflict between § 6129, Pope's Digest,

and the later legislative Act 44 and Act 99, these must govern as being of a later date, but we think there is no conflict when the legislative intent is ascertained and that no judgment could be rendered against the disbursing officer except one requiring the issuance of a voucher, as directed by the court, under the writ of garnishment, and that would be the proper judgment to render if there were a failure to answer by the garnishee.

We conclude, therefore, that Act 44 is not unconstitutional, and the judgment of the circuit court will be affirmed after being modified in one respect. The judgment requires the garnishee disbursing officer to turn over to the clerk of the Saline Circuit Court so much of the judgment defendant's salary, less Federal withholding tax, as may be required to satisfy the judgment against her. The disbursing officer cannot perform this judgment as the money never comes into or passes through his hands, but he will be required to issue his voucher to the clerk of the Saline Circuit Court for so much of the judgment defendant's salary as will be necessary to satisfy the judgment against her.

Act 44 does not affect, or impair, the right to claim as exempt any wages due the employee, when that right otherwise exists.

As modified, the judgment is affirmed.

The Chief Justice dissents.

ARK-LA ELECTRIC COOPERATIVE, INC., *v.* ARKANSAS PUBLIC SERVICE COMMISSION.

4-7883 194 S. W. 2d 673

Opinion delivered May 13, 1946.

Rehearing denied June 17, 1946.

Sherrill, Cockrill & Wills, for appellant.

P. A. Lasley, for appellee.

MINOR W. MILLWEE, Justice. The question for determination is whether appellant, Arkansas-Louisiana Electric Cooperative, Inc., is a public utility and, therefore, subject to regulation and supervision by the Arkansas Public Service Commission.

The Department of Public Utilities was created as a separate department of the Arkansas Corporation Commission by Act 324 of 1935, and the two agencies were consolidated as the Arkansas Public Service Commission by Act 40 of 1945. The agency existed as the "Department of Public Utilities" when the instant proceedings were determined by that body, and appellee, Arkansas Public Service Commission, will be hereinafter referred to as "Department," and appellant will be designated "Ark-La."

A brief history of the proceedings leading to the present controversy seems appropriate. Ark-La is a Louisiana corporation organized under Act No. 266 of the Louisiana Statutes for 1940, which provides for the creation, operation and regulation of electric cooperatives in that state. On August 8, 1941, Ark-La secured authority from the Secretary of State to transact business in this state as a foreign corporation, after complying with the provisions of § 2247 of Pope's Digest. In its application for such authority, Ark-La stated that it was a non-profit corporation organized for the purpose of producing, transmitting, and selling electric power on a non-profit basis.

On December 26, 1941, Ark-La filed its petition with the Department alleging it was "a non-profit electric cooperative corporation composed of five Arkansas rural electric cooperatives and five Louisiana rural electric cooperatives," and had a contract to supply 32,500 kw. capacity of electricity to the aluminum plant to be built

by the Defense Plant Corporation near Lake Catherine, Arkansas. The petition prayed that the Department authorize the construction and operation by Ark-La of, (1) a transmission line from the aluminum plant site near Lake Catherine to the Arkansas-Oklahoma line near Fort Smith, Arkansas; (2) a steam generating plant of 45,000 kw. capacity on the Ouachita River; (3) transmission lines to inter-connect the proposed steam generating plant with a similar plant to be built by the Defense Plant Corporation and to inter-connect with the transmission line from Grand River dam; and (4) all other transmission lines necessary to serve electric power to rural electric cooperatives that are members of Ark-La.

Two of the present utility appellees intervened in opposition to the Ark-La application. After a hearing, the Department withheld authority to construct a generating plant and lines extending therefrom to the aluminum plant. Authority to construct and operate transmission lines necessary to serve electric power to the rural electric cooperative members of Ark-La was denied, but without prejudice to the right to renew such application whenever the applicant was in position to furnish more accurate information as to the facilities it planned to construct and the service it proposed to furnish. A certificate of convenience and necessity to construct and operate the transmission line from the aluminum plant site to the Oklahoma line near Fort Smith, Arkansas, was granted. The opinion of the Department clearly indicates that this certificate was granted against its own judgment, and under a virtual directive from those federal agencies charged with the production of materials vital to the prosecution of the war and the national defense. The opposing utilities did not appeal from the order of the Department granting the certificate of convenience and necessity, and Ark-La has not renewed its application for a certificate to serve its own rural cooperative members. The transmission line was constructed and the defense plant was being served by Ark-La when the instant proceedings were instituted.

On December 7, 1943, appellees, Arkansas-Missouri Power Corporation, Southwestern Gas & Electric Company, Arkansas Power & Light Company, and Oklahoma Gas & Electric Company, all public utilities operating in this state, filed their complaint with the Department under § 17 (a) of Act 324 of 1935 (§ 2080, Pope's Digest), alleging that Ark-La was doing business in the State of Arkansas as a public utility and, therefore, subject to regulation by the Department under Act 324 of 1935. The utilities prayed that the Department require Ark-La to comply with the terms of the Act and that it be subjected to complete regulation by the Department.

Ark-La filed its answer and motion to dismiss contending that the utility appellees were unauthorized to complain to the Department, and that the issues raised by the complaint were beyond the jurisdiction of the Department to determine. Ark-La also contended that it was a cooperative, non-profit, membership corporation and not subject to regulation by the Department; that it served only the Defense Plant Corporation, one of its members, and contemplated service to its rural cooperative members when materials became available; and was not operating as a public utility.

After a hearing on November 23, 1944, a majority of the commissioners, with Chairman Hathcoat dissenting, issued an order in which Ark-La was found to be a public utility, subject to jurisdiction of the Department, and was directed to comply with the regulatory provisions of Act 324 of 1935. Pursuant to the provisions of § 2097 of Pope's Digest, Ark-La filed its petition in the Pulaski Circuit Court to review and vacate the order of the Department. This appeal is prosecuted from the judgment of the circuit court affirming the order of the Department.

In determining whether the Department has regularly pursued its authority in fixing the status of Ark-La as that of a public utility, it will be necessary to consider the extent of Ark-La's corporate powers while operating as a foreign corporation in this state. Act 266 of the

State of Louisiana for 1940, under which Ark-La was organized, is designated by § 30 as the "Electric Cooperative Act." The act is entitled, in part, "An Act relating to cooperative, non-profit, membership corporations organized to engage in electrification . . ." The act contains many identical and similar provisions to be found in our Act 342 of 1937 which is designated as the "Electric Cooperative Corporation Act," and is entitled "An Act Relating to Cooperative, Non-Profit, Membership Corporations Organized to Engage in Rural Electrification."

It cannot be denied that the powers granted Ark-La while operating in the State of Louisiana under Act 266, *supra,* are somewhat broader than those extended to rural electric cooperatives organized in this state under Act 342. Under the Arkansas act a cooperative may serve its members only, while under the Louisiana act, power is granted the cooperative to serve, in addition to its members, governmental agencies, political subdivisions and "other persons not in excess of ten per centum (10%) of the number of its members." The field of operation of a cooperative organized under the Louisiana act is not specifically confined to rural areas as is the case of a cooperative organized under our Act 342, which defines a rural area as any area not included within the boundaries of any city or town with a population of more than 2,500.

The appellees, to sustain the order of the Department, earnestly insist that when Ark-La entered this state as a foreign corporation, it brought with it all the charter powers granted it by the State of Louisiana, and that there is nothing in either our laws, or policy, to prevent the exercise of such powers in this state. If appellees are correct in this contention, and Ark-La has the power to serve non-members and non-rural areas in this state, a right denied a cooperative by our statute, then the determination of Ark-La's status as a public utility by the Department must be upheld.

The rule generally applicable is stated in 23 Am. Jur., Foreign Corporations, § 91, as follows: "Although the organic power of a foreign corporation depends upon the law of the state from which its existence is derived, in the exercise of such power in another jurisdiction the corporation must conform to the local laws and public policy. The validity and effect of its acts in states other than the state of incorporation, even though such acts are within its charter, must depend upon the law of the jurisdiction in which such exercise takes place and in which such acts are done. Its submission to do business within the state is not by right, but by comity only, and it is, in respect of business done within the state, generally subject to, and bound by, the local laws and unable to exercise powers or perform acts, whether authorized by its charter or not, which are contrary thereto." A similar statement of the rule is found in Fletcher Cyclopedia, Corporations, (Perm. Ed.), Vol. 17, § 8344, as follows: "Corporations coming into a state as a matter of comity become subject to the state's laws, and to the same restrictions and duties as corporations formed in the state. They have no authority to do any act or transact any business which is prohibited to domestic corporations of like character by the constitution, laws or policy of the state, anything in the charters of the foreign corporations to the contrary notwithstanding. If their charters contain grants of powers not allowed by the laws of such state, the grants will be treated simply as if they had not been made."

We find this rule embodied in the fundamental law of this state. Section 11, Art. XII of the Constitution of 1874 is as follows: "Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this state except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this state, they shall be subject to the same regulations, limitations

and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this state, nor shall they have power to condemn or appropriate private property." In *Woodson* v. *State,* 69 Ark. 521, 65 S. W. 465, Mr. Justice RIDDICK, commenting on this clause of our constitution, said: "It will be seen from this section of our constitution that the legislature has no power to give a foreign corporation greater powers, privileges or franchises than may be exercised by like domestic corporations." This court has construed this section to mean what it plainly says, and a foreign corporation admitted to do business in this state is subject to the same regulations, limitations, and liabilities as like corporations of this state and shall exercise no greater powers than may be exercised by like domestic corporations. *Railway Co.* v. *Gill,* 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; *Western Union Teleg. Co.* v. *State,* 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82; *Pekin Cooperage Co.* v. *Duty,* 140 Ark. 135, 215 S. W. 715.

Is Ark-La a "like corporation" to a cooperative organized under Act 342 of 1937, within the meaning of the aforementioned provision of our constitution? The Louisiana act, under which Ark-La was organized, and Act 342, *supra,* both provide for the organization of "cooperative, non-profit, membership corporations." The provisions of the two acts governing the admission, rights and duties of members of a cooperative are practically identical. Likewise the disposition of corporate revenues and refunds to members on a patronage basis are provided for in both acts. License fees are payable in lieu of other excise taxes, and organizations under each of the acts are exempt from the "Securities Act" on certificates of membership and certain obligations to the Federal Government. A careful comparison of the two acts clearly indicates the same primary purpose of furnishing electric power on a cooperative, non-profit basis by the corporations organized thereunder. It seems reasonable to assume that both acts were passed pursuant to the provisions of the federal "Rural Electrification

Act of 1936," (7 U. S. C. A., §§ 901-914), which authorized loans in the several states "for rural electrification and the furnishing of electrical energy to persons in rural areas who are not receiving central station service." Ark-La has borrowed from the Rural Electrification Administration under the provisions of this act and executed its mortgage to the federal agency in pursuance of the act's provisions.

Before Ark-La was authorized to do business in Arkansas, it filed with the Secretary of State its verified certificate together with its articles of incorporation. In this certificate, it sought authority to enter this state as "a non-profit corporation organized for the purpose of producing, transmitting, and selling electric power on a non-profit basis"; and it must be assumed that the authorization granted by the Secretary of State was responsive to the purpose thus expressed.

By § 25 of the Louisiana Act, cooperatives operating thereunder are exempt from the jurisdiction and control of the public service commission of that state. Section 31 of our Act 342 of 1937 provides: "All corporations organized under this Act shall be exempt in any and all respects from the jurisdiction and control of the Department of Public Utilities of this state, except said corporations shall secure from the Department of Public Utilities, before construction or operation is begun, a certificate of convenience and necessity for the construction or operation of any equipment or facilities for supplying electric service in rural areas." In the case of *Dept. of Public Utilities* v. *McConnell,* 198 Ark. 502, 130 S. W. 2d 9, this court held that the Department had no jurisdiction over cooperatives organized under Act 342, *supra,* and it was there said: "What we do decide is that the Department, by express language of the statute, is denied jurisdiction over the cooperatives in question other than a determination of whether public convenience and necessity will be served in the particular territory or area into which, or throughout which, the applicant proposes to operate."

After a careful consideration of the respective provisions of the two acts, and keeping in mind the common objects and purposes which both seem designed to achieve, it is our conclusion that Ark-La is a like corporation to an Arkansas cooperative created under Act 342 of 1937, within the meaning of § 11 of Art. XII of our constitution. When Ark-La established its business domicile in this state, it became entitled to rights, powers and privileges, the same as, but no greater than, electric cooperatives organized under Act 342 of 1937, except as to the specific constitutional restriction on the power to exercise the right of eminent domain. It is also subject to the same regulations which are imposed on a domestic electric cooperative organized under our statute and is, therefore, exempt from the control and jurisdiction of the Department, except that it must secure a certificate of convenience and necessity from the Department before beginning construction or operation of facilities for supplying service in rural areas.

However, despite its restricted powers while operating in this state, a company may, nevertheless, become a public utility by reason of the activities it actually pursues here. If Ark-La is, or has, actually engaged as a public utility, it cannot escape regulation by the Department merely because the charter powers it is permitted to exercise in this state may indicate a different status. There are numerous cases to the effect that it is what a company does that is the important thing, and not what it, or the state, says that it is. See *Inland Empire Rural Electrification, Inc.,* v. *Department of Public Service of Washington, et al.,* 199 Wash. 527, 92 P. 2d 258, and cases there cited. See, also, annotations, 132 A. L. R. 1495.

Section 1 (d) (1) of Act 324 of 1935 defines the term "public utility" to include "persons and corporations, or their lessees, trustees and receivers, now or hereafter owning or operating in this state, equipment or facilities for 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." The statute clearly gives the Department jurisdiction and control of those utilities which render service to or for the public for compensation.

The only service thus far performed by Ark-La in this state has been that rendered the Defense Plant Corporation under a certificate of convenience and necessity from the Department. This service was rendered for a year, or more, prior to the time the Defense Plant Corporation became a member of Ark-La. Appellees insist that this service is inconsistent with the idea that Ark-La is operating in this state as a rural electric cooperative for the reason that a cooperative under our act may serve members only, as customers. Conceding, without deciding, that the question whether a corporation is acting *ultra vires* is one properly to be determined by the Department, has the service rendered to the Defense Plant Corporation, under the circumstances disclosed in this record, resulted in fixing the status of Ark-La as that of a public utility? This service has been rendered pursuant to a private contract between the parties for the avowed purpose of relieving a power shortage created by the stress of war. It was rendered under a virtual directive of an agency of the federal government clothed with broad wartime powers and acting in a period of grave national emergency. While the service was rendered to a public body, Ark-La was under no obligation other than that imposed by its agreement to furnish the Defense Plant Corporation with electrical energy, and did not thereby hold itself out as willing to serve the public generally.

It is generally held that the furnishing of electric power to one customer under a private contract does not constitute the furnishing agency a public utility. *State ex rel. Buchanan County Power Transmission Co.* v. *Baker*, 320 Mo. 1146, 9 S. W. 2d 589; *Sunset Shingle Co.* v. *Northwest Electric Waterworks,* 118 Wash. 416, 203 Pac. 978; *Colorado Power Co.* v. *Halderman,* 295 Fed. 178. In the case of *Re Nevada Consolidated Copper Corporation,* 25 P. U. R. (N. S.) 319 (Ariz. 1938), the Arizona commission held that the copper company, furnishing

power to the United States Government temporarily to relieve a power shortage, was not doing a public utility business and was not, therefore, subject to regulation by the commission as a public utility. We concur in this view, and conclude that Ark-La has not dedicated its property to the use of the public by its contract and service to the Defense Plant Corporation.

The only other undertaking Ark-La has sought permission from the Department to perform is that of serving its five Arkansas rural cooperative members. An application for a certificate of convenience and necessity to construct and operate facilities for this service has thus far been denied, but without prejudice to the right to renew such application when Ark-La is in position to furnish the Department with more definite information concerning the proposal. Ark-La has not seen fit to renew this application. If, and when, a renewal of such application is made, it will be time enough to determine whether the facts and circumstances involved in such proposal would result in the determination of Ark-La's status as that of a public utility, and thus render it subject to jurisdiction and control of the Department. This question is, therefore, premature and not an issue here.

Appellees also argue that rural electric cooperatives organized under Act 342 of 1937 may not become members of Ark-La, and, in support of this contention, cite the following provision contained in § 12 of said act: "A corporation organized under this Act may become a member of another such corporation, and may avail itself fully of the facilities and services thereof." It is insisted that this provision of the act precludes a cooperative organized thereunder from becoming a member of a corporation organized under the law of another state. We think this provision of the statute must be considered in the light of the provisions of § 11, Art. XII of our constitution and the rights accorded like foreign corporations doing business in this state. In the case of *Patterson Orchard Co.* v. *Southwest Arkansas Utilities Corporation,* 179 Ark. 1029, 18 S. W. 2d 1028, 65 A. L. R. 1446, this court passed upon the question whether a foreign

corporation engaged as a public utility in this state had the right to exercise the power of eminent domain. It was there held that such corporation could not exercise this power by reason of the express constitutional restriction of § 11, *supra*. However, it was further held that such corporation might acquire right-of-way by lease, purchase, or other methods not excepted from the general powers granted under said constitutional provision. The above provision of § 12 of the act contains no express restriction against domestic cooperatives becoming members of other like corporations. Under the rule announced in the Patterson case, *supra*, cooperatives organized under Act 342, not expressly being denied the right to do so, may become members of a like foreign membership corporation entering this state to do business.

The record discloses that Ark-La entered into a contract with the Rural Electrification Administration under which the latter was obligated to advance Ark-La sufficient funds to enable it to construct facilities in a large number of Arkansas counties. It is insisted that the construction of such facilities could only be for the purpose of serving the public generally in the several counties, and that it is, therefore, Ark-La's purpose to establish an electric empire in competition with privately owned public utilities in this state. If Ark-La entertains the purpose of embarking upon such an ambitious program, that purpose has not been revealed in what it has already done, or declared its intention of doing, in this state. It has only rendered service to the Defense Plant Corporation. It has declared its intention to serve its own cooperative members, but, as yet, has failed to renew its application for the necessary authority from the Department to perform this service. We find nothing in its actions or declared intentions so far that indicates the purpose of making its services available to the public generally.

After careful consideration of the whole record, it is our conclusion that the operations and services of Ark-La thus far fail to bring it within the statutory definition of a public utility subject to the jurisdiction and control of

the Department. The judgment of the circuit court affirming the order of the Department of November 23, 1944, is accordingly reversed and the cause remanded with directions to dismiss the complaint of the utility appellees and vacate the order of the Department.

SMITH, J., dissents.

LAFARGUE *v.* LAFARGUE.

4-7886 194 S. W. 2d 438

Opinion delivered May 13, 1946.

Rehearing denied June 10, 1946.

[redacted]

Botts & Botts, for appellant.

George E. Pike, for appellee.

GRIFFIN SMITH, Chief Justice. The complaint alleges breach of a written contract. The prayer was for cancellation of a five-year lease of lands, with judgment for $3,356.60. All issues were decided in favor of the plaintiff, who is appellee here.

While the briefs are replete with information regarding two tracts—one containing 305.95 acres, the other 819.69—decree findings that Florence LaFargue was owner of an undivided fourth of the smaller farm and an undivided third of the larger, are not challenged.

E. B. LaFargue died in 1936, leaving four children: Quinn, Lloyd, and Florence LaFargue, and Edna Terrill. At that time Quinn LaFargue was in possession of both tracts through an arrangement made with his father, each of whom owned half of the farming tools and machinery. The acreage is what the witnesses refer to as improved rice lands, with wells, pumping equipment, etc.

Appellee testified that for several years after her father's death, Quinn made some payments to her as rental, but that he did not render an account of any kind —"didn't say anything; just gave me a check."

Edna Terrill testified that she signed a contract with Quinn in 1943 in order to collect the rentals due her—"I thought it would be the only way, except through the Court."

It is in evidence that appellee employed T. J. Moher, a Stuttgart attorney, to procure settlement under her father's will, and that in 1943 she employed G. W. Botts for the purpose of collecting, by legal process if neces-

sary, the rents due for 1942. The suit resulting in this appeal was filed in July, 1944. It was shown that in June, 1943, Quinn LaFargue entered into a written contract with his two sisters to lease their interest in the property for a period of five years, beginning with January, 1943. Mrs. Terrill owned a fourth interest in the smaller (305.95-acre) tract, but she was not interested in the farm containing 819.69 acres. Lloyd owned a fourth interest in the smaller tract and an undivided third of the larger. However, the contract of 1943 was executed by Mrs. Terrill and Florence LaFargue as lessors and Q. D. (Quinn) LaFargue as lessee.

Appellee and appellant disagreed regarding the amount of rent to be paid for 1942, an offer having been made by Quinn to settle for $1,375. With refusal to accept a check for this sum, appellee notified the Smith Rice Mill to withhold, on her account, a fifth of the crop, but the mill failed to do this. Subsequently the disagreement was adjusted through payment of $1,800 to appellee and $600 to Mrs. Terrill. At the same time the rental contract now sought to be cancelled was made. It provides that appellee shall receive a fifth of the rice, but that other crops shall be rent-free. There is this paragraph:

"[The lessee] agrees to make any and all minor necessary repairs; . . . but all major repairs, consisting of repairs to wells or pumping plant machinery or replacing of these items, are to be borne equally by the owners of the land."

There was the further agreement that ". . . the sale of all rice is to be made in the names of the parties hereto and the checks received therefor are to be payable in like manner."

Instead of complying with the agreement that checks should be made payable to appellee, appellant collected the full amount, applied proceeds to his own account, and then offered to settle with appellee after computing the cost of alleged major improvements. Although, according to appellant's own figures, the gross sum paid him by the rice mill for appellee's share was $2,434.60, deduc-

tions claimed for major repairs were $912.78, leaving a balance of $1,521.82. This was tendered and refused.

Appellant insists that in fact major repairs cost $5,022.46. However, he had not claimed the full pro rata due from appellee. If this had been done the amount actually due her, says appellant, would have been $922.82.

An item of $65.80 was charged against appellee "for hauling the rice to the mill and insurance."

It is difficult to determine whether any appreciable part of the charge correctly falls within the contractual provision that appellee shall pay pro rata for major repairs. Much of the work admittedly was done in anticipation of requirements for 1944 and succeeding years. Machinery and parts were virtually unobtainable. An old heavy duty oil engine was purchased in Texas at Tyler and shipped to appellant. It was dismantled so that parts could be used in overhauling power plants. Wells were cleaned, pumping equipment was replaced in some instances, and houses were roofed. Lumber was bought for $646.89, and a carpenter was paid $332.50.

In 1931 appellant was adjudged a bankrupt; yet in 1944, as a witness, he claimed to have spent $42,091.64 on the properties, adding by way of testimony, "None of the other heirs paid out anything."

The evidence clearly shows that appellant had pursued a consistent policy of building up the property, supplying modern machinery as circumstances permitted, and lowering cost of pumping. Indeed, witnesses who charged substantial sums for overhauling wells and engines testified that efficiency of the equipment was probably increased fifteen per cent. There is also testimony by a witness for appellant that incidental repairs to a single engine would vary: one year they would be $150, "and maybe the next year $350."

There is nothing in the contract permitting appellant to build houses and charge a proportionate part of the cost to appellee; and while appellant testified that almost $1,000 was spent for lumber and carpentering, there is

absence of a sufficient showing that this was not done to facilitate appellant and lower his "overhead" costs. The statements filed are somewhat vague, and the claims are based primarily upon appellant's testimony. Our view is that the Chancellor correctly weighed this evidence, and the Court's order of disallowance will be affirmed.

There was included in the judgment an item of $102, representing 1,023 bushels of seed rice stored in the Bauer Elevator at Gillett. Appellee thinks this commodity was produced on lands in which she had an interest. Appellant testified it was grown on a farm he had rented from a third party. We cannot agree with the Court below that appellee established by a preponderance of the evidence that the rice in question came from either tract in which appellee was interested; hence the judgment for $102 must be reversed.

By statute (§ 8599 of Pope's Digest) any person who rents lands and fails or refuses to pay according to the contract, ". . . shall at once forfeit all right to longer occupy said . . . land." The section in its present form appears in Act 129, approved February 24, 1937. It amended Act CXXII, approved April 24, 1901. The 1901 enactment applied to persons who failed to pay rent on any dwelling house or other building. The 1937 statute includes " . . . any person who shall rent any dwelling house, or other building *or land.*"[1] While appellant contends he did not refuse to pay rents according to the contract, effect of what was done is a virtual admission that payment directly to appellee by the mill was circumvented in order to compel acquiescence in excessive deductions appellant undertook to make. The contract gave no such right, and the statute reflects legislative intent in circumstances such as these.

The decree recites that customary rental was a fifth of the rice; as to oats, a fourth. The sum of $820 was adjudged as appellee's part of the oats grown in 1944 and sold—this on the theory that since appellant had

[1] Italics supplied.

breached his contract, appellee was not obligated to waive on all crops other than rice. Again we think the Chancellor was correct. The decree was rendered in July, 1945. In November of that year appellant asked that the decree be set aside because appellee had accepted $1,616.68 from the Smith Rice Mill covering 1944 rentals on the basis of a fifth of the rice crop. It was insisted that this constituted ratification after suit for the 1943 claim had been concluded. There was the further contention that appellant did not know, when the decree was handed down, that such payment had been made.

In the motion just referred to there was no contention that proceeds from the sale of oats harvested in 1944 were not mentioned in the suit covering 1943 rentals. We agree with the Chancellor that acceptance of an amount to which appellee was admittedly entitled (or at least the inference is to that effect) was not a ratification of things complained of; nor does a preponderance of the evidence show that appellee was not entitled to $820 if in equity she had the right of cancellation.

As we have heretofore shown, the contract of 1943 was signed by Florence LaFargue, Edna Terrill, and Q. D. LaFargue. Lloyd LaFargue, who was a joint owner of the larger tract, was not a party to the transaction; hence his interests and the interests of Quinn are not an issue. Mrs. Terrill did not own any of the larger farm, but was interested in the smaller one. The question is, May the owner of an undivided interest in lands, who with another owner of an undivided interest has contracted with still another owner of a like interest, procure through equity a cancellation of such contract where one of the signatories has not been made a party to the suit and did not join in the proceeding? Lloyd LaFargue, who did not sign the contract, cannot be affected except to the extent that his brother, who farms the land and is seemingly well equipped to do so, may be interfered with in orderly operation. But Mrs. Terrill is an interested party, and she is not asking for cancellation.

Thompson on Real Property, v. 4, § 1874, says that where there are four owners in common of business prop-

erty which has been leased to a tenant,[2] the owner of one fourth part, being dissatisfied with the amount of rent received, cannot terminate the tenancy as against the owners of the other three fourths; but the tenant of the property may [in the absence of statutory provisions] continue his occupancy under the authority of the other part owners, and [in the absence of partition] he is liable to pay a reasonable rent to the owner of such fourth interest.

The statement is not entirely applicable to what we are dealing with; but the general principle would seem to be that where owners of undivided interests have jointly and severally contracted with another such owner, as in the instant case, the complaining parcener cannot terminate the lease to the detriment of his or her co-parcener, but must find relief at law in an action for damages.

The record before us does not effectively show what proportions of rice or oats were grown on the smaller tract as distinguished from the main farm. Since appellant entirely disregarded his obligation not to collect from the mill money due appellee, it must be presumed that this was his intention when the crops were harvested, and that the act of mingling was an effectual method to prevent a determination of ratios. At any rate, appellant did not defend upon the ground that as to one farm certain rights attached, and as to the other the contract involved a different principle; hence the judgment for $3,356.60 will be modified by eliminating the item of $102, and as so modified it is affirmed. That part of the decree cancelling the lease covering 305.95 acres is reversed and appellant will be permitted to continue under the contract. This is without prejudice to appellee's right to seek damages.

[2] The distinction between joint tenancy and tenancy in common is not important to this opinion. Thompson's reference to "four owners in common" is merely an arbitrary reference to numbers; for of course the rule would be the same whether there were three, four, five, or more.

KRUMMEN *v.* MCVEY.

4-7860 194 S. W. 2d 442

Opinion delivered May 20, 1946.

[redacted]

M. F. Elms, for appellant.

W. A. Leach, for appellee.

SMITH, J. C. H. and Essie B. McVey are husband and wife, and occupied in that relation, a house in the city of Stuttgart, belonging to Ed Krummen, who brought unlawful detainer to recover possession of the house, and judgment for the rent past due and unpaid. Only McVey, the husband, was named as a defendant in

the complaint. It was alleged that the house had been rented to McVey at a monthly rental of $17.50, and had been occupied for thirteen months without payment of rent, and that $227.50 was due as such.

Statutory notice to vacate was given, and when it was not complied with, this suit was filed, and upon the execution of the bond provided for by statute in such cases a writ of possession issued. The bond named both Mr. and Mrs. McVey as defendants. The writ of possession which issued directed the Sheriff to "take from the possession of the defendants above named, Mr. and Mrs. C. H. McVey" the described property, and to deliver the possession thereof to the plaintiff, Krummen, with a proviso that "If, however, the defendants desire to retain possession of said land and premises, you will give five days in which to give bond and retain the same as provided by law." The writ directed the Sheriff "to summon the said defendants to answer within twenty days after service of this writ upon them, a complaint filed against them in said court by Ed Krummen and warn them that upon their failure to answer the complaint will be taken for confessed. And you will make due return of this writ and summons."

Without filing any pleadings, Mrs. McVey entered into a stipulation upon which the cause was submitted to and heard by the trial judge, by consent, sitting as a jury, from which stipulation the following facts are copied. "It is agreed that the defendant, C. H. McVey, rented from the plaintiff, Ed Krummen, the house and premises involved in this action at a stipulated monthly rental of $17.50 per month; that the said C. H. McVey is the husband of Mrs. C. H. McVey and that they were living together as husband and wife up until the filing of this suit, or near thereabouts; that said house was occupied by them under said rental agreement until about the time this suit was filed, at which time the said C. H. McVey left the defendant, Mrs. C. H. McVey, and the city of Stuttgart, and has been gone at all times since.

"At the time of the filing of this action by the plaintiff there was then delinquent and unpaid rents on said house and premises in the sum of $227.50.

"Upon the filing of this action the defendant, Mrs. C. H. McVey, executed a cross-bond, which is a part of the record in this case. Said bond was signed by Sarah Kline and Henry Oliver as sureties, and is in words and figures as follows, to-wit," the bond is then copied, its condition being that ". . . if the said Ed Krummen shall recover judgment for the possession of said property in said action the said Mrs. C. H. McVey shall deliver the possession thereof to the said Ed Krummen and shall satisfy any judgment that may be rendered against her therein then this bond shall be void; otherwise to remain in full force and effect."

Mr. McVey's name is not mentioned in this bond, and Mrs. McVey did not execute it as a surety, but executed it in her own name as a principal, and two persons signed the bond as her sureties.

Proceedings in unlawful detainer are provided for and regulated by the statute which appears as Chapter 71, Pope's Digest, entitled, "Forcible Entry and Detainer." This statute provides a remedy by which a landlord may evict a tenant who fails and refuses to pay the rent reserved in the contract of tenancy. Pursuant to this statute, notice was given to the tenant, who had failed to pay his rent, to vacate the rented property, and when the tenant refused and failed to vacate the property, the complaint was filed, which § 6039, Pope's Digest (a part of Ch. 71), authorizes, and the affidavit required by that section was made, and a bond conditioned, as required by § 6040, Pope's Digest, was filed, and the writ of possession above referred to was issued. This writ named Mrs. McVey as a defendant although she had not been named as such in the complaint.

Section 6044, Pope's Digest, a part of Ch. 71, reads as follows: "*Bond of defendant to retain possession.* If the defendant shall desire to retain possession of such premises, he shall signify the same to the officer, who

shall give the defendant five days in which to execute a bond in an amount equal to the bond given in such action by the plaintiff, with sufficient security to be approved by such officer, conditioned that he will deliver possession of the premises to the plaintiff, if the plaintiff recover in the action, and satisfy any judgment the court may render against him in the action. If such bond be given and delivered as above required, the officer shall leave the possession of such premises with the defendant, and shall return such bond with the writ into court."

When the writ was served, Mrs. McVey did not vacate the property, but elected to remain in its possession, and was enabled to do so by the execution of the bond above referred to, for which § 6044, Pope's Digest, provides. She continued in possession of this property by virtue of this bond, until the trial of the cause in the court below, a period of two months, for which time she offered at the trial to pay $35, the amount of two months rent. The plaintiff demanded judgment for the full amount of rent due, to the date of the trial, which judgment the court refused to render, but did render judgment for two months rent, and from that judgment the plaintiff landlord has appealed.

Section 6050, Pope's Digest, also a part of Ch. 71, provides that: "*Judgment for plaintiff—effect.* If, upon the trial of any action under this act, the finding or verdict is for the plaintiff, the court or jury trying the same shall assess the amount to be recovered by the plaintiff for the rent due and withheld at the time commencement of suit and up to time of rendering judgment, or the value of the use and occupation or of the rents and profits thereof during the time the defendant has unlawfully detained possession, as the case may be, and damages for withholding the same, or the damages to which said plaintiff may be entitled on account of the forcible entry and detainer of such premises, and thereupon the court shall render judgment in favor of the plaintiff for the recovery of such premises, and for any amount of recovery that may be so assessed, and, if possession of the premises has not already been delivered to

the plaintiff under the writ first issued, shall cause a writ of possession to be issued commanding the officer to whom directed to deliver to the plaintiff the possession of the premises, and to levy of the goods, chattels, land and tenements of the defendant the amount of recovery that may have been assessed as aforesaid, together with costs, or, in case possession has already been delivered, shall award the plaintiff execution as in case of judgment in personal action."

If and when the plaintiff recovers a judgment for possession, he is entitled to a judgment not only for the rent due when the suit was filed, but for the rent due at the time of the rendition of the judgment, and is entitled also to a summary judgment for the amount of such rent against the sureties on the bond of the defendant, under and by virtue of which the possession had been retained. *Layton* v. *Linton,* 159 Ark. 529, 252 S. W. 21; *Thompson* v. *Kirk,* 165 Ark. 218, 263 S. W. 402.

Section 6058, a part of Ch. 71, provides that: "*No cross-action.* 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."

Now while Mrs. McVey was not named as a party defendant in the complaint, she made herself such when she executed a bond which only a defendant was authorized to give. But for this bond, it would have been the duty of the Sheriff, five days after the service of the writ of possession, to have evicted Mrs. McVey from the premises, but by virtue of her bond, she continued in possession, and was not dispossessed. She did not execute the bond as the surety of her husband, but executed it in her own name, a right which only a defendant could exercise. Of her own volition, she obtained and exer-

cised a right which the statute gives only to a defendant in the case. It was held in the case of *Burgess* v. *Poole,* 45 Ark. 373, that by voluntarily becoming a party to a pending suit, one becomes bound by the result as much as if he had been an original party.

Under the sections of the statute from which we have quoted, the plaintiff who prevails in an unlawful detainer case is entitled to a summary judgment against the sureties on the retainer bond executed by the defendant. The statute reads: ". . . and thereupon the court shall render judgment in favor of the plaintiff for the recovery of such premises and for any amount of recovery that may be so assessed." This means, of course, the recovery that should be and is finally assessed.

We held in the case of *DeClerk* v. *Spikes,* 206 Ark. 1004, 178 S. W. 2d 70, to quote a headnote, that: "Where appellant intervened in the forcible entry action against S and kept the case in court while she adjudicated her claim for title in the ejectment action she will be required to abide the consequences of unsuccessful litigation."

Here the recovery was only for $35, but it should have been for all the rent due at the time of the trial, and the judgment will be reversed and the cause remanded with directions to award damages in the full amount of the rent due at the time of the trial, to-wit: the sum of $264.50, and judgment will also be rendered against the sureties on the retaining bond for that amount.

The Chief Justice did not participate in the consideration or determination of this case.

BREWER, EXECUTOR, *v.* FLETCHER.

4-7905 194 S. W. 2d 668

Opinion delivered May 20, 1946.

Ben B. Williamson, for appellant.

W. F. Reeves, for appellee.

Ed. F. McFaddin, Justice. S. L. Fletcher sued Oris R. Case in the chancery court, seeking damages for trespass and unlawful cutting of timber. From a decree allowing a recovery, there is this appeal.

Mrs. W. G. Wightman of Calais, Maine, was the owner of 160 acres of land in Stone county, Arkansas. By timber deed dated March, 1941, she sold to Fletcher "all the merchantable pine and oak timber" on said land. Mrs. Wightman suffered the 1940 taxes to remain unpaid; and on November 10, 1941, the lands were sold at the collector's delinquent tax sale (under § 13849, *et seq.,* Pope's Digest), and Bryan Hopper received a certificate of purchase (under § 13856, Pope's Digest).

In 1941, Fletcher cut and removed the pine timber, intending to later cut and remove the oak timber. Some time in the early part of 1942, Bryan Hopper (claiming under his said tax certificate) sold all the merchantable timber on the 160 acres to Oris Case, who immediately cut and removed the oak timber.

When Fletcher returned to the land in January, 1943, and found that the oak timber had been removed, he effected a redemption from the tax sale under which Bryan Hopper claimed; and then Fletcher filed this suit against Case, claiming, *inter alia,* that Case was a willful trespasser and liable for the timber in its manufactured state. Case denied that Fletcher was the owner of the

timber; and also denied that Case was a willful trespasser; and also disputed the amount and value of the timber. Both Fletcher and Case died prior to the decree of December 3, 1945, and the cause was revived by Fletcher's widow and heirs against Brewer, executor of the estate of Case. For convenience, we refer to the original parties as plaintiff and defendant, and their respective representatives as appellees and appellant. A trial resulted in a decree for $800 for appellees; and on this appeal appellant presents the assignments herein listed and discussed.

I. *Appellant Claims the Chancery Court Should Have Quashed the Deposition of Gerald E. Hill.* On September 2, 1944, appellees' attorney served personal written notice on appellant that the deposition of the witness for the appellees would be taken at a duly designated place in Calais, Maine, on September 11, 1944; and the deposition of Gerald E. Hill was taken under said notice. When the deposition was filed in court, the appellant moved to quash the deposition; and the denial of this motion is assigned as error. Three points are argued:

(1) The appellant contends that the deposition was taken outside of the state and without previous court order, and therefore should be quashed. We hold, that in civil cases, a court order is not a prerequisite to a valid taking of depositions outside of the state. Section 5227, Pope's Digest, says: "Depositions shall be taken upon reasonable notice to the adverse party, or upon interrogatories." Section 5228 to 5233, inclusive, Pope's Digest, relate to the sufficiency of such notice. Section 5238, Pope's Digest, does not limit these previous sections, but provides an alternative way of taking depositions. See *Mo. & N. A. Rd. Co.* v. *Daniels*, 98 Ark. 352, 136 S. W. 651.

To support his argument, to the effect that a deposition to be taken out of the state must be either upon court order or by consent, appellant cites § 5223, Pope's Digest, the last words of which section read: ". . . by consent of the parties, or by order of the court." A

reading of the entire section clearly demonstrates that the section relates to the *person* before whom a deposition may be taken, and not to the intention to secure the evidence. The section says that depositions out of the state may be taken before certain named officials (such as justice of the peace, notary public, etc.), ". . . or any person empowered by a commission, directed to him by consent of the parties or order of the court." The words "order of the court" relate to "any person" before whom the deposition is to be taken, and not to the power of the parties to take the depositions. In a civil case, such as here, depositions may be taken on notice to the adverse party and without a previous court order.

(2) The appellant next contends that the deposition of Gerald E. Hill should be quashed because it was not taken on written interrogatories and cross-interrogatories. On this point we hold that the depositions need not be taken on written interrogatories, unless the adverse party so requires. When the notice was served on the appellant under § 5227, Pope's Digest, then the appellant had the right (under § 5237, Pope's Digest) to require that the deposition be taken on written interrogatories. The appellant failed to avail himself of § 5237, Pope's Digest, so he is in no position now to object to the failure to take the deposition on written interrogatories.

(3) Finally, the appellant says that the deposition of Gerald E. Hill was taken without reasonable notice, because the time allowed was insufficient. It will be recalled that appellant received personal written notice in Stone county, Arkansas, on September 2, 1944, that the deposition would be taken in Calais, Maine, on September 11, 1944. Under § 5231, Pope's Digest, appellant was allowed two days for preparation; and under § 5232, Pope's Digest, appellant was allowed "the time ordinarily required for such mode of travel" from Stone county, Arkansas, to Calais, Maine. Seven days is certainly sufficient to travel from Stone county, Arkansas, to Calais, Maine, by bus or train, or other usual mode of travel. So, the time between the serving of the notice

and the taking of the deposition was ample in this case. See *Pine Bluff & Western Railroad Co.* v. *McCaskill,* 88 Ark. 177, 114 S. W. 208.

II. *Appellant Claims That the Plaintiff's Timber Deed Was Not of Record When the Defendant Cut the Timber, and Therefore Appellees Cannot Recover.* Fletcher received his timber deed from Mrs. Wightman in March, 1941, but did not record the deed until January, 1943. In the interim Bryan Hopper had received his tax certificate, and sold the timber to Case, who had cut and removed the oak timber here involved. Appellant cites § 1847, Pope's Digest, on the necessity of recording an instrument, which is: "No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated." Appellant argues that under this section, the defendant, Case, was a "subsequent purchaser . . . for a valuable consideration, without actual notice . . ."; and, because of this section, appellees cannot recover, since the plaintiff's timber deed was not of record.

There are several answers to appellant's contention. One answer is that neither Bryan Hopper nor Oris R. Case was a subsequent purchaser from the landowner, and the said statute refers to subsequent purchasers from the common grantor. See *Halbrook* v. *Lewis,* 204 Ark. 579, 163 S. W. 2d 171. Another answer to the appellant's contention is that neither Bryan Hopper nor Oris R. Case was a purchaser, but each was only a mere

holder of a tax certificate. Neither Hopper nor Case had any right to possession of the land until two years had expired from the date of the tax sale. The statute (§ 1847) is for the benefit of subsequent purchasers entitled to possession, and not to mere trespassers. In section IV of this opinion we will demonstrate that Hopper and Case were willful trespassers. Thus, the constructive notice statute (§ 1847, Pope's Digest) is no defense to appellant.

III. *Appellant Claims That Fletcher's Right to Cut the Timber Had Expired Before Case Entered the Land.* The appellees introduced evidence to show that Fletcher held under a timber deed dated March 21, 1941, which deed gave Fletcher "a period of two years from date hereof . . . within which to cut and remove said timber." Appellant insisted that the timber deed under which Fletcher held allowed only one year from March 17, 1941, within which to cut and remove the timber; and that the appellees could not recover because Fletcher's rights had expired before Case cut and removed the oak timber. There were two timber deeds introduced in evidence; one was dated March 17, 1941, and allowed Fletcher one year to cut and remove the timber. The other timber deed was dated March 21, 1941, and allowed Fletcher two years to cut and remove the timber. Appellees claimed that Fletcher had refused to accept the one-year timber deed, and thereupon Mrs. Wightman had executed the two-year timber deed. The appellant claimed that the two-year timber deed was the work of Fletcher, in changing the term from one year to two years without the knowledge or consent of the landowner.

Most of the evidence in the case was directed to the issue of whether the Fletcher timber deed was for one year or two years. Gerald E. Hill of Calais, Maine, was the notary public who witnessed Mrs. Wightman's signature and took her acknowledgment to the timber deed dated March 21, 1941; and Hill testified that he changed the term from one year to two years at Mrs. Wightman's request; and that she signed and acknowledged the two-

year timber deed. When we consider—as we do—the deposition of Gerald E. Hill, we reach the conclusion—as did the chancery court—that Fletcher had a two-year timber deed. At all events, we cannot say that the chancery court's finding on this point is against the preponderance of the evidence; and we affirm the holding of the chancery court to the effect that Fletcher's right to cut and remove the timber continued until March 20, 1943, and that Case cut and removed the timber before that date.

IV. *The Amount of the Recovery.* The chancery court allowed appellees $800 as damages. This judgment is not excessive, if Case was a willful trespasser. The rule is well established in this state that, if the trespass is unintentional, then the measure of damages is the value of the timber in the trees; but if the trespass is willful, then the measure of damages is the value of the timber in its manufactured state. *Peek* v. *Henderson,* 208 Ark. 238, 185 S. W. 2d 704; *Warren Stave Co.* v. *Hardy,* 130 Ark. 547, 198 S. W. 99, L. R. A. 1918B, 183.

We hold that Oris R. Case was a willful trespasser in cutting and removing the timber. Bryan Hopper obtained his certificate of purchase at the delinquent tax sale on November 10, 1941. This was not a tax sale of the timber rights under §§ 13858 and 13861, Pope's Digest, but was a tax sale of the land under § 13849, Pope's Digest. Bryan Hopper received a certificate of purchase under §§ 13856 and 13852, Pope's Digest; and the landowner had two years from the sale in which to redeem under § 13860, Pope's Digest. Fletcher made the redemption for the landowner under § 13864, Pope's Digest, within the two years allowed for redemption.

Neither Hopper nor Case had any right to possession of the land until two years had expired from the date of the tax sale; and before the two years had expired, there was a redemption. So, neither had any right at any time to possession of the land or the timber thereon. In 61 C. J. 1295, in discussing the right to possession of lands sold for taxes, pending the period of

redemption, the general rule is stated: "In the absence of a statute authorizing a purchaser of land sold for taxes to enter into possession prior to the expiration of the period of redemption, until he obtains his tax deed, or at any rate until the expiration of the period of redemption, . . . the owner of the land, and not the tax purchaser, is ordinarily entitled to the possession and enjoyment of the estate, and, if the latter enters without the consent of the former, it is a trespass. Thus, in the absence of statutory authority, a purchaser has no right of entry on his mere certificate of tax sale before deed." See, also, 51 Am. Juris. 931.

We have no statute in Arkansas which empowers the holder of a certificate of purchase of lands sold at a collector's tax sale (under § 13849, *et seq.*, Pope's Digest) to take possession of the land prior to the expiration of the period of redemption; and therefore no such right of possession exists. In fact, the language of paragraphs 2 and 3 of § 13860, Pope's Digest (being the amendatory language added by Act 302 of 1923), if applicable, shows a legislative intent to prevent timber from being removed from lands for a period of ten years from the date of the tax sale. The holder of a certificate of purchase, in a proper case, might prevent the removal of the timber by another during the period of redemption, as was done in *Little Red River Levee District* v. *Thomas*, 154 Ark. 328, 242 S. W. 552. But the holder of the tax certificate certainly could not legally cut and remove the timber before the two years allowed for redemption. Even thereafter he proceeds at his peril in the cases covered by § 13860, Pope's Digest.

Bryan Hopper (called as a witness by the appellant) testified that he purchased the land at the tax sale in November, 1941, and sold Case the timber "the next spring." Hopper testified as follows: "Q. Did you tell Mr. Case at the time that you had bought it for taxes? A. Yes, sir. Q. He knew the source of your title? A. Yes, they knew I had bought it in. Q. Did you tell him when you had bought it? A. Well, I don't remember telling him just when, I had the papers there. Q. You

had your papers? A. Yes, sir. Q. You showed him your papers? A. Yes, sir. Q. That was the Sheriff's certificate of sale? A. I guess that is what you would call it. I don't know."

The facts in the case at bar—insofar as regards willful trespassing—are similar to the facts in the case of *Warren Stave Co.* v. *Hardy,* 130 Ark. 547, 198 S. W. 99, L. R. A. 1918B, 183. In that case we said:

"The testimony of Jolly shows clearly that when he bought this timber from Turner he did not know and made no effort to ascertain whether Turner had any title to it. He simply purchased it on Turner's statement that it was his timber. He did not know whether Turner had a deed to it or not. While Turner testified that he purchased the timber, he refused to disclose the name of the person from whom he purchased.

"One who converts to his own use the timber of another without making any other or further investigation as to the ownership than that discovered by this evidence must be held to be a willful trespasser. . . .

"Jolly being a willful trespasser in cutting and removing the timber from appellees' lands, if the suit had been against him he would not have been entitled to any deduction from the market value of the stave bolts on account of labor and expenses in reducing the timber from its original to its present form. He would have had to pay for the value of the timber in the form in which it was found in his hands; and, although appellant innocently assisted him in converting the timber to his own use, it stands in his shoes so far as liability to the appellees is concerned. *McKinnis* v. *Little Rock, Miss. River & Texas Ry. Co.,* 44 Ark. 210; *Central Coal & Coke Co.* v. *John Henry Shoe Co.,* 69 Ark. 302, 63 S. W. 49; *U. S.* v. *Flint Lumber Co.,* 87 Ark. 80, 112 S. W. 217; *Nashville Lumber Co.* v. *Barefield,* 93 Ark. 353, 124 S. W. 758, 20 Ann. Cas. 968."

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

The Chief Justice did not participate in the consideration or determination of this case.

SWEARENGEN *v.* JOHNS.

4-7906 194 S. W. 2d 445

Opinion delivered May 20, 1946.

Rains & Rains, for appellant.

Creekmore & Robinson and *Batchelor & Batchelor,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, W. C. Swearengen, as plaintiff in the circuit court, brought this action under the provisions of § 1298 of Pope's Digest to recover damages from the defendant and appellee, Willie Johns. The complaint contains the following allegation:

"That on the 23rd day of February, 1945, the defendant herein set fire to the grass on his farm, located in section 12, township 12 north of range 32 west, without giving any notice to this plaintiff whose farm joins that of the defendant; and that the said fire spread over the plaintiff's farm, burning 25 acres of lespedeza pasture, and 15 acres of other land, all located in the northeast quarter of section 12, township 12 north of range 32 west."

Plaintiff further alleged damages to his pasture lands in the sum of $350 by reason of the fire for which he prayed judgment. The complaint was filed on March 20, 1945, and on July 9, 1945, defendant filed an answer which contained a general denial of damage to plaintiff resulting from the fire and further alleged notice to plaintiff of defendant's intention to burn his lands, and the absence of negligence on defendant's part.

On November 19, 1945, defendant, with the permission of the court, withdrew his answer and filed a general demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained on the ground that the complaint failed to allege negligence on the part of the defendant. Upon plaintiff's failure to plead further, the court dismissed the complaint. Plaintiff prosecutes this appeal from the action of the court in sustaining the demurrer to the complaint.

Section 1298 of Pope's Digest reads as follows: "If any person shall set on fire any grass or other combustible material within his inclosures, so as to damage any other person, such person shall make satisfaction in single damages to the party injured, to be recovered by civil action in any court having jurisdiction of the

amount sued for; but if any such person shall, before setting out fire, notify those persons whose farms are adjoining said place which he proposes to burn that he is going to fire such grass or other combustible matter, and shall use all due caution to prevent such fire from getting out, to the injury of any other person, he shall not be liable to pay damages as provided in this section."

Under the early English decisions, every man was absolutely bound to keep fire, intentionally originated by him, within the limits of his own land, and was liable for any injury done by its escape, regardless of his negligence. But the general rule in this country, as well as in England, now is that, an owner of land, who sets out fire on his own premises for a lawful purpose, is not, in the absence of a statute to the contrary, liable for the damage caused by the spread of the fire to the property of another, unless he was negligent in starting or negligent in controlling the fire. The burden of alleging and proving negligence on the part of defendant under the present common-law rule is on the plaintiff. *Valley Lumber Co.* v. *Westmoreland Bros.*, 159 Ark. 484, 252 S. W. 609, 45 A. L. R. 870. This was also the rule recognized in this state prior to the passage of the statute under consideration. *Bizzell* v. *Booker, et al.*, 16 Ark. 308. The statute (§ 1298, Pope's Digest) was enacted in 1875, but this is the first time this court has been called upon to construe its provisions.

In 36 C. J. S., p. 815, the textwriter sets out the general rule, which is based upon cases involving similar statutes, as follows: "Since, in actions for damages under statutes which require notice to be given to adjoining landowners, neighbors, or other persons of the setting of the fire, a failure to comply with the statutory requirement and damage done are the basis of the action, it is no defense that defendant used reasonable care to prevent the spread of the fire after it was set. It is, however, a good defense that the burning was done from necessity, or that plaintiff had waived or had received the required notice, and it is immaterial so far as plain-

tiff is concerned that such notice was not given to others."

One of the leading cases cited in support of this statement is that of *Lamb* v. *Sloan,* 94 N. C. 534. That case involved the construction of a statute which provided: "No person shall set fire to any woods, except it be his own property, nor in that case, without first giving notice, in writing, to all persons owning lands adjoining to the wood lands intended to be fired, at least two days before the time of firing such woods, and also taking effectual care to extinguish such fire, before it shall reach any vacant or patented lands, near to or adjoining the lands so fired." The plaintiff in that case alleged the intentional setting of the fire by defendant without first giving the statutory notice. It was admitted by the defendant at the trial that such notice was not given, but it was contended that due diligence was, nevertheless, a defense to the action. The court said: "Having set fire to his woods, without first having given the plaintiff at least two days' notice thereof, he made himself liable for such damages as the latter sustained by the spread of the fire to and upon his adjoining woodland. Reasonable diligence on the part of the defendant in his efforts to keep the fire under control, would not relieve him from this cause of action; he made himself responsible at all events for the harm his fire did the plaintiff.

"The very purpose of the statute was to give the plaintiff a right of action, in which the defendant could not defend himself successfully, by showing reasonable care and diligence on his part, in respect to the fire, as he might do, if the plaintiff had sued for a breach of his common-law right. Otherwise, the statutory right of action would be nugatory. . . . The statute intended to give an additional right of action and remedy."

As we construe our statute, it was the apparent intention of the Legislature to re-establish the early common-law rule of absolute liability in the case of an intentional firing of farm lands except where the re-

quired notice is given and all due caution is exercised to prevent the fire from spreading to the injury of another. It will be noted that the statute does not make the use of due caution in the *setting* of the fire a defense. Due caution in preventing the fire from spreading to adjoining lands is a defense only when it concurs with the giving of the notice. The statute requires both the giving of the notice *and* the use of due caution in preventing the fire from spreading. If the notice is not given, and the giving of the notice is not waived, the use of due caution in preventing the fire from spreading becomes unavailing as a defense to the action. Since the defendant would be liable under the statute, even though he exercised due caution in preventing the fire from spreading, where notice is not given, it was unnecessary for the plaintiff to allege negligence of the defendant in allowing the fire to spread. We think this construction of the statute is in conformity with the general rule stated in 22 Am. Jur., Fires, § 77, as follows: "Where one is authorized to set a fire only under exceptional circumstances or conditions, the burden ordinarily rests upon him, in an action for injury sustained as the result of such fire, to show the existence of the circumstances or conditions relied upon as a justification for his action."

Counsel for defendant earnestly insist that this construction of the statute would prevent a person from burning paper or other rubbish from his home within his inclosures, without first giving the statutory notice, and regardless of the degree of care and caution used. While it is sufficient to say that these questions are not involved in the instant case, we think it is clear that the statute may be invoked only in the case of intentional, as distinguished from accidental, or negligent, firing of lands within one's inclosures.

It follows that the judgment of the trial court sustaining the demurrer to the complaint will be reversed and the cause remanded with directions to overrule said demurrer, and for such further proceedings as are not inconsistent with this opinion. It is so ordered.

The Chief Justice did not participate in the consideration or determination of this case.

PULASKI COUNTY *v.* COMMERCIAL NATIONAL BANK.

4-7898 194 S. W. 2d 883

Opinion delivered May 20, 1946.

Rehearing denied June 17, 1946.

John M. Rose, for appellant.

E. R. Parham, Wallace Townsend, Donham, Fulk & Mehaffy, Moore, Burrow, Chowning & Hall and *Henderson, Meek, Catlett & Henderson,* for appellee.

ROBINS, J. Appellants, County of Pulaski, City of Little Rock, and Little Rock Special School District, by their attorney, Mr. John M. Rose, complained to the assessor of Pulaski county that appellees, four banks domiciled in Little Rock and one bank in North Little Rock, in listing their property for assessment, used an improper formula by which to compute the value of the banks' shares of stock, resulting in too low an assessed valuation thereon. The assessor ignored the protest of

appellants and assessed the shares of stock of appellees according to the calculations submitted by each of them, respectively.

The said appellants and Mr. Rose, as a property owner, made application to the Board of Equalization of Pulaski County for an increase of these allegedly erroneous assessments. The Equalization Board refused to make the requested increases. An appeal to the county court from this action of the board was taken by appellants. The County Court made an order sustaining the action of the Board of Equalization and granted an appeal to the circuit court.

In circuit court appellees filed a motion to dismiss the appeal of appellants on these grounds:

1. That Pulaski county, Little Rock and the school district were not "aggrieved property owners" within the meaning of § 13671 of Pope's Digest and were therefore not entitled to appeal from the action of the Equalization Board.

2. That said section of Pope's Digest did not authorize one property owner to prosecute an appeal from the refusal of the Equalization Board to adjust the assessment of another property owner.

3. That appellant, John M. Rose, was not entitled to prosecute the appeal for the further reason that he failed to show that his (Rose's) property was assessed on the basis (50% of value) that he was seeking to enforce as to the property of appellees.

4. That the petition for appeal failed to show that the stock of appellees was assessed "at a level lower" than that of other taxpayers.

5. That if § 13671 of Pope's Digest may be interpreted as giving one taxpayer the right to appeal from the action of the Board of Equalization in refusing to increase the assessment of another taxpayer it is ineffective for this purpose because it fails to provide for notice to the property owner whose assessment is questioned.

The circuit court sustained the motion on all of the grounds set forth above, and to reverse judgment dismissing their appeal from the order of the county court appellants have appealed to this court.

Section 13671 of Pope's Digest (§ 30 of Act 172, approved March 22, 1929) is as follows: "*Property owner may apply to board for adjustment of assessment.* Any property owner may, by petition or letter, apply to the Equalization Board for the adjustment of the assessment of his own property or that of another person as assessed by the county assessor, provided, all applications shall be made to the board on or before the third Monday in August. Any property owner may, in person, by agent, petition or letter, apply to the Equalization Board for the adjustment of the assessment of his own property or that of another person as equalized by the Equalization Board, provided, all applications shall be made to and considered by the board on or before the first Saturday next preceding the third Monday in September. The assessor or any property owner who may feel aggrieved at the action of the Equalization Board may appeal from the action of said board to the county court by filing petition of appeal with the clerk of the county court, for which, except on appeals by the assessor, one ($1.00) dollar shall be paid as cost to said clerk, who shall summon the members of the board and issue such process as said assessor, board or county judge may request for witnesses and evidences of amount and value of property; provided, no appeal to the county court shall be taken except by those who have first exhausted their remedy before the Equalization Board, excepting however, all cases where the petitioner shall have had no opportunity to appear before said board. Provided, further, such appeals must be filed on or before the second Monday in October of each year and shall have preference over all matters in said court, and shall be heard and order made on or before the first Monday in November; and provided further, that no reduction shall be allowed except on evidence corroborative of that of the owner. It shall be the duty of the

prosecuting attorney or his deputy when called upon by the county assessor, a member of the Equalization Board or the county court, to represent the county and state in the prosecution of all appeals before the county and circuit courts.''

When all the language of this section is given effect, it must be held that it evinced a legislative intention to permit one property owner to protest to the Equalization Board against a conceived insufficiency in the amount of the assessment of another taxpayer and to appeal to the county court from an unfavorable disposition of his protest by the board; and on appeal to the county court that tribunal has the power, under this law, to change assessments as made by the assessor and as approved by the Equalization Board by increasing or decreasing the amount of same. But the statute makes no provision whatever for any sort of notice to the property owner whose assessment is thus attacked.

The law prescribes that all property must be assessed at a certain time by the assessor, and therefore every property owner must take notice of this step in fixing the tax lien on his property; but the situation is manifestly different as to the making of an increase in the property owner's assessment by the county court on appeal from the Board of Equalization. With all the provisions of this statute being duly observed, it could occur that property owner A would not know that property owner B, dissatisfied with the valuation placed on A's property by the assessor, had protested unsuccessfully to the Board of Equalization and had thereafter appealed to the county court; and A might not discover that B had succeeded in obtaining an order of that court increasing the assessment of A's property until it was too late to obtain relief from such order. The statute (§ 13645, Pope's Digest) requires that notice be given to a property owner whose assessment has been increased by the Board of Equalization, but does not require notice to a property owner whose assessment is protested before but not raised by the Board of Equalization.

To constitute "due process" it is essential that, in proceedings to assess and collect taxes, the property owner have notice either from the tax law itself, or by some method prescribed in the tax law, of every essential step in such proceedings.

Mr. Justice FIELD, discussing the necessity of provision in a tax law for notice to the property owner, in the case of *County of San Mateo* v. *Southern Pacific Railroad Company,* 13 Fed. 722, said: "There being, then, no provision of law giving to the company notice of the action of the state board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action. . . . We cannot assent to any such doctrine. . . . Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form."

The Supreme Court of Appeals of Virginia, in the case of *Heth* v. *City of Radford,* 96 Va. 272, 31 S. E. 8, said: "Imposing taxes or levies is a *taking* of property. The owner is entitled to be heard before the charge is fully established against him. If he is not afforded an opportunity to be heard upon the question of the assessment of his property for taxation, the tax or levy is unlawfully exacted of him, for otherwise he is deprived of his property without due process of law, in violation of the fourteenth amendment of the Constitution of the United States. . . . It is sufficient to say that where notice to the party to be affected and an opportunity for him to be heard is not provided for in the law under which

the assessment is made or the taxes and levies laid, the law is unconstitutional and void, and the assessment or levy is illegal."

This court, in the case of *Massey* v. *Arkansas & Missouri Highway District in Pulaski County*, 163 Ark. 63, 259 S. W. 387, said: "It contains no provision for notice of assessments and a hearing to be afforded to owners of property, and, unless the statute is connected up with the original act creating the district, which contains such provisions, then the statute is void, for the reason that, where the lawmakers delegate to subordinate agencies or other tribunals authority to make assessments, owners of property are entitled to a hearing, otherwise it constitutes the taking of property without due process of law."

The fact that, in the case at bar, appellees actually knew of the proceeding and participated therein does not in any wise dispense with the necessity that the law itself must, in order to satisfy the requirement of the "due process" clause of the constitution, provide for notice to be given to the property owner in a proceeding designed to raise his assessment. In determining the constitutionality of a statute of this kind courts must consider, not what may have been done in the case being reviewed, but what might, under the statute, be done in *any* case; and, as we have pointed out above, a property owner might never learn of a raise made in his assessment made in pursuance of this statute until it was too late for him to contest.

Almost the identical question posed here was decided by the supreme court of South Dakota in the case of *Beveridge* v. *Baer*, 59 S. Dak. 563, 241 N. W. 727, 84 A. L. R. 189, in which the court said: "It is a general rule that 'due process' requires that, after an assessment has been made by an assessor, it cannot be increased by a reviewing board without notice to the taxpayer or opportunity to be heard. . . . What is the effect of the fact that, before the increase was made, notice was actually given to the plaintiff and an opportunity of being heard upon the merits of the proposed increase was actually afforded the plaintiff? These facts do not go to

the constitutionality of the law itself, because in determining whether or not the law is unconstitutional we look, not to what has actually been done under the law, but what the law authorizes to be done under its provision. See *Minneapolis Brewing Co.* v. *McGillivray* (C. C.), 104 F. 258; *State* v. *Miller,* 146 Ia. 521, 124 N. W. 167; *City of Beatrice* v. *Wright,* 72 Neb. 689, 101 N. W. 1039; *Matter of Ellard,* 62 Misc. Rep. 374, 114 N. Y. S. 827; *Meade* v. *Dane Co.,* 155 Wis. 632, 145 N. W. 239; *State* v. *Stark Co.,* 14 N. D. 368, 103 N. W. 913.

" 'The law authorizing the proceedings must require notice or it will be unconstitutional. It is not enough that a person may by chance have notice, or that he may, as a matter of favor or courtesy, have a hearing.' 12 C. J. 1229."

In discussing the same subject, in the case of *Henry L. Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027, the supreme court of the United States said: "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* v. *City of Watertown,* 19 Wall. 107, 22 L. Ed. 72, 77. Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart* v. *Palmer,* 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in *Security Trust & S. V. Co.* v. *Lexington,* 203 U. S. 323, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice PECKHAM, said, with respect to an assessment for back taxes:

'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute the taxpayers may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in *Central of Georgia R. Co.* v. *Wright,* 207 U. S. 127, 138, 52 L. Ed. 134, 141, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In *Roller* v. *Holly,* 176 U. S. 398, 409, 44 L. Ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louisville & N. R. Co.* v. *Central Stock Yards Co.,* 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

The supreme court of Oklahoma, dealing with a somewhat similar question, in the case of *Barrett, et al.,* v. *Board of Commissioners of Tulsa County,* 185 Okla. 111, 90 P. 2d 442, said: "The situation here presented is comparable to an attempted increase of the tax burden on property by an attempted increase of the assessment after it has been made by the assessor, of which, it is said generally in treating of the necessity of notice in 12 Am. Jur. 334, Par. 642 (subject 'Constitutional Law'), as follows: 'It is a general rule that "due process" requires that after an assessment has been made by an assessor, it cannot be increased by a reviewing board without notice to the taxpayer or opportunity to be heard. Hence, a statute giving a reviewing board power to increase individual assessments without notice to the taxpayer or provision for review is unconstitutional as denying due process. The law authorizing such proceedings must require notice or it will be unconstitutional. It is not enough that a person may by chance have notice or that he may as a matter of favor or courtesy have a hearing. A statute giving to a tax commissioner power to increase individ-

ual assessments, without providing for notice to the taxpayer other than is given by the fact that the time of the meeting of the commission is fixed by law, does not afford the notice necessary to due process . . .' "

The statute invoked here, in so far as it authorizes an appeal by one property owner from action of the Board of Equalization in refusing to raise the assessment of another property owner, without requiring any kind of notice to the property owner whose assessment is being questioned, contravenes the fourteenth amendment to the constitution of the United States and is therefore void. This conclusion obviates the necessity of consideration of other questions raised.

The lower court properly sustained the motion to dismiss, and its judgment is affirmed.

McHaney, J., concurs.

McFaddin, J., dissents.

The Chief Justice did not participate in the consideration or determination of this case.

McHaney, J. (concurring). I agree with the other members of the court that the failure of the statute, § 13671, to require notice to the owner of an appeal by one property owner from the action of the Equalization Board on another property owner's assessment, is a denial of due process, and, therefore, void as to such other property owner. But I do not agree that § 13671 authorizes such an appeal, or that it authorizes one property owner to protest the assessment or to petition the Equalization Board to raise the assessment made by the assessor of another's property.

Said section does provide that "Any property owner may . . . apply to the Equalization Board for the adjustment of the assessment of his own property or that of another person as assessed by the county assessor . . ." Also, in the next paragraph, that "Any property owner may, in person, by agent, petition or letter, apply to the Equalization Board for the adjustment of the assessment of his own property or that of another

person as equalized by the Equalization Board . . ." Also, in the next paragraph it provides that the "assessor or any property owner who may feel aggrieved at the action of the Equalization Board may appeal" to the county court. I do not feel that the statute clearly gives the right to one person to protest the assessment of another person before the Equalization Board, and, if he loses, to appeal to the county court.

There was a time that such right was conferred. Section 3 of Act 249 of 1911, so provides, as follows: "Any taxpayer . . . may appear before the Board of Equalization and file his objection to the assessment of property of another taxpayer either as made by such taxpayer before the assessor, or as reduced by the Board of Equalization," and provides for an appeal to the county court, thence to the circuit court, and to this court. But this act was repealed by Act 147, p. 132, § 11, of 1919. See § 9911, C. & M. Digest. The present statute was enacted in 1929. See § 30 of Act 172 of 1929, now § 13761 of Pope's Digest. This statute does not, as did the Act of 1911, give one property owner the right to "object" to the assessment of another property owner, but only to apply to the board for the "adjustment" of the assessment of his own or of another's property. I would say that it is a rare bird who applies to the Equalization Board for the "adjustment" of the assessment of his own property upward, and the statute confers upon him only the same right to act for another that he acts for himself. It is well known that many property owners act for others in the assessment, equalization and payment of taxes, and this right is what I think said statute confers.

For this reason I concur in the result reached by the court.

Ed. F. McFaddin, Justice (dissenting). This proceeding was initiated by Pulaski County, the City of Little Rock, and the Little Rock School District (all hereinafter called "petitioners"), in order to obtain larger assessed valuation of the banks hereinafter listed (appellees here). The success of the proceedings would

have allowed more revenue for these governmental subdivisions, and resulted in greater tax payments by the banks. Here are the assessments made by the banks, and adopted by the county assessor:

Commercial National Bank	$370,841.00
Peoples National Bank	112,981.31
W. B. Worthen Co.	201,300.00
Union National Bank	267,432.41
Twin City Bank	44,795.00

Here are the assessments asked by the petitioners, first adopted, but later abandoned by the county assessor:

Commercial National Bank	$651,882.00
Peoples National Bank	207,164.63
W. B. Worthen Co.	592,596.25
Union National Bank	558,504.55
Twin City Bank	96,239.00

Here are the assessments made by the Board of Equalization when the assessments reached that body:

Commercial National Bank	$332,190.00
Peoples National Bank	112,981.31
W. B. Worthen Co.	297,435.00
Union National Bank	267,432.41
Twin City Bank	44,795.00

It will be observed that the Board of Equalization lowered the assessment of the Commercial National Bank, and raised the assessment of W. B. Worthen Co., and left the other three assessments unchanged. The petitioners went to the county court for relief. From an adverse holding, they appealed to the circuit court.

In the circuit court, the banks filed a motion to dismiss: raising, for the first time, the question about § 13671, Pope's Digest, not providing for notice or summons to be issued out of the county court and served on the banks. I call particular attention to the fact that no such motion was made in the county court, and no objection of any kind was there made to the regularity of the appeal. The order of the county court recites that the banks appeared by their respective attorneys.

The majority opinion of this court is sustaining this motion to dismiss, on the theory that § 13671, Pope's Digest, did not provide for notice to be served on the property owner when any petitioner went from the Board of Equalization to the circuit court. There are two answers to the contention made by the banks, and sustained by the majority opinion, and these answers are: (1) the statute provides for notice, and (2) the banks appeared in the county court, and thus waived any question of notice. We discuss these points.

I. *The Statute Provides for Notice.* The majority opinion quotes § 13671 *in extenso,* and then says of that statute: "But the statute makes no provision whatever for any sort of notice to the property owner whose assessment is thus attacked."

I submit that the statute—inferentially, at least—provides for notice, because it says that after the appeal is lodged in the county court, the clerk of the court "shall summon the members of the board and issue such process as said assessor, board, or county judge may request for witnesses and evidences of amount and value of property . . ." It is hard to believe that the county judge would hear the matter in the absence of the property owner affected, particularly when the statute says the county judge may request evidences of amount and value of the property. It seems clear to me that the county judge, under this section, should and would have the property owner before him. Certainly, that is what happened here, for the judgment of the county court—as previously noted—shows that the banks appeared in the county court. It is carrying those mysterious words "due process" past the ultimate to hold—as the majority does here—that there was no provision for notice, when the statute says that the county judge has a right to request the witnesses and evidences of amount and value of the property. It seems clear to me that this statutory provision satisfies the requirement of due process.

II. *The Banks Appeared in the County Court, and thus Waived Any Question of Notice.* Section 28 of Art. VII of the Constitution of Arkansas says:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, . . ."

This proceeding by the petitioners in the county court certainly related to taxes. The county court is a judicial court. When the petitioners filed the appeal in the county court, the banks could have entered—and in fact *did* enter—their appearance. They contested the matter in the county court on its merits, and thereby lost any right to raise any question of any defect in notice. The only purpose of notice is to supply the absence of knowledge. When the banks knew of the proceedings in the county court, and entered their appearance and contested the assessments, they waived any notice.

If a case is filed in a court (and I have pointed out that the county court is a judicial court), and the opposing party appears and defends the case on its merits without raising any question of summons, then such a defense constitutes a waiver of process and service thereof. Cases so holding are collected in West's Arkansas Digest, "Appearance," § 20. For cases concerning the effect of failure to object to informality of appeal, see West's Arkansas Digest, "Appeal and Error," § 228. I contend that it was too late for the banks, on appeal in the circuit court, to raise for the first time a question that they had not raised in the county court, and a question such as this question of notice—which could be waived by appearance.

The matter of the assessment of personal property in Arkansas is very serious; and I regret to see the majority of this court dispose of this case on a procedural point rather than on the merits. The real question is, whether the assessments as offered by the banks were correct, or whether the assessments as contended for by the petitioners were correct. It would be far better, as I see it, for the case to be decided on its merits, so that taxpayers and assessing officials would know exactly how property should be assessed. My mind is open on the question of which side—that is, the banks or the petitioners—is correct on the formula for allowing

valuation and assessment. I dissent because the affirmance of this case is on a procedural point, and the merits of the case have not been considered.

[redacted]

PULASKI COUNTY *v.* NATIONAL OLD LINE INSURANCE COMPANY.

4-7897 194 S. W. 2d 890

Opinion delivered May 20, 1946.

Rehearing denied June 17, 1946.

[redacted]

John M. Rose, for appellant.

Frank Chowning, Beloit Taylor, M. J. Harrison, Verne McMillen and *Pat Mehaffy,* for appellee.

HOLT, J. This is a companion case to No. 4-7898, *Pulaski County, et al.,* v. *Commercial National Bank, et al., ante,* p. 124, 194 S. W. 2d 883, this day decided, and the decision in that case is controlling here.

Appellants, Pulaski County, The City of Little Rock, The Little Rock Special School District, and John M. Rose, a property owner, challenged the correctness of the formula, or method, used by appellees, The National Old Line Insurance Company, The National Equity Life Insurance Company, The Pyramid Life Insurance Company, The Union Life Insurance Company, and The Southern National Insurance Company, all domestic insurance companies, to compute the value of the shares of stock of these companies. They alleged that the formula used resulted in too low an assessed valuation on

the stock of appellees and that the assessor ignored appellants' protest and assessed said shares in accordance with appellees' own calculations. As in the case of the banks, *supra,* appellants applied to the Board of Equalization of Pulaski county for an increase in these alleged erroneous assessments. The Equalization Board denied any increases, and appellants appealed to the county court which affirmed the action of the Equalization Board and granted an appeal to the circuit court.

Appellees, in the circuit court, filed identically the same motion to dismiss appellants' appeal as that filed by the banks, *supra.* Appellants say (quoting from their brief): "The motion to dismiss the cases against these five insurance companies and the motion to dismiss the cases against the five Little Rock banks (case No. 7898 now also on appeal to this court) were argued simultaneously before the two circuit judges. Said two motions raise identically the same five points, but consolidation was not asked on appeal to this court due to objection by some of appellees. . . . That portion of this brief containing the 'Argument' is identically the same as the argument in the bank cases."

Since we hold in case No. 4-7898, *supra,* that the statute, § 13671 of Pope's Digest, invoked by appellants here is unconstitutional [since it contravenes the 14th Amendment to the Constitution of the United States] in so far as it permits a property owner to appeal from the action of the Board of Equalization in refusing to raise the assessments of another property owner without requiring any kind of notice to the property owner whose assessment is sought to be increased, we must, and do, affirm the judgment of the lower court.

McFaddin, J., dissents; McHaney, J., concurs.

The Chief Justice did not participate in the consideration or determination of this case.

Ed. F. McFaddin, Justice (dissenting). This is a companion case to No. 4-7898, styled *Pulaski County, et al.,* v. *Commercial National Bank, et al., ante* p. ....., 194

S. W. 2d 883; and my dissent in the bank case gives the reasons for my dissent in this case.

[redacted]

LUPTON *v.* LUPTON.

4-7890 194 S. W. 2d 686

Opinion delivered May 27, 1946.

[redacted]

Jay M. Rowland, for appellant.

William G. Bouic, for appellee.

ROBINS, J. Appellee brought this suit praying for divorce from appellant on the ground that appellant had been guilty of such indignities toward him as to render his condition in life intolerable. Appellant's answer was a general denial of the charges against her. The lower court found the issues in favor of appellee and from decree granting him a divorce this appeal is prosecuted.

For reversal appellant argues that the evidence is not sufficient to sustain the decree.

These parties were married in 1920, and have two grown children. According to appellee's testimony appellant, for a number of years before their separation, had quarreled at appellee, upbraiding him at mealtime until he could not eat in peace and nagging him at night until he could not sleep; and appellee asserted that this conduct on the part of appellant was such as to injure his health. There was some corroboration of appellee's version of the matter, and, taken as a whole, the testimony of appellee and his witnesses was sufficient to

establish the indignities and intolerable conduct which we have held sufficient ground to entitle the innocent spouse to a divorce. *Rose* v. *Rose,* 9 Ark. 507; *Preas* v. *Preas,* 188 Ark. 854, 67 S. W. 2d 1013; *Welborn* v. *Welborn,* 189 Ark. 1063, 76 S. W. 2d 98.

While the effect of the testimony of appellant and her witnesses was to contradict the appellee and his witnesses, we cannot say that the findings and decree of the lower court were against the preponderance of the testimony. Therefore, under our long established rule that we do not reverse the decree of a chancery court on a question of fact, unless the finding of the lower court is against the weight of the evidence, the decree appealed from must be affirmed. *Giberson* v. *Wilson,* 79 Ark. 581, 96 S. W. 137; *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, 118 S. W. 250; *O'Neal* v. *Ross,* 100 Ark. 555, 140 S. W. 743; *Fisher* v. *The Rice Growers Bank,* 122 Ark. 600, 184 S. W. 36; *Reeves* v. *Reeves,* 165 Ark. 505, 264 S. W. 979; *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905; *Atwood* v. *Ballard,* 172 Ark. 176, 287 S. W. 1001; *Field* v. *Koonce,* 178 Ark. 862, 12 S. W. 2d 772, 68 A. L. R. 1303; *Jackson* v. *Banks,* 182 Ark. 1185, 33 S. W. 2d 40; *White* v. *Williams,* 192 Ark. 41, 89 S. W. 2d 927; *Piggott Nursery Company* v. *Davis,* 195 Ark. 738, 113 S. W. 2d 1102; *High* v. *Bailey,* 203 Ark. 461, 157 S. W. 2d 203; *Burnett* v. *Clark,* 208 Ark. 241, 185 S. W. 2d 703.

CONATSER *v.* D. W. HOSKINS TRUCK SERVICE.

4-7908 194 S. W. 2d 680

Opinion delivered May 27, 1946.

J. H. Lookadoo and *Agnes F. Ashby,* for appellant.

Buzbee, Harrison & Wright, for appellee.

McHaney, Justice. Appellant suffered an accidental injury on September 1, 1943, arising out of and in the course of his employment by appellee, Hoskins Truck Service, as a truck driver. Following this injury compensation payments were voluntarily made by appellee, Commercial Standard Insurance Company, insurance carrier for said employer, which were continued through November 24, 1943, when further payments were stopped because appellant had returned to work on November 22. His average weekly wage at the time of his injury was $37.50, and from the time he went back to work to the time of the hearing before the Workmen's Compensation Commission on August 6, 1945, his average weekly wages equalled or exceeded that amount. The Commission held, for that reason, he was not entitled to disability benefits under the Workmen's Compensation Law, Act 319 of 1939, but that he could come before the Commission at any time within the remainder of the statutory period, and, by showing that his wage earning capacity had been affected by the injury, receive such award as the facts then might justify.

From the action of the Commission an appeal was taken to the circuit court of Hot Spring county, where

the action of the Commission was affirmed. This appeal followed.

We think the Commission and the circuit court followed the decision of this court in *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956, and we agree that this case is ruled by that. It was there held, to quote a headnote, that: "The Workmen's Compensation Act does not call for general accident insurance; its purpose is to protect the worker or employee against reduced or lost earning power and when it is shown that the employee is earning higher wages in the same employment or otherwise after the injury than before he is not entitled to compensation under the act." The undisputed evidence is that since leaving the employment of appellee employer, for more than two and one-half years, appellant had actual earnings of from $40 to $71 per week, as compared with his average weekly wage of $37.50 at the time of the accident. While appellant testified that he was compelled to go to work in order to sustain himself and family and that his work was attended by discomfort, the fact remains that he did work and that he did earn by reason of his employment sums substantially in excess of what he was making at the date of injury, and, under the rule there announced, there can be no recovery here at this time and his future rights, if any, were fully preserved by the Commission.

"Disability," as defined in the statute, "means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." Section 2 (e) of Act 319 of 1939. The fact that appellant works with discomfort does not distinguish this case from that of *Sallee Bros.* v. *Thompson,* for appellant there testified to the same effect.

This case being ruled by that, it follows that the judgment must be affirmed. It is so ordered.

TOLLEY *v.* TOLLEY.

4-7912 194 S. W. 2d 687

Opinion delivered May 27, 1946.

Owen C. Pearce and *Culbert L. Pearce,* for appellant.

W. D. Davenport, for appellee.

ED. F. MCFADDIN, Justice. The essential question on this appeal is the force and effect to be given in Arkansas to a Kansas judgment (1) awarding money, and (2) attempting to vest title of Arkansas real estate.

Appellant, Lillie Mae Tolley, and appellee, James Alvis Tolley, were married in Arkansas in 1925, and two children were born to the marriage. Appellant and appellee separated in 1941, and thereafter each party made an unsuccessful effort to obtain a divorce in Arkansas. Then, in September, 1944, while the appellant was residing in Kansas, the District Court of Wyandotte county, Kansas, in a suit filed by the appellant and based on personal service on appellee, rendered a judgment which awarded appellant: (1) a divorce; (2) final judgment for $195; (3) $10 per week from date of judgment until further orders of the court for the support and education of the minor child then in the custody of appellant; and (4) title to certain real estate in White county, Arkansas, free and clear of all claims and liens of James A. Tolley.

Basing her claim on the said Kansas judgment, Lillie Mae Tolley, on April 27, 1945, filed suit against James A. Tolley in the Circuit Court of White county, Arkansas, seeking: (1) judgment both for the $195, and also for the continuing sum of $10 per week for the support of the child, and past due under the Kansas judgment, *supra,* and (2) possession of the forty acres in White county as described in the Kansas judgment, *supra.* To this complaint, appellee filed a demurrer, which was sustained. Appellant's complaint was dismissed upon her refusal to plead further; and there is this appeal.

The record reflects that the appellee filed answer in addition to demurrer, and the appellant demurred to the answer. However, the cause was heard by the White Circuit Court solely on the pleadings; and the court ruled that the appellee's demurrer to the complaint

should be sustained. So, we disregard on this present appeal any and all reference to the appellee's answer and the appellant's demurrer thereto.

We hold that the appellee's demurrer should have been (1) overruled as to those parts of the appellant's action which sought money judgment; and (2) sustained as to so much of the appellant's action as sought ejectment for the land.

I. *The Action to Enforce the Kansas Judgment for Money.* Article IV, § 1 of the Constitution of the United States says: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." 28 U. S. C. A., § 688, was enacted to carry into effect the last sentence above quoted. The judgment of the District Court of Wyandotte county, Kansas, said: "It is further ordered and decreed that plaintiff have judgment against the defendant in the sum of $120 for past-due support and maintenance, and attorney fees in the sum of $75; total $195." This language quoted immediately above was a final judgment, and entitled to full faith and credit in the State of Arkansas under the provisions of the United States Constitution, as above quoted. *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75, 23 L. R. A., N. S., 659; *Lewis* v. *United Order of Good Samaritans,* 182 Ark. 914, 33 S. W. 2d 53; *Motsinger* v. *Walker,* 205 Ark. 236, 168 S. W. 2d 385. Therefore, so much of the appellant's complaint as was an action on this Kansas judgment for $195 stated a good cause of action; and to that extent the demurrer should have been overruled.

The appellant also sought judgment in this action in White county for the allegedly past-due weekly installments of support money awarded by the Kansas court, the judgment of which (under date of September 27, 1944) reads: "It is further ordered that plaintiff be and she is awarded the care, custody and control of their

minor child, Mary Jacquline Tolley; that defendant be and he is hereby ordered and directed to pay to the plaintiff the sum of $10 per week from this date for the support, maintenance and education of said minor child, until a further order of this court.''

Whether this award for support money is a final judgment and entitled to full faith and credit presents an interesting question, and one not discussed in *Kelly* v. *De Wees,* 200 Ark. 770, 140 S. W. 2d 1011. Under the rule laid down by the Supreme Court of the United States in *Sistare* v. *Sistare* (218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A., N. S., 1068, 20 Ann. Cas. 1061), and reaffirmed by the Supreme Court of the United States in *Barber* v. *Barber* (323 U. S. 77, 65 S. Ct. 137, 89 L. Ed. 82, 157 A. L. R. 163), these weekly payments of support money are within the purview of the full faith and credit clause of the Federal Constitution, if the judgment for such future payments is not subject to annulment or modification by the Kansas court as to past-due and unsatisfied installments. In *Barber* v. *Barber, supra,* the United States Supreme Court, in discussing the holding in *Sistare* v. *Sistare, supra,* said: ''The court held that a decree for future alimony is, under the Constitution and the statute, entitled to credit as to past-due installments, if the right to them is 'absolute and vested,' even though the decree might be modified prospectively by future orders of the court. See, also, *Barber* v. *Barber,* 21 How. (U. S.) 582, 16 L. Ed. 226. The Sistare case also decided that such a decree was not final, and therefore not entitled to credit, if the past-due installments were subject retroactively to modification or recall by the court after their accrual. See, also, *Lynde* v. *Lynde,* 181 U. S. 183, 187, 45 L. Ed. 810, 814, 21 S. Ct. 555.''

We are not concerned here with the effect the Arkansas courts give to their own awards for future payments for support, but rather with the effect the Kansas courts give to Kansas awards for future payments for support. We turn, then, to the law of Kansas as declared by the courts of the state. In *Sharp* v. *Sharp,* 154 Kan.

175, 117 P. 2d 561, the Kansas Supreme Court has clearly stated the law of that State; and we quote:

"With respect to installments due and unpaid, the judgment was final. *Burnap* v. *Burnap,* 144 Kan. 568, 71 P. 2d 899; *Wilkinson* v. *Wilkinson,* 147 Kan. 485, 77 Pac. 2d 946. In *Paul* v. *Paul,* 121 Kan. 88, 245 P. 1022, 46 A. L. R. 1197, in a divorce action in Nebraska an order for temporary alimony payable in installments was made. An action on the judgment for the unpaid installments was brought in this state. As the order as to the unpaid installments had not been modified by the Nebraska court, it was held the judgment was final and the action would lie. The rule is the same in other jurisdictions. 2 Beal, Conflict of Laws, p. 1393.

"In *Cheever* v. *Kelly,* 96 Kan. 269, 150 P. 529, it was held, as stated in the syllabus: 'When installments of alimony awarded by a decree of divorce and alimony become due and are not paid, they may be collected by suit, judgment, and execution, although the decree provided it should not be a lien on the defendant's property.'

"As the court is without power to modify or change past-due installments for the support and education of minor children (*Davis* v. *Davis,* 145 Kan. 282, 65 Pac. 2d 562), we think such accrued unpaid installments may be collected by suit, judgment and execution the same as past-due unpaid alimony installments. 2 Freeman on Judgments, 5th Ed., § 1067." See, also, *Wilkinson* v. *Wilkinson,* 147 Kan. 485, 77 P. 2d 946; and *Trunkey* v. *Johnson,* 154 Kan. 724, 121 Pac. 2d 247. See, also, *Griffin* v. *Griffin,* 327 U. S. 220.

Interesting annotations on the question of the full faith and credit to be accorded past-due installments for alimony or support may be found in 41 A. L. R. 1419, 46 A. L. R. 1200; 57 A. L. R. 1113; and 157 A. L. R. 170. In 27 C. J. S. 1286, Divorce, § 329, the various holdings are summed up: "On the other hand, a decree for the support of a minor child, which is unalterable, or so much thereof as is unalterable, is within the application of the

full faith and credit clause of the Federal Constitution, . . ."

The holdings of the Supreme Court of Kansas demonstrate that the past-due installments for support are final and unalterable, and are not subject to annulment or modification by the Kansas courts. It therefore follows that the appellee's demurrer should also have been overruled to so much of the appellant's complaint as sought to enforce in Arkansas, the unpaid and unsatisfied awards for weekly support adjudged by the Kansas court, and past-due at the time of the filing of this cause in the White Circuit Court.

II. *The Action to Enforce the Kansas Judgment Affecting Title to Arkansas Real Estate.* The judgment of the District Court of Wyandotte county, Kansas, contained this language: "It is further ordered and decreed that plaintiff be and she is hereby awarded the following described real estate, to-wit: The southeast quarter (¼) of the southeast quarter (¼) of section ten (10), township seven (7) north, range five (5) west, consisting of forty (40) acres of land, more or less, in White county, Arkansas, free and clear of all claims and liens of the defendant." This was a decree *in rem* by the Kansas court, attempting to settle title to real estate in Arkansas by operating directly on the title. The full faith and credit clause of the United States Constitution does not afford any sanctity or force in the State of Arkansas to such judgment of the Kansas court, because the Kansas court was without jurisdiction to vest title to Arkansas real estate in the form in which this judgment was rendered. *Fall* v. *Eastin,* 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65, 23 L. R. A., N. S., 924, 17 Ann. Cas. 853. In that case just cited, Mr. Justice McKenna, speaking for the United States Supreme Court, quoted from the earlier case of *Watts* v. *Waddle,* 6 Pet. 389, 8 L. Ed. 437: "It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt." In speaking of the full faith and credit clause, Mr. Justice McKenna

said: "This provision does not extend the jurisdiction of the courts of one state to property situated in another . . ."

The Supreme Court of Kansas has recognized that a court of one state has no jurisdiction to vest title *in rem* in lands located in another state. In *Rodgers* v. *Rodgers,* 56 Kan. 483, 43 P. 779, the Supreme Court of Kansas had before it a case where a divorce had been granted in West Virginia, and in which divorce decree the West Virginia court had attempted to settle the title to real estate in Kansas. The Supreme Court of Kansas accorded full faith and credit (under Art. IV, § 1 of the United States Constitution) to so much of the West Virginia judgment as decreed a divorce, but refused to recognize that part of the West Virginia judgment which attempted to settle the title to real estate in Kansas. The Kansas Supreme Court said: ". . . and, while the West Virginia court did make a general order purporting to bar the rights of the wife in the real and personal property of the husband, yet this part of the decree could have no extra-territorial force so as to settle the title of any property outside of that state."

In 27 C. J. S. 1287 the rule is stated: "Since jurisdiction to render a judgment *in rem* inheres only in the courts of the state which is the situs of the *res,* a divorce decree which attempts to settle the title to lands in another state, by operating directly on the title, and not by compelling the holder of the title to convey, is void and not *res adjudicata* of the same claim in an action between the same parties and involving the same land."

And in 17 Am. Juris. 369 this appears: "The rule is well established that in divorce proceedings the courts of one state cannot, by their decree, directly affect the legal title to land situated in another state, . . ."

And in Leflar on "Conflict of Laws," § 119, the rule is stated: "The only state which can, by operation of law and apart from the act of the parties, transfer title in land out of one person and into another is the state where the land lies."

This court has recognized and applied the same rule in the cases of *Kendall* v. *Crenshaw,* 116 Ark. 427, 173 S. W. 393; and *O'Connell* v. *Sewall,* 191 Ark. 707, 87 S. W. 2d 985. In *O'Connell* v. *Sewall, supra,* a final decree was rendered in the superior court of Cook county, Illinois, adjudging that a certain party had no right, title or interest in a certain 160-acre tract in Ouachita county, Arkansas; and the Illinois judgment was pleaded in the Arkansas case. Mr. Justice HUMPHREYS, speaking for this court, said: "The Illinois court was without jurisdiction to determine title to lands in this State, and the adjudication there cannot estop appellee from claiming an interest in real estate in this State nor can the adjudication there be pleaded as *res judicata* of issues here involving title to said land. *Clopton* v. *Booker,* 27 Ark. 492; *Williams* v. *Nichol,* 47 Ark. 254, 1 S. W. 243; *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75, 23 L. R. A., N. S., 659." See, also, the annotation in 51 A. L. R. 1081.

There are, of course, cases where a court of one state may require a party to execute a deed to lands in another state, as in specific performance cases; and, when such deed is executed, it is valid. The following cases of this court bear on this point: *Arkansas Mineral Products Co.* v. *Creel,* 181 Ark. 722, 27 S. W. 2d 1003; *Grayson* v. *Garratt, Chancellor,* 192 Ark. 47, 90 S. W. 2d 500; *Nakdimen* v. *Brazil,* 131 Ark. 144, 198 S. W. 524; and *Bell* v. *Wadley,* 206 Ark. 569, 177 S. W. 2d 403. These cases fall within the rule stated in 14 Am. Juris. 434, and as stated by Leflar in "Conflict of Laws," § 120, that it is permissible for courts of one state to enter *in personam* judgments and decrees in suits involving foreign land. But the Kansas judgment in the case at bar is not such a decree as falls within the rule of these cases.

The Kansas judgment here involved did not require the appellee to execute a deed, so as to be an *in personam* decree. Rather, the Kansas judgment here involved was an attempt by the court of Kansas to directly adjudicate, settle and vest the title of Arkansas real estate; and in that respect the Kansas judgment is not effective in the State of Arkansas; and the Circuit Court of White

county, Arkansas, correctly sustained the appellee's demurrer to the ejectment action based on the Kansas judgment.

It follows, therefore, that the judgment here appealed from is affirmed as to so much thereof as sustained the appellee's demurrer to the ejectment action; but is reversed and remanded with directions to overrule the demurrer to so much of the complaint as sought a money judgment based on the Kansas decree for the $195, and also for the unpaid and unsatisfied award for weekly support adjudged by the Kansas decree and past due at the time of the filing of this action in the White Circuit Court. Costs of this appeal are taxed against appellee.

RAGAN *v.* COX.

4-7899 194 S. W. 2d 681

Opinion delivered May 27, 1946.

J. B. Milham and *Gladys Wied,* for appellant.

Ernest Briner and *Ben M. McCray,* for appellee.

GRIFFIN SMITH, Chief Justice. The case of *Ragan* v. *Cox* came to us on appeal from the Court's action in sustaining demurrers filed by the three defendants. We affirmed as to W. W. Beeson, clerk for Hot Spring County, but reversed with directions that W. A. Ragan and Ben H. Cox be required to answer the complaint. See *Ragan* v. *Cox et al.,* 208 Ark. 809, 187 S. W. 2d 874.

The plaintiff is Maggie Ragan, who sues for her daughter, Louise, alleging actual damages of $15,000, and $35,000 punitive because of the wrongful act of Ragan in attaching himself to Louise as her alleged husband through instrumentality of a ceremony performed by Cox, a Justice of the Peace, who defended on the ground that he acted under authority of license issued by Beeson, regular on its face, and giving the girl's age as eighteen years. The so-called "ceremony" was performed July 22, 1944. Louise was born February 3, 1932. She was, therefore, twelve years, five months, and nineteen days of age when Ragan induced her to acquiesce in the proposals he made.

When the case was here in May, 1945, the demurrer admitted allegations of the complaint, one of which was that Louise was Ragan's niece, "related to him within the fourth degree of consanguinity." We held that the law's interdiction against incestuous marriages rendered

the transaction void *ab initio*; hence the relationship of man and wife was not created. Pope's Digest, § 9018. Although the law has been brought forward from the Revised Statutes, ch. 94, § 3, it was amended by Act of March 5, 1875, p. 221, to include first cousins.

When the defendants Cox and Ragan answered on remand, Ragan alleged (and the assertion is not disputed) that the relationship as originally admitted was erroneous, and that he was Louise's great uncle, a degree of kinship not expressly prohibited by the statute relating to incestuous marriages. If it be conceded that this is true and that § 9018 of the Digest does not pointedly prohibit a great uncle from crossing his blood with one so distantly related, still Ragan cannot free himself from the unlawful status he so methodically created by allowing all that the prosecution alleges by way of aggravation to go unchallenged and falling back upon an unsubstantial and transparent plea of weakmindedness. The verdict was, "We, the jury, find for the defendants, Ben H. Cox and W. A. Ragan."

Thirty-two alleged errors are assigned in the motion for a new trial. As to Ragan, it is enough to say that the evidence is insufficient to show an absence of that mental sufficiency it was sought to impute to the fifty-two-year-old divorcee, thereby causing him without sufficient thought volition to seek as a wife a relative who had not reached the first of her 'teens.

Section 2927 of Pope's Digest provides that an infant under twelve years of age shall not be found guilty of any crime or misdemeanor. In an effort to bring the defendant within the scope of this language, Ragan's brother, Albert, testified that W. A., since "breaking up" with his family in 1937, "has acted very peculiar. It seems like he was in more trouble than he had been; he acted unconcerned. He did not have much to say to anybody and does not know how to carry on a conversation—but sometimes he talks pretty clear. All his life he has been more or less peculiar. . . . It would be my guess that in 1943 and 1944 he had the mentality of a twelve-year-old boy."

Even if § 2927 were applicable, (and it is not), the test there laid down is the mentality of an infant *under* twelve, as distinguished from one twelve or over. But the general rule is that an insane person is liable for his torts, unless the specific act complained of involves an intent which the person from whom recovery is sought is incapable of entertaining. Corpus Juris Secundum, v. 44, p. 281.

Cox testified that two or three days prior to the time Ragan and Louise "got married" Ragan came to him and discussed the matter briefly, saying only that "a couple wants to get married—that is, they want to get married in two days." Ragan asked Cox if he would, at the time planned, come to the street curb and perform the ceremony, and Cox replied that he would. There is the further testimony by this defendant:

"When [Ragan] came to get me to go out [to a waiting automobile] and marry them he had the license. I looked at [the document] and saw that both names were Ragan, but it is not uncommon for me to marry people with the same names. I did not know what their relationship was, and still don't know—they could have been father and daughter. Ragan went with me to the car, where the girl was sitting on the back seat. I did not pay much attention to her; didn't try to find out anything about her. I did not ask anybody about her. I do not ask anybody when they want to get married. I go by the ages on the license. . . . I cannot [by looking at a girl between twelve and thirteen years of age] tell [whether] she is under sixteen years unless I pay enough attention. [If I have it on my mind to ascertain the age] I might tell something about her."

Instruction No. 1 was that if the jury believed Ragan "willfully, maliciously, or wantonly, and while of sound mind, with the mentality of a person above the age of twelve years, injured and damaged the plaintiff," she would be entitled to recover.

Instruction No. 2 told the jury the plaintiff should recover if it believed that Ben H. Cox solemnized the

marriage "willfully, wantonly, or maliciously, with the intent to injure and damage the plaintiff."

Appropriate objections were made to each instruction, and to others that are erroneous. It is sufficient to say that as to instruction No. 2, no mention is made of negligence on the officiating magistrate's part; nor, in respect of instruction No. 1, was it necessary as a prerequisite to liability for the jury to find that Ragan acted willfully, wantonly, or maliciously. Nor as to damages other than punitive was it necessary (as to either defendant) to show willfullness, malice, or wantonness. We do not discuss other instructions because the judgments must be reversed and the causes remanded for a new trial.

In *Smyth* v. *State,* 13 Ark. 696, it was held that a minister or magistrate who performs an illegal marriage ceremony in the circumstances attending the case there at issue did so at his peril. It was said: "The law, which esteems marriage as the most solemn, the most binding, and [the most] important of all contracts, does not punish the parties to it, if within the age prescribed, . . . by avoiding the contract, but its policy is to discourage such marriages, and to punish those who engage in celebrating them without the consent of the parents or guardian of the minor. . . . The minister or magistrate performing the ceremony . . . cannot justify or excuse his agency in the violation of the law by showing that it was without any criminal intent on his part, or [that it was induced] by a deception practiced upon him." See *State* v. *Willis,* 9 Ark. 196; *Sikes* v. *State,* 30 Ark. 496.

Louise Ragan testified that as an inducement to the association he proposed, W. A. Ragan said he would buy her anything she desired:—"I did not know anything about being married; did not know what I would have to do or what acts I should do. I had never been taught anything about it; no instructions at all. [The defendant] did not talk very much about marriage before the ceremony was performed: he just told me he would get

me anything I wanted: he bought me candy, and a dress, and gum. . . . [Mr. Cox] performed a ceremony and told us we were husband and wife. . . . Mr. Ragan told me to keep it a secret—not to tell anyone.

"We left [my father's] home about ten o'clock that night; walked the railroad to the river bridge and remained there all night. The next morning we walked to Haskell. My folks were in bed and didn't know when we left. We changed our clothes at Haskell and got on the train and went to Jefferson, Texas, by way of Texarkana. We slept in one bed and he would not let me sleep in my dress—had me remove all of my clothing. We both had nothing on: no clothing. He had sexual intercourse with me that night. We went from Jefferson to Marshall and on to Longview, Texas. There we got a room at the Rainbow Tourist Court where we stayed nearly a week. We had no visitors there, but I talked with a few little girls. They wanted me to go play with them, but I told them 'No.' Ragan told me to tell them I was his daughter. He told the people I was his daughter until my father and the police came after me. Prior to this time he told the officers our names were Jones."

Maggie Ragan teestified that her daughter had not arrived at the age of puberty, and no information or instructions regarding the duties of a married woman had been given her.

When the former appeal was disposed of, the opinion called attention to construction of "void" as construed in *Kibler* v. *Kibler,* 180 Ark. 1152, 24 S. W. 2d 867, and in *Hood* v. *Hood,* 206 Ark. 1057, 178 S. W. 2d 670. Cases in other jurisdictions were also cited, where void was construed to mean voidable. But in *Witherington* v. *Witherington,* 200 Ark. 802, 141 S. W. 2d 30, Mr. Justice HUMPHREYS, speaking for the Court (with one Judge dissenting from that part of the opinion which held that the marriage should not be annulled), employed this emphatic expression: "Of course, marriages between girls under fourteen and boys under seventeen could be annulled, but it is because such marriages are *absolutely void.*" The decision was handed down June 10, 1940.

The General Assembly convened in January, 1941. By Act No. 32 it amended § 9017 of Pope's Digest by permitting males who had arrived at the full age of eighteen years and females who had reached sixteen to contract marriage. There was then added: *"If under those ages, their marriages shall be absolutely void."* (Italics supplied.)

Act 404 of the same session, approved March 27, 1941, lends some clarity to Act 32, but is not in conflict with it and does not repeal it.

American Jurisprudence, v. 35, p. 212, § 46, discusses *"Unlawful or Irregular Marriages as Void or Voidable."* A definition, it says, which will closely fit modern conditions, is that a marriage may be considered voidable although prohibited by law when it is possible, under any circumstances, for the parties to contract or subsequently to ratify it; while it should be considered void if it is impossible for them under the law to contract it, and if it is impossible for them subsequently by any conduct to ratify it, and if the statute expressly declares that the marriage is void. It is further said: "Wherever the impediment is such that it might not have been readily known to both parties before marriage, and where public policy does not rise superior to all considerations of private utility," the legislative tendency is to make marriages voidable, rather than void.

The same work (American Jurisprudence) cites cases in § 47 (p. 213) supporting the proposition that a void marriage cannot be validated by limitations or prescription, ". . . [or] at least this is true of a marriage void as against public policy and good morals."

Chancellor KENT is quoted in L. R. A. (1916C, pp. 692-93) to the effect that as to void marriages no sentence of avoidance is absolutely necessary, ". . . yet as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction. And while annulment of a voidable marriage

renders it void *ab initio* unless it is otherwise provided by statute, as is often done, the usual provision being that the nullity shall exist from the time of the decree to that effect, such a marriage is regarded as practically valid by all courts until its nullity has been declared in a proper proceeding maintained during the lives of the parties to the marriage. . . . And with respect to the effect of voidable marriages which are avoided in proper manner, it should perhaps be emphasized that by the practically unanimous opinion of judicial and text writers, the annulment of a voidable marriage renders it void *ab initio,* and of no civil effect, except as rights may be saved by virtue of statutory provisions."

Section 9021 of Pope's Digest provides that when either of the parties to a marriage shall be incapable, for want of age or understanding, of consenting to any marriage, or shall be incapable from physical causes of entering into the marriage state, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction.

In the instant case the Chancery Court rendered a decree September 18, 1944, in which it was found that the "alleged" marriage was void.

In *Ragan* v. *Cox, supra,* effect was given the word "absolutely" in a statute declaring that incestuous marriages were absolutely void—and this was done because public policy had been proclaimed by the Legislature, making it imperative that the obvious meaning be ascribed. When the Act now appearing as 9021 of Pope's Digest was passed, the General Assembly was dealing with "void" in the sense ordinarily understood by the layman: that is, something that can be avoided. But when the Fifty-Third Assembly prefaced "void" with "absolutely," it certainly had some purpose in view other than to use words, irrespective of meaning. If we are at liberty to say that a man who has passed the half century mark may fraudulently procure marriage license, and in consummation of lust induce a justice of

the peace to intone the phrases that in more favorable circumstances would result in marriage—if this can be done with a twelve-year-old girl, it can be carried still further and serve to unite an octogenarian with a female child appropriated from the play room; and if "absolutely void" means voidable and a married status continues until a court goes through the formality of annulling something that in common sense never existed, the mature wrongdoer need have no fear of carrying his "bride" across state lines for immoral purposes. The Mann Act[1] could not apply because at the time of transportation there had been no annulment. The sovereign State of Arkansas would stand between the itinerant and prosecution. Such could not have been the intention of the Legislature, and a Court does not have the right to ascribe to an Act an utterly barren result.

In the circumstances of this case the pretended marriage between W. A. and Louise Ragan was—certainly as to the appellee (through whose fraudulent agency the status was sought to be created)—a complete nullity. What effect the ceremony might have had upon any marriage status claimed by Louise does not enter into the discussion, because at her instance the records were purged.

Our holding, therefore, is: (a) That Ragan's fraudulent conduct, coupled with the provisions of Act 32 of 1941, resulted in a transaction which could not be dignified by the term "marriage," and that following a ceremony for which the procurer paid $2.50 to Cox, the relationship was exactly what it had been before—great uncle and grand niece; (b) that if Cox negligently contributed to a status whereunder Louise was subjected to injury and indignities, he is accountable to her, and the cause should be retried on its merits, under proper instructions, and in a manner not inconsistent with this opinion.

[1] Ragan is under indictment in Federal Court for violation of the Mann Act in taking the twelve-year-old child from Arkansas for immoral purposes.

GALE & COMPANY *v.* WALLACE.

4-7910 194 S. W. 2d 881

Opinion delivered May 27, 1946.

Rehearing denied June 24, 1946.

John L. Hughes, for appellant.

Kenneth C. Coffelt, for appellee.

HOLT, J. July 27, 1945, appellant, plaintiff below, brought this action in replevin against appellee to recover possession of an automobile.

Appellant alleged in its complaint "that plaintiff is the owner and is entitled to the immediate possession of one 1941 DeLuxe Model Tudor Ford Automobile, Motor No. 18-6469065, of the value of six hundred and sixty-one and 50/100 dollars ($661.50); that the defendant, William Wallace, has possession of said automobile and unlawfully detains same. Wherefore plaintiff prays judgment for the recovery of said automobile, for one

hundred dollars damages for the detention thereof, and for all proper relief."

Appellee answered with a general denial and retained possession of the car by executing the necessary bond under § 11382, Pope's Digest.

By agreement, the cause was tried before the court sitting as a jury. The court made no specific findings of facts or declaration of law, but "finds the facts and the law in favor of the defendant." This appeal followed.

The facts disclose that appellee purchased the automobile in question from the Eastern Auto Company, a used car dealer in Little Rock, October 30, 1944, for $1,500. He made a down payment of $850 in cash, and orally agreed to pay the balance in monthly installments. Appellee was given a bill of sale and possession of the car. Thereafter, on November 25th and December 28, 1944, he made additional payments in the amount of $70, and on April 18, 1945, appellee made another payment of $47.25, or a grand total of $967.25, and thereafter made no more payments.

March 20, 1945, appellee, buyer, entered into a conditional sales contract with the Eastern Auto Company, seller, under the terms of which appellee agreed to pay $1,106 for the car here involved. A down payment of $526 was noted and "balance of time price" of $708.75 to be paid in fifteen monthly installments of $47.25 each. Title to the car was retained by the seller until payment in full of the purchase price, with right to repossess the car on failure to pay any installment when due. On the same date, appellee executed his note in favor of the Eastern Auto company in the amount of $708.75, "balance of time price," named in the contract, *supra*. The sales contract, together with the note, were duly assigned on March 21, 1945, to appellant, Gale & Company.

Appellant prosecuted this suit on the theory (1) that he was an innocent purchaser and holder for value before maturity of the contract and note in question here and entitled to recover on this ground, and in any event, (2)

that the sales price of the car in question was not in excess of the maximum ceiling price as fixed by the OPA under the authority of the Federal Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. A., Supp. II, §§ 901 *et seq.*, as amended by the stabilization act of October 2, 1942; 56 Stat. 765, 50 U. S. C. A., Supp. II, §§ 961 *et seq.*, and the rules and regulations made pursuant thereto.

(1)

As appears from appellant's complaint, *supra*, appellant has elected to prosecute an action to recover and take the automobile, a right given to him only under the terms of the sales contract here. The note contains no provision for title retention or for repossession of the car. Having elected to take the property, an action to recover on the note is barred. In *McCain* v. *Fender*, 188 Ark. 1139, 69 S. W. 2d 867, this court said: "Where the vendor reserves title to a chattel until the payment of the purchase price, the sale is conditional and dependent for its consummation upon the performance of the condition that the purchase price shall be paid. When the debt becomes due the vendor, in sales of this character, may bring an action to recover the debt, and by this he affirms the sale and waives the reservation of title; or he may elect to take the property and, by doing so, cancels the debt. He may not, however, have both remedies, and, where he elects to retake the property an action to recover on the debt is barred. *Nashville Lumber Co.* v. *Robinson*, 91 Ark. 319, 121 S. W. 350; *Laird* v. *Byrd*, 177 Ark. 1144, 9 S. W. 2d 571."

The sales contract here was assignable, but not negotiable since it lacked the fourth requisite of a negotiable instrument under § 10159, Pope's Digest, which requires that it must be made payable to order or bearer. Since this sales contract was not negotiable, but assignable only, appellant took it subject to all defects or infirmities available to the maker (appellee here) as a defense against the payee therein. *General Motors Ac-*

ceptance Corporation v. *Salter,* 172 Ark. 691, 290 S. W. 584.

(2)

As noted, *supra,* the sales price stipulated in the contract of sale was $1,106. Mamie Landers, on behalf of appellee, testified (as abstracted in appellant's brief): "That she is chief clerk in the OPA office at Benton and has charge of the price charts and records in that office; that MPR 540 governs the ceiling price of used automobiles; that the ceiling price of a used 1941 Ford DeLuxe Tudor automobile at the time the car in controversy was sold was $845." William Wallace, appellee, testified (as abstracted by appellant): "That on October 30, 1944, he purchased a 1941 Model Ford DeLuxe Tudor Automobile from the Eastern Auto Company, a used car dealer in Little Rock; that he bought it from John Angenendt, a salesman for said company; that he agreed to pay for the car the sum of $1,500 and paid down in cash $850 and promised to pay the balance of $650; that no papers of any kind were executed for this balance at the time of sale, because of OPA prices and regulations; that he has since that time made two payments of $35 each and an additional payment of $47.25; that he has paid a total of $967.25; that he bought the car under a written warranty; that he later found the car not to be as guaranteed and tried to turn it back and the seller refused to take it; that on March 20, 1945, he executed the note and contract sued on; that all his dealings were with Angenendt; that he had no dealings with Gale & Company and knew nothing of such company until it had acquired the note and contract." The only other witness offered by appellee, Mrs. William Wallace, his wife, tended to corroborate the testimony of her husband.

The base selling price of the automobile involved here, under the rules and regulations of the OPA, was $845, as testified by Mamie Landers, chief clerk in the OPA office in Benton, but appellant argues that since the car here was sold with warranty, the seller or dealer, under OPA rules, could add 25 per cent. to the base price, equipment allowance, and 2 per cent. sales tax. The evi-

dence fails to show that the car here carried any extra equipment. No one testified as to any extra equipment items and in the sales contract, under "Itemize Extra Equipment," there is left a blank space, so in the absence of proof, nothing could be added to the base price for extra equipment items. The addition of 25 per cent. of the base price because the car was sold under a warranty was conditioned under the OPA regulations MPR 540 on the used car being in good operating condition and when the car so sold proves not to be in good operating condition, the dealer has made an overcharge in excess of the "permitted maximum price (the 'non-warranted' maximum price)," or base price. Here the testimony of appellee is undisputed that the car was not as guaranteed, that is, not in good operating condition, that he tried to turn it back for this reason "and the seller refused to take it," and therefore appellant was not entitled to add 25 per cent. to the base price of $845 because of the breach of said warranty. The only remaining item that appellant therefore claimed above the base sales price of $845 was the 2 per cent. sales tax, amounting here to $16.90, and when added to the base price would make a total of $861.90. Since appellee has already paid $967.25, which is more than the company had a right to charge for the car, and there is now no debt due, replevin will not lie. *Scott Furniture Company* v. *Maurer,* 208 Ark. 604, 187 S. W. 2d 185. The judgment therefore must be and is affirmed.

LITTLE ROCK SPECIAL SCHOOL DISTRICT *v.* ARKANSAS PUBLIC SERVICE COMMISSION.

4-7895 194 S. W. 2d 874

Opinion delivered May 27, 1946.

Rehearing denied June 24, 1946.

[redacted]

John M. Rose, for appellant.

Will G. Akers, Beloit Taylor, Frank Chowning, Verne McMillen, Pat Mehaffy, M. J. Harrison and *Owens, Ehrman & McHaney,* for appellee.

E. Chas. Eichenbaum and *Charles Mehaffy, amici curiae.*

McHaney, Justice. In June, 1945, appellants, who, in addition to the School District, are Pulaski County, City of Little Rock and John M. Rose, a property owner, filed a petition with appellee, or the Tax Division of appellee, styled "In the Matter of the Taxation of the Shares of Stock." This petition was addressed to appellee and sought a revision of Assessment Form 16, as prescribed by the Commission for the use of the several county assessors in assessing banks and domestic insurance companies. The principal revision sought by petitioners was the revision of Form 16 so as to make it applicable for and require its use by the several county assessors for the assessment of the shares of stock of all domestic corporations to be assessed against said corporations as agent of the shareholders, and not merely applicable to banks and domestic insurance companies. Other changes or revisions in said Form 16 were sought

in the wording thereof to the end that the revenue accruing to appellants, the School District, the County and the City, might be increased through the assessment of shares of stock in all domestic corporations, including banks and insurance companies.

Notice of the filing of said petition was given and a number of responses were filed,—one by corporations other than banks and insurance companies, one by the Arkansas Bankers' Association and through it all the banks, both state and national, and one or more by several domestic insurance companies, and two individuals, attorneys, were permitted to file a response to the petition.

The matter was set for hearing, was briefed and argued, and, after due consideration, the petition to revise Form 16 was denied. An appeal was prayed and granted to the circuit court of Pulaski county, where, on motion, the appeal was dismissed, and appellants prayed and were granted an appeal to this court.

We think the circuit court properly dismissed the appeal to it for the reason that such an appeal is not authorized by statute and that no justiciable issue is presented to the courts for decision.

The statutes on which appellants base their right of appeal to the circuit court and to this court are §§ 20 and 21 of Act 124 of 1921, p. 177, now §§ 2019 and 2020 of Pope's Digest. Said Act 124 abolished the Arkansas Corporation Commission and created the Arkansas Railroad Commission in § 1. The jurisdiction of the new Arkansas Railroad Commission was limited to all matters pertaining to the regulation and operation of public utilities,—carriers, railroads, *etc.*, naming 16 utilities in § 5, with the reservation of certain powers in municipalities. Appeals are also provided for in § 19 of said Act 124 from the action of municipalities to the circuit court under the conditions therein set out. It appears to us that the whole substance of said act relates to the regulation and operation of public utilities, and that the right of appeal by "any party aggrieved," as used in said

§§ 20 and 21, has reference only to any party aggrieved on account of an order made by the Commission in a proceeding involving the regulation or operation of a public utility, and no public utility is involved in this proceeding.

Furthermore, we think no justiciable issue is here presented for the courts to decide. A petition is presented to the Commission asking it to change a form prepared by it and distributed to the various county assessors to be further distributed to banks and domestic insurance companies for making returns of their intangibles, shares of stock. It is contended that such form ought to go to all domestic corporations and not merely to banks and insurance companies, and certain other complaints are made of said form. No particular assessment of taxes is involved. The courts are not asked to compel by mandamus the issuance by the Commission of the form suggested by appellants, even if such an action would lie. The Commission was asked by appellants to change or revise its form to comply with their view of the law, and it declined to do so, and they have appealed. They have named the Commission as appellee, but we do not find that it was ever made or became a party to the appeal or otherwise, nor did it make any order, except to say that "the petition for the revision of Commission Form No. 16 be, and the same is hereby, denied."

Whether this action of the Commission was right or wrong, the appeal does not present a question for decision by the courts that would be binding on the Commission and any decision on the merits would be in the nature of a declaratory or advisory judgment, which the courts of this State have no power to render.

The legislature of 1917 enacted Act No. 262, entitled "An Act to provide for the assessment for taxation of companies, associations and corporations engaged in all kinds of insurance, security, guaranty and indemnity business, and assessing for taxation the intangible property of all corporations." Section 2 of that act undertook to provide for the assessment of the capital stock

of "all corporations doing business in this State," except utilities and those provided for in § 1, such as domestic insurance companies and banks. This court, in *State ex rel. Attorney General* v. *Lion Oil & Ref. Co.*, 171 Ark. 209, 284 S. W. 33, held that section unconstitutional as to foreign corporations, because the situs of the shares of stock of such corporations is in another state and could not be taxed to the corporations in this State. In *State ex rel. Attorney General* v. *Williams-Echols Dry Goods Co.*, 176 Ark. 324, 3 S. W. 2d 340, we held said statute unconstitutional as to domestic corporations because the provisions of the Act were not severable.

From that time, 1928, to this the legislature has not enacted any new legislation attempting to tax the shares of stock of ordinary business corporations. Whether § 13741 of Pope's Digest, the section relied on by appellants as requiring the Commission to demand the report therein set out of all ordinary domestic business corporations, is unconstitutional for the same reason as stated in the Williams-Echols case, *supra,* is not before us and is not decided.

For the reasons stated above, the judgment of the circuit court in dismissing the appeal is correct and is affirmed.

LOWE *v.* COX.

4-7919 194 S. W. 2d 892

Opinion delivered June 3, 1946.

L. Jean Cook and *Frank S. Quinn,* for appellant.

Shaver, Stewart & Jones, for appellee.

MINOR W. MILLWEE, Justice. Appellant, J. C. Lowe, purchased from R. H. Hanson and Stella Hanson, his daughter-in-law, a 200-acre tract of land in section 6, township 14 south, range 27 west, in Miller county. The contract of purchase was made in 1929 and a deed delivered in 1932. Appellant went into immediate possession of the lands after his purchase in 1929, and a fence was built 97.7 feet beyond the south boundary of the 200-acre tract described in his deed from the Hansons. This strip embraced 7.3 acres and is a part of the fractional north half of the north half of section 7, township 14 south, range 27 west, which was purchased by appellee, A. P. Cox, from Stella Hanson James in December, 1939.

The section line between sections 6 and 7 in township 14 south, range 27 west, forms the southern boundary of the tract purchased by appellant and the northern

boundary of the tract purchased by appellee Cox. Sections 1 and 12 in township 14 south, range 28 west, lie immediately west of sections 6 and 7 in range 27 west, but the four sections do not have a common corner and the point where sections 6 and 7 corner is 97.7 feet north of the point where sections 1 and 12 corner on the range line. This offset between the section lines was apparently responsible for Hanson's erroneous indication to appellant of a fence line by extending the section line between sections 1 and 12, in range 28, east into section 7 of range 27.

In the fall or early winter of 1942, Cox constructed a new fence on the section line between sections 6 and 7 according to the descriptions set out in the respective deeds of the parties. In November, 1943, appellant filed suit in chancery court alleging ownership of the 7.3-acre strip of land in controversy by adverse possession. It was further alleged that appellee had removed appellant's south boundary fence and had harvested a corn crop on the strip in 1943 and deprived appellant of the use of said land to his damage in the sum of $40. The complaint prayed that the deed from Stella Hanson James to Cox be canceled, in so far as it covers the strip in controversy, as a cloud upon appellant's title; that appellees be required to reconstruct the fence at its former location and enjoined from interfering with appellant's enjoyment of the land and maintenance of the fence; that upon failure to replace the fence appellant have judgment for the cost of replacing same and for damages for loss of use of the strip.

Appellees filed a demurrer to the complaint on the ground that its allegations were insufficient to state a cause of action. The court treated the demurrer as a motion to transfer to law, which was sustained, and the cause transferred to circuit court over the objections of appellant. Appellees answered in the circuit court and trial to a jury resulted in a verdict and judgment in their favor. This appeal is prosecuted to reverse the circuit court judgment.

It is first argued that the chancery court erred in transferring the cause to the circuit court. In support of this contention, appellant insists that this court, in the case of *Pearman* v. *Pearman,* 144 Ark. 528, 222 S. W. 1064, and in many more recent decisions, has overlooked the provisions of Act 74 of 1891 which gave an action to quiet title to real estate to a person, whether in actual possession or not, against an adverse claimant, whether in actual possession or not. In the case of *Pearman* v. *Pearman, supra,* Justice HART stated the rule, which has since been repeatedly cited with approval, as follows: "The equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession, unless his title be merely an equitable one. The reason is that where the title is a purely legal one and some one else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by a jury. (Citing cases)."

It was also said in the opinion: "The action has been greatly extended by statute and in many states is the ordinary mode of trying disputed titles. Pomeroy's Equity Jurisprudence (3 Ed.), vol. 4, § 1396. Such is not the case in this state, however."

It is contended that the statement contained in the last paragraph above is inaccurate and overlooked the statute of 1891 which appellant insists was in force when the Pearman case was decided, and has been in effect since, not having been repealed. But this court held in *Lawyer* v. *Carpenter,* 80 Ark. 411, 97 S. W. 662, that Act 74 of 1891, as amended by Act 118 of 1893, was impliedly repealed by Act 79 of 1899. The Act of 1899 was carried forward into §§ 649-60, Kirby's Digest, and now appears as §§ 10958-69, Pope's Digest, except for slight amendments which are immaterial to the issues here.

It is also argued that, even though Act 74 of 1891 is not now in effect, the chancery court had jurisdiction in the instant case under the rule announced in *Sanders*

v. *Flenniken,* 180 Ark. 303, 21 S. W. 2d 847; where it was said that a suit to cancel certain conveyances as clouds upon title is of purely equitable cognizance although plaintiffs asked that title be declared in themselves, and that they have possession under their claim of title. It further appears, however, that the defendants in that case pleaded laches as a defense to the suit which the court said "is entirely a defense in equity." This brought the case within the rule announced in *Gibbs* v. *Bates,* 150 Ark. 344, 234 S. W. 175, where it was said: ". . . of course, when the defendant files a cross-bill, founded on matters clearly cognizable in equity, this supplies any defect in jurisdiction and places the court in possession of the whole case, and imposes upon it the duty of granting relief to the party entitled to it. The original bill and cross-bill then became but one cause, and a court of chancery takes jurisdiction, when allegations of the cross-bill supply the defects of the original bill. *Pearman* v. *Pearman,* 144 Ark. 528, 222 S. W. 1064, and cases cited."

Appellant also relies on the case of *Patterson* v. *McKay,* 199 Ark. 140, 134 S. W. 2d 543. There the cases of *Jackson* v. *Frazier,* 175 Ark. 421, 299 S. W. 738, and *Fisk* v. *Magness,* 193 Ark. 231, 98 S. W. 2d 958, which reaffirmed the rule announced in *Pearman* v. *Pearman, supra,* were reviewed. Mr. Justice Baker, speaking for the court in that case, said: "We do not impair in any manner any announcement made in the cases cited, but the case at bar, and others of like kind, will be easily distinguishable from all those presented by appellant, as controlling authority on the propositions under consideration. The well-recognized principle that, in any proceeding wherein a plaintiff seeks to gain possession of lands held by a defendant, the remedy is by ejectment, a purely legal method to obtain possession of the land in dispute, unless plaintiff's title is an equitable one, not cognizable in a law court." And, speaking of the action by plaintiff in that case, the court also said: "Nothing was said in his complaint that indicated his action was to any extent possessory."

Appellant, in the case at bar, says that no prayer for possession appears in his complaint. The prayer of the complaint in this connection is "that the defendants be required to reconstruct this fence at its former location; and that said defendants be enjoined from in any way interfering with the plaintiff in the enjoyment of said land belonging to him, and further restrained from interfering with the maintenance of said fence." It is doubtful that a more effective manner of obtaining possession of the strip of land in controversy could be accomplished than the method thus prayed by appellant.

The case of *Simmons* v. *Turner*, 171 Ark. 96, 283 S. W. 47, was a suit in equity for cancellation of certain instruments as clouds upon the plaintiff's title. Plaintiff asked that title be confirmed in herself and another; that the land be partitioned between them; and that plaintiff have immediate possession of her share of the lands. The demurrer and motion to dismiss of defendants were overruled by the trial court, and this court said: "A court of equity has no jurisdiction to determine that one who is claiming under a purely legal title has such title and the right of possession against one who is already in possession claiming the legal title thereto, and holding the same adversely against all the world." It was further said that the trial court should have treated the demurrer and motion to dismiss of defendants as a motion to transfer to the law court.

Appellant was out of possession and appellee was in actual pedal possession of the strip of land in controversy, and these facts were revealed by the complaint. The complaint also alleged title in appellant by adverse possession which is a purely legal title. 1 Am. Jur., p. 798. A careful analysis of the complaint convinces us that the primary purpose of this suit was to obtain possession of the tract of land. Since appellant was asserting legal title in himself, but was out of possession, his remedy at law was adequate. Appellees, being in actual possession and claiming title, had the constitutional right to insist that the issues be tried before a jury in a court of law. The chancellor, therefore, properly treated the

demurrer of appellees as a motion to transfer the cause to the circuit court.

Appellant earnestly insists that the trial court erred in refusing to grant an instructed verdict in his favor at the conclusion of the testimony. It is contended that the undisputed facts established appellant's title to the strip of land by adverse possession and that there is no substantial evidence to support the verdict of the jury. This presents the most difficult question in the case and leads us to a brief review of the evidence under the familiar rule that, in testing its sufficiency to support the verdict, such testimony must be viewed in the light most favorable to appellee.

The testimony of appellant was to the effect that no survey was made, but his grantor, Hanson, pointed out the line upon which both parties constructed the southern boundary fence. Three tenant houses were built on the disputed tract and part of the land was cultivated and occupied by tenants of appellant for more than seven years under claim of ownership. Appellant also testified that the first time he knew his deed did not include the lands, or that Cox was claiming title thereto, was when Cox built the new fence in 1942. No one else was present when Hanson pointed out the line to appellant and Hanson died before the instant suit was filed.

Appellee, A. P. Cox, testified that appellant came to him about two weeks after he purchased the property and wanted to buy the 200-acre farm. He told appellee that the line had never been straightened out between the two places and Hall (the surveyor) some way took a strip of his land. They discussed the offset and appellee told appellant of his agreement to adjust a similar offset on his south line with the adjacent owner by sharing the costs of placing a fence on the section line. Appellee made the same offer to appellant to adjust the line to the north and appellant said, "Yes, sir," but did not say whether he would or wouldn't. After appellee built the fence on the section line, appellant tried to buy the disputed strip and offered appellee $40 an acre, but he refused to sell. Cox bought a lease on appellant's farm

from the latter's tenant in January, 1943, and paid rent to appellant, but did not pay rent on the 7.3 acres in controversy. Appellant accepted the rent without objection.

Prince Beed farmed appellant's lands for at least three years and sold his lease to Cox in 1943. He testified that he was preparing to rebuild the fence when appellant told him that Cox had bought the strip and he was going over to see if he could buy it from Cox. When appellant returned he told Beed not to rebuild the old fence, that Cox was going to put the fence on the line. Beed saw Hall when the latter surveyed the lands and showed appellant the stakes Hall had placed on the section line. One or two of the tenant houses had practically fallen in when Beed left the farm and there were no tenants in the houses while he was there.

The fence constructed by appellant and Hanson consisted of three strands of barbed wire on cottonwood posts. Witnesses for both parties testified that the posts decayed within three years and that the fence was never properly maintained.

It is contended that none of the statements and acts attributed to appellant by Cox and Beed tends to show the character of appellant's possession as being permissive instead of adverse, and that a title which had already vested in appellant could not be divested by his subsequent acts and admissions. In the recent cases of *Deweese* v. *Logue,* 208 Ark. 79, 185 S. W. 2d 85, and *Sloan, et al.,* v. *Ayers,* 209 Ark. 119, 189 S. W. 2d 653, we discussed the applicable rule which was announced in *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456, as follows: "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."

In discussing the recognition of title in another by an offer to purchase made after the running of the statutes, this court in *Shirey* v. *Whitlow, supra,* said: "Such recognition might be evidence tending to show that the possession of the claimant was not adverse, and that no title had in fact vested. But the weight to be given to such recognition would be a question for the jury, and the court could not declare, as a matter of law, that the mere fact that defendant had recognized the title of the defendant entitled plaintiff to a judgment for possession."

This court also said in *Butler* v. *Hines,* 101 Ark. 409, 142 S. W. 509: "While it is true that, where title has once been acquired by adverse possession, it can not be divested by the mere recognition of another's title, such recognition might be evidence to show that the holding of the claimant was not adverse. In the present case, the character of the possession of Lynch was the all-important inquiry to which the attention of the jury was directed. Hence any act or declaration of Lynch at any time while he owned the land, tending to show that he recognized the claim of Brown to the land in dispute, was competent to show the character of his possession." And it was there held to be error to charge the jury that such recognition of title in another by an adverse claimant could not be considered by the jury.

Under the above authorities we think the evidence of appellant's acts and admissions, when considered in connection with the temporary character of the fence and the other circumstances in evidence, was substantial and warranted the submission of the issue of adverse possession to the jury.

The judgment of the circuit court is accordingly affirmed.

KROGER GROCERY & BAKING COMPANY *v.* REEVES.

4-7915 194 S. W. 2d 876

Opinion delivered June 3, 1946.

[redacted]

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

John Ferguson and *Yingling & Yingling,* for appellee.

HOLT, J. This is an action by appellee, Helen Reeves, against Kroger Grocery & Baking Company for malicious prosecution.

She alleged in her complaint that the agent of appellant company wrongfully and maliciously caused a warrant to be issued for her arrest charging that she had given a "hot check" in the amount of $5, and that while the warrant of arrest was never served, the officer made inquiry in and about Searcy, Arkansas, as to her whereabouts and that there was much publicity incident thereto. She further alleged that the unlawful and malicious issuance of said warrant for her arrest "subjected plaintiff to great humiliation and shame, exposed her to disgrace and infamy, injured her reputation, damaged her character and caused her to suffer great and excruciating

mental anguish and physical pain to her damage in the sum of $2,900," and prayed for judgment against appellant "for the sum of $2,900, for her costs, and all proper relief."

Appellant answered with a general denial.

September 4, 1945, there was a jury trial and the following verdict returned: "We, the jury, find for the plaintiff and fix her actual damages at the sum of $..... and exemplary or punitive damages at the sum of nine hundred dollars ($900). G. H. Scott, foreman."

On September 6th thereafter, before the judgment had been entered by the court, appellant filed a motion for judgment notwithstanding the verdict alleging that the jury had found by its verdict that appellee was not entitled to recover actual damages, and under no circumstances would she be entitled to recover exemplary or punitive damages without having first found and assessed actual damages. This motion was overruled and judgment entered for appellee in the amount of $900 on the verdict, *supra*. This appeal followed.

Appellant says: "It is from this order of the court overruling appellant's motion to enter a judgment for the appellant notwithstanding the verdict of the jury that the appeal is taken, and that is the only question involved. . . . We stand solely on the ground that the trial court, when the jury found that the appellee had sustained no actual damage, should have rendered a judgment in favor of the appellant."

No motion for a new trial, so designated, was filed. We can therefore consider only errors appearing on the face of the record. In the absence of a motion for a new trial, "nothing is brought before the court for review except the pleadings, verdict and judgment; and if the pleadings and verdict authorized the judgment rendered, it will be affirmed without regard to the rulings of the court at the trial further than they appear in the judgment." *American Insurance Company of Newark, New Jersey* v. *Dutton,* 183 Ark. 595, 37 S. W. 2d 875.

The question, therefore, is: Was the judgment entered by the trial court authorized by the jury's verdict? We do not think it was.

In an action such as we have here, the rule in this state, as well as the general rule, is that there can be no recovery for exemplary damages unless actual damages are found and assessed. The general rule is stated in 15 Am. Jur., page 706, § 270, in this language: "According to the rule laid down by a majority of the decisions, actual damage must be found as a predicate for, or at least must be shown to have been done to sustain, an award of exemplary damages. In other words, according to the weight of authority, exemplary damages or punitive damages are not recoverable in the absence of proof of actual damages. The reason given for this rule is that punitive damages are mere incidents to the cause of action. . . . The position taken in many cases applying the general rule is that in order to sustain an award of punitive damages, the plaintiff must have alleged, proved, and been awarded actual damages. According to this view actual damages must be found as a predicate for the recovery of exemplary damages."

See, also, 25 C. J. S., page 713, § 118, where the same general rule in effect is announced, and in support of the text, *Burt* v. *Henderson,* 152 Ark. 547, 238 S. W. 626, is cited. In the *Burt* v. *Henderson* case, this court said: "The judgment rendered in favor of Mrs. Katie C. Henderson in the sum of $600 for punitive damages is clearly erroneous, for in no event can punitive damages be assessed where actual damages are not sustained," and in *Gordon* v. *McLearn,* 123 Ark. 496, 185 S. W. 803, Ann. Cas. 1918A, 482, in an action similar to the one presented here, the jury returned a verdict in favor of plaintiff for $25 compensatory damages and $1,000 punitive damages, this court said: "No punitive damages could be assessed unless some compensatory damages were also assessed, although, of course, punitive damages might largely exceed the compensatory damages."

Appellant insists that the judgment should be reversed and judgment entered here for it, or the cause

dismissed, notwithstanding the verdict of this jury, but we think appellant is not entitled to that relief. We have the right to, and do, however, treat his motion as one for a new trial, and when we have done so, it appears that there is an error upon the face of the record as the verdict of the jury does not support the judgment which was pronounced.

Appellee says that the court did not instruct the jury that "the recovery of exemplary damages is dependent upon the recovery of actual damages." Appellant's contention is to the contrary. Assuming that appellee's contention is correct, the fact remains that compensatory damages were not assessed, and without a finding that compensatory damages should be awarded and assessed, punitive damages could not be imposed.

In view of the state of this record, under the power given to this court, under the provisions of § 2786 of Pope's Digest, "when the judgment of the trial court has been reversed, to remand or dismiss the cause, and enter such judgment upon the record as it may, in its judgment, deem just," (*Jackson* v. *Carter,* 169 Ark. 1154, 278 S. W. 32), the judgment is reversed and the cause remanded for a new trial.

ROBINETTE *v.* DAY.

4-7911 194 S. W. 2d 878

Opinion delivered June 3, 1946.

C. A. Holland, for appellant.

George F. Hartje, for appellee.

GRIFFIN SMITH, Chief Justice. J. H. Robinette sued Clarence Day and J. E. Loveless April 13, 1945, claiming to be the owner of forty acres described in the complaint. They asked that deeds of the defendant be canceled. Robinette answered that he "Had had and [was] entitled to possession . . . from June 13, 1932, and has paid taxes on said land, or had the only right to pay same," etc.

In the decree there were findings that Robinette purchased at the collector's sale in June, 1932, for nonpayment of 1931 state and county taxes, but the sale was void for want of power.

It was then stated that the Federal Land Bank of St. Louis was given a valid mortgage on the property in 1924. Default in the secured debt having occurred, there was foreclosure November 25, 1936. A commissioner's deed was issued to the Bank (purchaser) March 22, 1937. Through various conveyances the land again came to appellees (defendants below, whose chain of title antedates the tax sale) January 20, 1943.

An express finding is that Robinette had never been in actual possession of any part of the property. It also appears from the decree that within the time allowed

for redemption, Robinette transferred his certificate of purchase, and subsequently he did not pay any taxes or make improvements.

Appellant's first purpose is to have us strike transcript pages 29 to 70, on the ground that the matter is irrelevant. If the content is irrelevant, no harm can be done by overruling the motion: but, as a matter of fact, the parties stipulated that each should have the right to file copies of any deeds "or other documentary evidence showing the chain of title. . . ." In the absence of more restrictive language in the agreement, we think the litigants were at liberty to introduce such records as might reasonably bear upon the controversy; hence the contention that pages 29 to 70 should be disregarded must be determined against appellant.

The second point argued as error is the Court's failure to require appellees to comply with § 4663 of Pope's Digest by filing an affidavit that they had tendered reimbursement of taxes and the value of improvements. Robinette testified that he transferred his tax certificate to Mrs. C. A. Watkins, and the Clerk's deed was made to her. Mrs. Watkins sold to appellant's sister, Mrs. G. W. Adkisson, and appellant then paid $200 for a deed from his sister and notified Loveless to vacate. This notice was served by the Sheriff July 6, 1943.

Evidence preponderates in favor of the Chancellor's finding that neither Robinette nor his predecessors in title had been in actual possession, nor had improvements of any kind been made. The land was used for pasturage; and, while there is some conflict in the testimony regarding fences, appellees insisted it was enclosed. If appellant's cattle used the area, this—according to appellees' version—occurred when fencing was down. When appellant gave notice, it was ignored; for, say appellees, they were in possession, and were not being materially inconvenienced.

Attention is called to *Reynolds* v. *Plants,* 196 Ark. 116, 116 S. W. 2d 350, and *Farrell* v. *Sanders,* 204 Ark. 1068, 166 S. W. 2d 889. The Reynolds opinion was cited

in the Farrell-Sanders decision. Treating the two cases as decisive of the same legal principle, appellant says our holding was that "In any event the tender [of taxes paid and value of improvements] must be made and cannot be avoided."

We think the holdings have been misconstrued. In *Reynolds* v. *Plants* a general demurrer was filed, and later a motion to dismiss. Mr. Justice Donham, who wrote the Court's opinion, said it was not clear whether the order of dismissal was based upon action of the Court in sustaining the demurrer or in granting the motion. (p. 118). He then said that ". . . if the trial court sustained the motion to dismiss for failure to file the affidavit of tender of taxes and value of improvements, [it] was in error"; and in *Lea* v. *Lewis,* 189 Ark. 307, 72 S. W. 2d 525, Mr. Justice MEHAFFY, speaking for the Court, said: "Since this is not a suit for the recovery of land nor the possession thereof, the affidavit provided for [by § 4663 of Pope's Digest] was not required." *Farrell* v. *Sanders* expressly declares that the Digest section in question ". . . was intended to apply only in cases for the recovery of lands or for the possession thereof." (Where the action is for possession, see *Chronister* v. *Skidmore,* 198 Ark. 261, 129 S. W. 2d 608, and similar decisions.)

Testimony is not substantially abstracted. In consequence we are unable to determine some of the questions discussed.

The sale was not confirmed. Appellant thinks he is protected by Act 142 of 1935. However, it is not disputed that the delinquent sale was held in 1932, and that Robinette, after assigning the certificate of purchase to Mrs. Watkins, dealt with his sister, (Mrs. Adkisson) who on January 6, 1936, acquired the interest now sought to be quieted, through quitclaim deed executed by C. S. Watkins.[1] But Mrs. Watkins presented her certificate to the

[1] Although references are to Mrs. Watkins, the quitclaim deed is signed by Mrs. C. S. Watkins and C. S. Watkins; but Mrs. Watkins executes relinquishment of dower and homestead.

Clerk March 5, 1935, and that officer's deed bears such date.[2] Act 142 was repealed by Act 264 of 1937.

We are not able to determine from the abstract what issues were presented the Chancellor relating to appellee's contention that the tax sale of 1932 was void. It appears from the evidence of Mrs. Jewell Crow, Deputy County Clerk, that the Clerk did not issue his warrant authorizing the Collector to collect taxes in 1932.

An early case dealing with Act 142 was *Carle* v. *Gehl*, 193 Ark. 1061, 104 S. W. 2d 445. It was held that certain statutory fundamentals mentioned in Act 142 could not be dispensed with, though the General Assembly had power to say a sale should not be set aside because of irregularities or informalities of a character the legislative body could say were immaterial if it elected to. The result was a decision based upon the proposition that where certain requirements were enumerated, and all informalities and irregularities were sought to be dismissed, inclusion of enumerated matters amounted to exclusion of others that litigants set up, if constitutional power to dispense with the procedural steps existed. But in *Deaner* v. *Gwaltney*, 194 Ark. 332, 108 S. W. 2d 600, it was expressly held that issuance of the Clerk's warrant was a formality, and failure to do so was an irregularity cured by Act 142. This, however, does not mean that the sale of 1932 relied upon in the appeal before us was impervious to attack. We do not know what the proof disclosed—this because it was not fully abstracted. The complaint alleges that the sale was not advertised according to law. Mrs. Crow's testimony (which did not deal with publication) was objected to by Robinette's attorney, but on grounds other than that the records were primary, and the best evidence rule was being violated. The objection was not sufficient. If it had gone to the exact point, no doubt the Court would have required production of the books.

[2] In the body of the deed to Mrs. Watkins it is recited that ". . . the said J. H. Robinette did on the 15th day of March, 1935, duly assign the certificate of the sale of the property aforesaid." This is obviously an error, because the deed is dated March 5th, it was acknowledged before the Circuit Clerk March 5th, and it was filed for record March 15th.

Robinette testified he was indebted to Mrs. Watkins, and that in selling her the certificate he was fully compensated. Mrs. Watkins did not warrant the title to Mrs. Adkisson, and Mrs. Adkisson is not a party to this suit.

The attempted purchase by Robinette occurred two years, nine months, and seven days before Act 142 was approved. The Clerk's deed was issued fifteen days before there was such a law. Appellant's argument, predicated upon *Waldon* v. *Holland,* 206 Ark. 401, 175 S. W. 2d 570, is not decisive of the issue. On the contrary that case is pertinent to emphasize Chief Justice McCulloch's opinion in *Smith* v. *Spillman,* 135 Ark. 279, 205 S. W. 107, 1 A. L. R. 136 (cited in the Waldon-Holland case) to the effect that "The law as it existed at the time of the sale controlled the rights of the parties, and . . . . the Legislature could not thereafter change it so as to affect existing rights."

Since Act No. 142 was not in effect when either the certificate to Robinette or the deed to Mrs. Watkins was executed; since a preponderance of the testimony shows there were no improvements, and that Robinette received value for his purchase—this by his own admission;—since the record has not been sufficiently abstracted to show why the Court was in error in determining that the sale of 1932 was void, and since possession was not the immediate issue, appellant's contentions must fail. The decree is affirmed.

FEIGENBAUM *v.* FEIGENBAUM.

4-7907 194 S. W. 2d 1012

Opinion delivered June 3, 1946.

Rehearing denied July 1, 1946.

Carl L. Hunter, for appellant.

J. L. Taylor and *E. G. Ward,* for appellee.

SMITH, J. The parties to this litigation are residents of the city of St. Louis in the state of Missouri, and were residents of that city at the time of their marriage in Corning, Arkansas, on July 14, 1944. They had been previously married and after having lived together, as man and wife, for fifteen years, were divorced in the state of their residence. The present suit was brought by the husband to annul this last marriage, and from a decree awarding that relief is this appeal.

The suit was predicated upon § 9021 of Pope's Digest which provides that: "When either of the parties to a marriage shall be incapable, from want of age or understanding, of consenting to any marriage, or shall be incapable from physical causes of entering into the marriage state, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction." Plaintiff alleged that his voluntary consent was not given, for the reason that

at the time of the marriage, he was under the influence of a drug, and the threats of violence made by the woman he married.

The question of jurisdiction first presents itself. The case of *Witherington* v. *Witherington,* 200 Ark. 802, 141 S. W. 2d 30, was a suit between non-residents of this state, to annul a marriage contracted in this state, but that relief was denied, without deciding the question of jurisdiction.

At § 1154, Schouler on Marriage, Divorce, Separation and Domestic Relations, p. 1413, it is said: "The question of jurisdiction for annulment is confused by the very real confusion in our decisions between divorce and annulment. There is a clear distinction between them, and their effects. Divorce expressly or impliedly sustains the validity of the marriage. One of the steps in obtaining a divorce is to prove a valid marriage. Annulment on the other hand proceeds on the theory that no marriage ever existed. Jurisdiction in divorce depends on domicile, but it seems that a suit for annulment of the *res* of the marriage should be brought where the *res* was created, that is, in the state where the marriage was celebrated, and there is some authority for this, which we submit is the correct view. The great weight of authority, however, seems to put jurisdiction for annulment on the basis of domicile largely as a result of statutory confusion between the two and partly on account of the failure of the courts to distinguish between them."

After citing cases from Massachusetts, New York and South Dakota sustaining what the author says is the better view that jurisdiction abides in the courts of the state where the marriage was contracted, there is cited in the footnote to the text the learned article by Professor Herbert F. Goodrich in 32 Harvard Law Review, 806. This article in the Harvard Law Review, in a very able and convincing manner, points out the distinction between suits for divorce and suits to annul a marriage. It was there said: "To recapitulate: since annulment of

a marriage differs so fundamentally from divorce, in that while the latter severs the matrimonial bonds, the former declares they never existed, jurisdiction to render the nullity decree is not to be found where the parties at the time it is sought may be domiciled. Only the law by which the marriage came into being has power to annul it. If the place of contract, domicile at the time of the marriage and domicile at the time of annulment, are the same, no difficulty is presented. If the place of contract is another state, its law can say that the parties involved did not validly contract, and there is then nothing on which a marital status can be predicated. Despite a valid ceremony by *lex loci contractus,* the then domiciliary law may say that no marriage status is created. But if the marriage can successfully run this gauntlet, it stands until dissolved by death or divorce."

The question of jurisdiction is covered by the annotator's note in the case of *Bell* v. *Bell,* 128 A. L. R. 61. The many cases there cited show that the decisions on the subject are in hopeless conflict.

At § 140 of Professor Leflar's excellent work on "Conflict of Laws," p. 286, it is said: "Annulment of a marriage, strictly speaking, destroys the status as of its inception. Unlike divorce, the effect of it is to treat the parties as never having been married. Obviously annulment is for reasons existing at the date of the purported marriage, therefore the question of whether such reasons exist is to be determined by the law under which the marriage came into existence. As to the place having jurisdiction to render a decree of annulment, the restatement takes the view that the problem is the same as with jurisdiction to grant divorces, so that the only state which may validly grant a decree of annulment is one which is the domicile of one or both parties at the time of the decree. Undoubtedly such a state does have jurisdiction to annul the marriage. But there is also plentiful authority to the effect that the state under whose law the marriage purported to come into existence may annul it. This in one sense is the state of domicile, in that that state has ultimate control over the status of all its domi-

ciliaries, but more ordinarily it is the state in which the marriage ceremony was performed. There are numerous cases saying that there is jurisdiction to annul in the state in which the marriage was celebrated. Perhaps the law is not yet completely developed on the point, but it seems to be true that there is recognized jurisdiction to decree annulment at either place."

We have reached the conclusion that the courts of this state have jurisdiction to determine the validity of a marriage performed in this state, in the suit of a nonresident, to annul it, and it is unnecessary to consider the jurisdiction of the courts of the domicile to determine that question, as our views would have no binding effect upon the courts of the domicile. Upon one branch of the case there is no difference of opinion, and that is, that wherever the question of the validity of a marriage may arise, the question must be determined in accordance with the laws of the state where the marriage was contracted.

We proceed to consider the case on its merits. The first marriage of the parties was dissolved by a decree of divorce, rendered in Missouri, the state of the residence, January 11, 1943, yet there appears to have been no cessation of the most friendly relations between the parties. The plaintiff is a lawyer, and the defendant was his client. He attended to her legal affairs, and advised her about her business and other matters. He admitted that he went out with defendant after their divorce, at least once a week for a year and a half, but he denied any cohabitation. They frequently dined and went together to shows.

Plaintiff testified that he sustained an injury to his jaw, which occasioned much pain, and that his doctor gave him a prescription for its relief. Defendant testified that plaintiff's injury was sustained after the second marriage.

Plaintiff's testimony was to the following effect. He did not give his consent to the marriage which took place July 14, 1944, inasmuch as he was under the influence

of a narcotic drug, codeine sulphate, and had been so for about twelve hours before the marriage, and he had been taking some of the drug for two nights prior to the marriage. He did not contend that defendant administered any of this medicine, or any other medicine to him. He testified:

"Commencing sometime the latter part of May of last year, the defendant continued to call me at night, sometimes as late as 3:00 or 4:00 o'clock in the morning, on the telephone; she would wake me out of bed, and I would be terribly frightened; at different days she would talk gloomily and despondently and neurotically about things that she thought were the matter with her, and things that were going to happen to her; she told me she was going to kill herself, unless I remarried her.

"On one occasion, many months before that, she had actually gotten me out of bed at 3:00 o'clock in the morning, and I had to drive clear out to her house, get my clothes and drive out there and she wouldn't go to sleep until I was there. For this reason, although I had followed the practice of being friendly with her since our divorce in January of 1943, and had been taking her out at least once a week, in the late spring of 1944, I discontinued going out with her for several weeks, because she would get excited, neurotic, hysterical, even refuse to get out of the car when I took her home."

On the evening of June 15, he was called to defendant's apartment to advise about a controversy she was having with the O. P. A. about one of her tenants. They went out together and returned to her home about midnight. She refused to leave the car, but was finally persuaded to do so. Soon after she called at his apartment about 2:00 a.m., and spent the night there. The next morning she refused to leave, went into the bath room and took a number of sleeping tablets, when she collapsed and was carried to the hospital. He took her from the hospital to her sister's home, and he called up every day or two to inquire about her. He was much worried and could not sleep.

About July 10 he took her for a ride, and he urged her to have a needed surgical operation, and offered to pay the expense of it. She refused to consent, and said she was going to commit suicide. He did not testify that defendant ever, at any time, threatened to do him any harm, if he did not marry her. On the night of July 12 he took a number of capsules which had been prescribed for his pain, and went to the home of defendant's sister, who told him that, "if you don't marry her she is going to do it again," that is try to commit suicide. He went to her house and she said to him, "we are going to get married, let's do it now." He learned that Arkansas was the only adjoining state that did not have a three-day waiting law.

He went to his office, saw his brother, and told him he was going to remarry his former wife, and when his brother protested, told him it was none of his business. Took another tablet, and left in a car with defendant, for Arkansas, about 5:00 p.m.; became ill and proposed that they return, but defendant said if he did, she would kill herself. They came to a town, the name of which neither of the parties remembered, walked around for about an hour and a half, when he finally found a drug store and took a double dose of bromo-seltzer. They registered as man and wife and spent the night together, without cohabitation, and the next morning resumed their journey to Corning, where they were married shortly before noon; remained in Corning about a half an hour and returned to Saint Louis, arriving there about 5:30 or 5:45 p.m.; saw a doctor after his return, who told him to go home and go to sleep, and to see him the next day.

At the time of his re-marriage, he was very dopey and drowsy, but had a feeling of exhilaration which made it seem everything would be all right regardless of what he did. Had only one bad feeling and that was one of nausea. Was very sick the night of his marriage and did not go to his office the next day, although he dressed and shaved. When they arrived in St. Louis defendant left his car and took a taxi to her home. He did not see her again for several days, when he took her out to dine.

During the meal she said she knew he was dopey when they married, and she agreed that the marriage might be annulled, but suggested that she have her operation before this was done. He continued to go with defendant as often as twice a week for two or three weeks after the marriage, but they never cohabitated, and she continued to be known by her maiden name, which she had resumed after her divorce, and she told him that she never expected to live with him. He told the justice of peace who performed the ceremony, that he had made a terrible mistake.

Defendant's brother, a registered pharmacist, testified that he saw plaintiff the day he left St. Louis for Corning, and that he was in a comatose or semi-dazed condition, and that if one had taken as much codeine as plaintiff said he had taken, "it would leave a man in a semi-dazed condition, with control of his locomotive muscles, or in fact, he would know where he was going, but it would also leave him dazed as to any mental action."

Plaintiff saw the doctor who had given him the prescription, and the doctor testified that the plaintiff was mentally excited when he saw him the next day. He was asked what the effect would be of taking an excessive quantity of the drug which he had prescribed, and he answered, it would produce bewilderment, mental confusion and physical instability.

After the testimony had been taken, plaintiff amended his complaint to allege the sexual impotency of defendant. This allegation may be disposed of by saying that the testimony does not sustain it.

The testimony on behalf of defendant is sharply conflicting on the essential points of the case. Defendant testified that plaintiff sought a reconciliation after the divorce, and his brother urged her to remarry plaintiff before he doped himself to death; that their relations were very cordial after the divorce. He was her attorney and advised her about her business and other affairs, and went with her two or three times every week to dinner, and to shows, and to night clubs, and he had

dinner with her family about twice every week, and frequently urged her to remarry him.

They visited each other at their respective apartments, and on one of her visits to his apartment, she found a younger woman in his bath room, who was wearing one of plaintiff's bath robes. He tried to explain the next day, but she said to him, "we are divorced. You are entitled to live your life."

On July 14, the plaintiff called on her at her sister's home, and again proposed a reconciliation. She asked about the girl she had seen in his room, and he said she was twenty-six, and he would soon be fifty, and there was too much difference in their ages, and he said, "I can't get rid of her. She won't let me." Plaintiff left, saying he was in trouble. Later he called her and proposed that they go to Arkansas to be married that day. Asked why the rush, he answered, "that Arkansas did not have the waiting law which the state of Missouri had." She agreed, and they left that afternoon for Corning.

Plaintiff appeared to be perfectly normal. They stopped on the way, in a small town, where they registered at a hotel as man and wife, but did not cohabitate. He was ill and she was fatigued, they resumed their trip and reached Corning about 11:00 a.m., the next day. They went to the office of the clerk of the county court and remained there about a half an hour. A citizen of the county who was in the clerk's office as a member of the equalization board, testified that he had quite a little conversation with the plaintiff, who appeared to be normal, and when he learned that plaintiff was a lawyer, he talked with him about looking after and selling some property he owned in St. Louis, and plaintiff suggested that he write to him, but he received a letter when he went home which caused him to make other arrangements, and he did not write to plaintiff.

The clerk, who issued the marriage license, testified that he heard the conversation between plaintiff

and Mr. Lewis, and that this, with his own conversation with plaintiff, indicated that plaintiff was "physically and mentally at himself," and "that there wasn't a thing wrong with him that was apparent to me," and that if it had appeared that plaintiff was under the influence of liquor or a drug, he would not have issued the license.

The justice of the peace who performed the ceremony about 10:30 testified that plaintiff and defendant were in his office about twenty-five or thirty minutes after the ceremony was performed; that they discussed the condition of the country and the crops; that he saw nothing wrong with plaintiff and "in my estimation he was all right"; and he would not have performed the ceremony if he had had any doubt about plaintiff knowing what he was doing. He testified, however, that after plaintiff reached St. Louis he called him on the phone, and said that he wanted the marriage annulled, and asked witness to make no record of it, and when he told plaintiff he could not do this, plaintiff asked the name of some local lawyer, and the lawyer recommended was later employed.

Two doctors, testifying for plaintiff, stated that, if plaintiff had taken the quantity of the drug which he said he took, there would have been a muscular weakness and drowsiness which would have incapacitated him and rendered him unable to drive his automobile, yet he drove a car from St. Louis to Corning and back, making fair time, and without incident.

Defendant testified that they agreed they would keep their marriage a secret for a time, but that they resumed marital relations without residing together.

There is a total absence of evidence as to force or fraud, and the only evidence of a threat was that defendant threatened to commit suicide if plaintiff did not marry her, a statement which she denied making.

Plaintiff did not claim that he did not know all he was doing when he was married, and the testimony shows very clearly that he was fully aware of what he

was doing. We are left only to conjecture what influence the existence of the other woman in the case may have had on his actions.

In the case of *Phillips* v. *Phillips,* 182 Ark. 206, 31 S. W. 2d 134, we quoted as follows from the case of *Vanness* v. *Vanness,* 128 Ark. 543, 194 S. W. 498: "It is generally conceded in all jurisdictions that public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner and for the causes prescribed by law."

Marriage, affected as it is with the public interest, is a relationship too sacred to be trifled with as plaintiff is attempting to do, and the decree of annulment will, therefore, be reversed, and the cause dismissed.

ROBINS, J. (concurring). I concur in the finding of the majority that the evidence in this case is insufficient to authorize an annulment of the marriage of appellant and appellee; but I do not agree that the lower court had jurisdiction to award this relief.

Both of these parties at the time of the filing of this suit were and had been for many years residents of the state of Missouri. Neither of them had ever lived in Arkansas. Therefore, it seems to me, only the courts of Missouri had jurisdiction to determine whether these Missouri citizens had properly assumed the status of husband and wife.

The fact that the marriage ceremony was actually performed in Arkansas did not in itself confer jurisdiction on the Arkansas courts. If A and B, residents of Arkansas, while temporarily sojourning in Missouri, enter into a contract, and then return to Arkansas, certainly the courts of Arkansas would ordinarily have jurisdiction in an action between A and B to enforce the contract or to determine whether in fact it had ever been executed; and, though the laws of Missouri might control a construction of the contract, or in determining whether the contract was legally entered into, the courts of Mis-

souri would not be invested with any jurisdiction in the matter solely because it happened that the parties made the contract in that state.

Much of the deplorable conflict, confusion and uncertainty as to the law of domestic relations has arisen from the tendency of courts of some states to interfere with the marital status of citizens of other states. In my opinion, the rule announced, apparently by a majority of the courts in the United States, to the effect that only the courts of the state of the domicile of at least one of the parties have the power to dissolve or annul the marriage, is the better one and the one more in accord with sound public policy.

The Supreme Court of Mississippi, in the case of *Antoine* v. *Antoine,* 132 Miss. 442, 96 So. 305, holding that the courts of Mississippi had no jurisdiction to annul a marriage between residents of Alabama solemnized in Mississippi well stated the rationale of the matter thus: "The reason for this rule is that every government or state is entitled to establish, and change from time to time, the status of its domiciled subjects, but not that of the subjects of any other government or state. The courts of the domicile of married parties have the jurisdiction to determine, reverse, or modify the status, if married or single, of all persons domiciled therein, but not that of others. . . . Both of these parties being domiciled in Alabama, that court, and not this one, has jurisdiction in this cause."

This statement is made in a discussion of jurisdiction of actions to annul marriage at p. 1349, vol. 38, of Corpus Juris: "Jurisdiction of the marriage *res* depends upon the residence or domicile of plaintiff, and it is immaterial where the marriage was solemnized."

In Restatement of the Law of Conflict of Laws (American Law Institute), pp. 167, 168, 173, it is said: "Marriage is a status. While it is an intangible thing and without situation in space, it is nevertheless of peculiar interest to the state in which the spouses have their

domicil and where in the great majority of cases the family life is permanently carried on. The state of domicil is so peculiarly interested in the relation of marriage that it has jurisdiction over the status and may put an end to it for causes determined by its law. . . . A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state. . . . A state can exercise through its courts jurisdiction to nullify a marriage from its beginning under the same circumstances which would enable it to dissolve the marriage by divorce. A state can exercise through its courts jurisdiction to annul a marriage from the time of the decree under the same circumstances which would enable it to dissolve the marriage by divorce."

In my opinion the lower court had no jurisdiction and the decree ought to be reversed and the cause dismissed for that reason.

HARRIS *v.* WHITWORTH, ADMINISTRATOR.

4-7913 194 S. W. 2d 1017

Opinion delivered June 3, 1946.

Rehearing denied July 1, 1946.

W. Leon Smith, for appellant.

Reid, Evrard & Roy, for appellee.

McHaney, Justice. C. H. Harris, the father of appellant and appellees, other than the administrator, died intestate in the Chickasawba District of Mississippi county, Arkansas, on March 19, 1945, at the age of 88 years. Said intestate left a substantial estate, both real and personal. His real estate consisted of two farms, one of 120 acres about a mile south of the city of Blytheville, known as the Home Place, on which he was residing, at the time of his death, with appellant; the other of about 202 acres some 6 or 8 miles northeast of Blytheville, known as the Crooked Lake Farm near Number Nine; and a number of pieces of rental property in said city. His personal property consisted of two bank accounts totaling more than $32,000, U. S. Government bonds of the maturity value of $5,000, a lot of livestock—horses, mules, cattle, etc.—and farming machinery, equipment, feed, seed, etc.

On May 4, 1945, appellant filed a suit against appellee, Frank Whitworth, as administrator of his father's estate, alleging that in the year 1921 he and his father entered into a partnership agreement to operate as partners the farm property then owned by his father, which is the same as mentioned above, and the city property as above mentioned, and were to share equally in the gains and losses, which continued to the death of his father; that the personal property above described—bank deposits, bonds, livestock, etc., belonged to the partnership; that the administrator, appointed at the instance of his brother, Gordon Harris, and his sisters, Sue Burks and Mattie Bell Nation, wrongfully took possession of said

bank deposits which was partnership property, and has made demand upon him to surrender and deliver up the possession of the other personal property; and that until said partnership affairs are wound up, the interest of the estate therein is contingent. He prayed that the administrator be enjoined from listing said property as assets of said estate, or from paying estate or inheritance taxes thereon, and that the administrator be required to turn over to appellant the money in his possession so that the affairs of said partnership might be wound up.

The administrator answered with a general denial and cross-complained for the possession of the other personal property held by appellant and the rental value of the use thereof.

Thereafter, on May 11, 1945, appellant filed suit against his brother and sisters in which he sought specific performance of an alleged oral contract with his father made in 1921 to convey to him the 120 tract of land called the Home Place. He alleged that at that time his father was heavily indebted on account of the long illness and death of his wife (appellant's mother) and had been compelled to mortgage a portion of the Crooked Lake Farm to secure same and further alleged: "That by reason and on account of his advanced age and his inability to farm and manage his property he induced this plaintiff to assume the management and control of said property and made a contract and agreement with the plaintiff in consideration that the plaintiff would take charge of and manage said property and take care of the said C. H. Harris as long as he should live and pay off the mortgage indebtedness against said property and that the C. H. Harris and this plaintiff would be equal partners in the management and operation of said property and the said C. H. Harris, before his death, would deed the 120 acres above described to this plaintiff." Appellees in this case answered with a general denial and a plea of the statute of frauds, and filed a counter-claim against appellant for their share of the rental value of the 120-acre tract for the year 1945, and prayed partition of all the real estate.

Both cases were submitted to the trial court on depositions and stipulations, and resulted in decrees which found the issues of both law and fact in each case against appellant, and held that he was not entitled to recover either on his alleged partnership agreement with his father, or on the alleged oral contract to convey the land. On the counterclaim of the administrator the court held that he was entitled to recover from appellant the war bonds above mentioned, the mules, teams, livestock, farming implements, seed and feed, and awarded the possession thereof to the administrator, with process to recover same. On the suit regarding the Home Place, the court found that appellant and appellees are the owners as tenants in common of all the real estate of their deceased father, each being entitled to one-fourth interest therein, describing it, and that appellees were entitled to have partition made of said lands. Decree was entered therefor and viewers were appointed for said purpose. No recovery was allowed against appellant for rents. This appeal followed.

Appellant was 51 years old at the time he testified in this case. His mother died in 1920 and his father never remarried. He testified in support of his complaints that he entered into the oral agreements set out therein with his father in 1921, that is, the partnership agreement and the agreement to deed him the home place when the mortgage and other indebtedness was paid off. Appellant lived on the home place and farmed it at that time and for some years prior thereto. His father, brother and sisters lived on property owned by the father in Blytheville. The father owned all the real estate in 1921 that he owned when he died. From 1932 on the father lived with appellant and his wife on the home place. In 1937, appellant divorced his wife on account of her misconduct, but appellant and his father continued to live together on the home place, until the father was taken to the hospital on February 28, 1945, suffering from a heart attack from which he died on March 19. During his last illness the father was conscious at all times. For a period of at least 24 years, therefore, this alleged agreement between

father and son was said by the son to be in existence, yet no memoranda thereof in writing ever existed, or, if so, not produced, and no other member of the family ever heard of them until these suits were filed. Between the 19th day of March, the date of the death of the father, and May 4th, the date of the suit against the administrator, appellant not only did not tell his brother and sisters that he had this contract with his father, but on the other hand had conferences with them about the division of the whole estate, in which he wanted, as a part of his share, not the whole of the home place, but only 80 acres out of the 120 acres. The home place is on highway No. 61. The residence is on 80 acres east of the highway and 40 acres is west of the highway. Appellant wanted the division of property so made as to give him the 80-acre tract on the east and he wanted his brother George to have the 40-acre tract west of said highway. He made no claim that he had any contract with his father regarding a partnership operation of all the properties, or that he owned by virtue of an agreement any part of the real estate of his father.

Another significant fact is that, for 24 years after said contract was said to have been made, all business was conducted in the name of C. H. Harris, the father. All bank deposits were in his name. All checks on the bank accounts were signed by the father. Appellant had no authority to sign any checks for any partnership or any other purpose. As he so testified, he would write the checks and stick them under his father's nose to be signed, and, even after the father was so blind that his hand would have to be directed to the place to sign, he continued to place his name thereon and gave no authority to appellant to sign a check for any purpose. There is this exception: when the father was in the hospital, on his death bed, he gave authority for appellant to sign checks to cover hospital, medical and doctor's bills, and for no other purpose.

Some of the other significant facts and circumstances are that all the property, both real and personal, was assessed in the name of and all taxes were paid by the

father. The only assessment of taxes against appellant was for $25 on his household furniture. All income taxes were reported by the father and were paid by him, and no income tax report was ever filed by the partnership or by appellant, although the total tax would have been less, if the income had been returned as partnership income. There are other facts and circumstances that contradict appellant's claims. It appears to us to be entirely unreasonable that appellant would have operated under the alleged contract for 24 years, or for that matter, any number of years, and particularly after 1937 when the mortgage debt was paid in full, without having a division of the partnership funds. He says that for all this time he "lived like a negro" and worked day and night, and yet he never at any time demanded or received any portion of the large earnings of the alleged partnership. He must have known that his aged father was likely to die at any time and particularly after he went to the hospital, and with this knowledge before him he did not ask for or get from his father any deed to the home place or any writing indicating his one-half interest in the personalty.

There was testimony from a number of witnesses for appellant to the effect that the relationship between appellant and his father was close and that appellant looked after his father for several years as a dutiful and loving son would do. Also that C. H. Harris told them he was going to give Ancil the home place, and that they were operating on a 50-50 basis, meaning that each was getting half the profits. A great many witnesses testified for and against appellant, but when we give consideration to the undisputed facts and circumstances, many of which are mentioned above, as no doubt the trial court did, we agree with the trial court that appellant failed to establish his contract, nor can we say that the court's finding is against the preponderance of the evidence.

Assuming without so deciding that the evidence in the suit against the administrator does not run afoul of the proviso in § 2, Schedule of the Constitution, and

repeated in § 5154 of Pope's Digest, which reads: "Provided, in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party," still we cannot say that the finding that the contract was not proven is against the weight of the evidence.

This is so even though only a mere preponderance is necessary. Appellant testified to one contract only with his father and this covered the partnership agreement and the agreement to convey the land. It is conceded that as to that part of the oral contract relating to the land the clear and convincing rule applies. Whether the same rule applies to the partnership agreement because in the same contract, we find it unnecessary to decide, as we have already held that we cannot say the finding of the court on either phase of the contract is against the preponderance of the evidence.

It necessarily follows that the decree in each case must be and is affirmed.

HIXON *v.* FULKS.

4-7918 194 S. W. 2d 870

Opinion delivered June 10, 1946.

Ben B. Williamson, for appellant.

W. M. Thompson, for appellee.

McHaney, Justice. This action was brought by appellees, G. B. Fulks and Maggie Fulks Younger, brother and sister, to cancel a tax deed issued to appellant by the Clerk of Stone county on November 7, 1941, based on a tax forfeiture in 1939 for the taxes of 1938, on a certain 120 acre tract of land in Stone county, described in the complaint. Appellee Younger was the owner of said land on and prior to January 5, 1942, but on that date she conveyed it to appellee Fulks. On November 6, 1939, the taxes for 1938 being unpaid, the Collector sold same to appellant for the taxes, penalty and costs charged against it.

The complaint alleged that the sale thereof was illegal and void for ten different reasons. It also alleged that on the ..... day of October, 1941, before the period of redemption had expired, appellee Fulks, "acting as agent for himself and for his co-plaintiff, Maggie Younger," applied to the Clerk of Stone county to redeem said land from said sale and tendered the correct amount for such purpose which was refused, although the deed to appellant had not been executed at that time. The prayer was for cancellation of the tax deed to appellant and that Fulks be permitted to redeem. Tender was made of $48.20 for this purpose. The answer was a general denial and a plea of the two year statute of limitations, § 8925 of Pope's Digest, in that appellant had been in the possession of said lands for two years under his tax deed next before the filing of the complaint and that neither of appellees had been in possession thereof within said two years.

Trial resulted in a decree for appellees in which appellant's tax deed was canceled and the title was vested in appellee Fulks who was directed to refund appellant all sums of money he has paid out in taxes on said land, including the amount paid at the Collector's sale. This appeal followed.

Appellant admits that the tax sale to him is void for any or all the reasons set out in appellees' complaint. He also admits that the only question on this appeal is purely one of fact, and that is whether appellant was in the actual possession of said lands under his tax deed for a period of two years next before suit was filed by the appellees in the court below.

The suit was filed against and summons was issued for appellant on February 26, 1944. The Clerk's deed was issued to appellant on November 7, 1941, and was filed for and recorded on February 2, 1944. Therefore, unless appellant actually took possession of said land on or prior to February 26, 1942, the land being unimproved, unenclosed, and not in the actual possession of anyone, not even the record owner, at the time said deed to appellant was executed and delivered, and continued his possession to the filing of this suit, he cannot successfully defend on said ground. Section 8925 of Pope's Digest provides in substance, in so far as this action is concerned, that no action for the recovery of any lands or for the possession thereof against any person who may hold same by virtue of a purchase thereof at a sale by the Collector for the nonpayment of taxes shall be maintained unless it appears that the plaintiff or his predecessors in title "was seized or possessed of the lands in question within two years next before the commencement of such suit or action," which is retroactive in operation. This statute contemplates actual possession under a deed. *Towson* v. *Denson,* 74 Ark. 302, 86 S. W. 661; and time is reckoned from the date of the deed. *Wade* v. *Goza,* 78 Ark. 7, 96 S. W. 388. In *Gates* v. *Kelsey,* 57 Ark. 523, 22 S. W. 162, Judge BATTLE, speaking for the court, said: "The statute necessarily implies that if he was seized or possessed within the two years, he can recover. In other

words, it makes the disseizure or dispossession of the true owner for two consecutive years a bar. It is the only fact under the statute which can defeat him in an action to recover. There is nothing in the statute which constitutes any act a disseizin. The general rule governs, and constructive possession follows the title. There is only one way in which he can be disseized or dispossessed by an illegal sale for taxes, and that is adverse possession. Two years adverse possession is therefore necessary to constitute a bar under the two years statute."

Now, the undisputed evidence, that of appellant himself, is that his first act of possession, was hauling posts to build a fence, taking in about one acre of said land, and doing a little clearing and cleaning up in the spring of 1942. On cross-examination, when asked what month of the spring of 1942 he made the improvements, he answered: "It was about April. I wanted to get it done in time to cultivate a garden." This testimony shows that appellant did not take actual possession of any portion of said land until the spring of 1942, perhaps April, and that, therefore, appellees were in possession "within two years next before the commencement of such suit or action," and that appellant must fail. February is not a spring month. His tax deed being void and not having had two years actual possession, it follows that he has no title as against the true owner.

Affirmed.

MORGAN *v.* HESS.

4-7914 194 S. W. 2d 871

Opinion delivered June 10, 1946.

B. L. Beasley and *C. C. Hollensworth,* for appellant.

SMITH, J. J. W. Hess brought suit in replevin against Jettie Morgan, in a justice of the peace court, to recover possession of a bull, valued at $60. In preparing the papers the Justice of the Peace used printed blanks prepared for the purpose, which, when filled out, contained the recitals essential to obtain an order for the delivery of the bull to Hess. The affidavit recites that oath and without having Hess sign it. A bond in the it was subscribed and sworn to before the Justice of the Peace who signed the jurat without administering the sum of $120, which was double the alleged value of the bull, was prepared and signed by Hess, who asked if he might make a cash bond. The Justice of the Peace informed Hess that the bond would have to be approved by the Sheriff, to whom the order of delivery was directed, and the Sheriff agreed to, and did accept a check to his order, drawn by Hess, for $120 in lieu of a personal surety. The validity of the check is not questioned.

It was held in the case of *Wilson* v. *Williams,* 52 Ark. 360, 12 S. W. 780, that the solvency of the plaintiff did not dispense with the necessity for the surety on the

bond required by law (§ 11376, Pope's Digest); and that if the officer proceeded under a bond, without a surety, he was liable as a trespasser. In the case cited the bond was signed by the plaintiff only, and there was no surety, nor was there any attempt to make a cash bond. Whether such a bond could be given, in lieu of the bond required by the statute, is a question unnecessary here to decide.

The order for the delivery of the bull required Morgan to answer on June 23, 1945, but the cause was continued from that day, and set for trial June 30, 1945, at which time Morgan moved to dismiss the action, for the reason that Hess "had made no affidavit or bond as required by law in suits for replevin." The Justice refused to require the plaintiff to make additional bond, but accepted the check from the plaintiff in lieu of the bond. The court then permitted Hess to sign and make affidavit which he had previously failed to do. There was no error in permitting this to be done. *Higgason* v. *Braswell,* 163 Ark. 348, 258 S. W. 983. The defendant and his counsel refused to proceed further, and the plaintiff submitted his case upon the testimony of witnesses who were named in the judgment. The defendant offered no testimony.

Judgment was rendered by the Justice for the plaintiff, from which judgment the defendant did not appeal. On the contrary, he sued out a writ of certiorari, and prayed the cancellation of the judgment for the alleged reason that the justice court was without jurisdiction. Upon the trial in the circuit court the writ of certiorari was quashed, and from that judgment is this appeal.

Now the law is that an order of delivery may not be issued unless the plaintiff makes the affidavit, and executes the bond required by law, but it was long since held that failure to issue an order of delivery does not effect the nature of the suit. Earlier cases on the subject were reviewed in the case of *Chapman* v. *Claybrook,* 173 Ark. 705, 293 S. W. 43, where it is said:

"In the case of *Schattler* v. *Heisman,* 85 Ark. 73, 107 S. W. 196, a pleading purporting to be an affidavit was

filed with a justice of the peace, but it was not verified. The court there said: 'This paper, although not sworn to, was a sufficient complaint to give the court jurisdiction of the subject-matter in replevin; and the court could proceed to try the right to the possession of the property involved without the possession being changed. Sections 6853-54, Kirby's Digest; *Hanner* v. *Bailey,* 30 Ark. 681; *Hawes* v. *Robinson,* 44 Ark. 308; *Eaton* v. *Langley,* 65 Ark. 448, 450, 47 S. W. 123, 42 L. R. A. 474. But, before an order of delivery can issue for the immediate possession of the property in advance of the trial of the rights of property, an affidavit contemplated by § 6854, Kirby's Digest (§ 6854, Kirby's Digest, is identical with § 8640, C. & M. Digest) must be filed. A failure to file such affidavit before the issuance of the order of delivery for the immediate possession is ground for quashing the writ. But it is not a prerequisite to the jurisdiction of the court to settle the rights of property without a change of the possession. *Eaton* v. *Langley, supra.*' "

If it be true that the bond given by Hess did not meet the requirements of the statute in that respect, this would have been ground to quash the order of delivery, but it was not ground to dismiss the suit. Morgan did not ask that the order of delivery be quashed, but asked that the suit be dismissed, and when that motion was denied, he interposed no defense, and seeks to quash the judgment on certiorari.

Our reports are replete with cases to the effect that certiorari cannot be used as a substitute for an appeal or writ of error, and it cannot be used to correct mere errors of the lower court. Among many other cases to that effect are the following: *Carolan* v. *Carolan,* 47 Ark. 511, 2 S. W. 105; *Town of Salem* v. *Colley,* 70 Ark. 71, 66 S. W. 195; *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S. W. 501.

In *Railway Company* v. *State,* 55 Ark. 200, 17 S. W. 806, Justice HEMINGWAY said: "The restricted office of the writ of certiorari precludes a review of such matters as, coming within the court's jurisdiction, were incorrectly determined; for the petitioner had the right of

appeal, which it does not appear to have lost by any unavoidable cause. Such being true, certiorari can be invoked only to set aside a judgment rendered without jurisdiction. *Burgett* v. *Apperson,* 52 Ark. 213."

In the case of *Little Rock Traction Co.* v. *Wilson,* 66 Ark. 582, 53 S. W. 43, it was sought to quash on certiorari a judgment rendered by a Justice of the Peace in favor of the plaintiff against a garnishee in a case where the allegations and interrogatories required by statute in such cases, had not been filed. In affirming the action of the circuit court in denying that relief, Justice BATTLE said: "But we do not mean to say that the allegations and interrogatories need not be filed. They ought to be filed, but the failure to file them cannot defeat the jurisdiction of the court, but, like any other failure of a court exercising its jurisdiction to conform to the law in any important particular, constitutes an error for which a judgment against the garnishee can be set aside on appeal or writ of error, but which could not have been reached as a general rule by a writ of certiorari at the time the judgment appealed from in the case before us was rendered."

Here there is no lack of jurisdiction, and the circuit court properly quashed the writ of certiorari, and the judgment is, therefore, affirmed.

ROSE *v.* MARSHALL SPECIAL SCHOOL DISTRICT NO. 17.

4-7909 195 S. W. 2d 49

Opinion delivered June 10, 1946.

W. F. Reeves, for appellant.

N. J. Henley, for appellee.

GRIFFIN SMITH, Chief Justice. School District No. 17, through the process of annexation, has taken over the area formerly embraced within District No. 79. Legality of the procedure is not questioned. We are only asked to determine whether Chancery Court erred in holding that three-fourths of an acre, with the building formerly used by District No. 79, has been abandoned for school purposes, and whether District No. 17 may continue to use the property as a bus station. Transportation is supplied by District 17. During bad weather children gather in the building and are afforded a certain degree of comfort as compared with what their status would be if the facilities were not available.

In 1909 James Tilley and his wife deeded the land ". . . unto said School District No. 79 as [a] school site for school purposes." A covenant was that the grantors would warrant the title ". . . as long as [the land is] used for school purposes"; otherwise title would revert to James Tilley.

December 18, 1945, Rose, who procured a deed from Tilley, posted a notice on the front door, informing the public he had purchased the property, and warning against the trespass, "or entering the building." The concluding paragraph was: "I am putting locks on the doors and taking possession of the building, which is my property."

District No. 17 procured a temporary injunction. On final hearing January 2, 1946, the order was made permanent. January 2, 1946, an intervention was filed by B. C. Tilley, who asserted that he was the oldest son of James Tilley, and that for himself and other children of James Tilley (some of whom were minors) he had sold the property to Rose. Other interventions were filed, but a discussion of the purpose they were intended to service is not necessary to this opinion.

There was ample testimony to sustain essential facts upon which the Chancellor must have predicated the decree. The building was constructed through community effort—"box suppers," and other local enterprises. Seats were not removed when annexation with District No. 17 occurred. The School Board maintained insurance. Only a short time before trial two new windows and twenty-nine glass panes were installed. A neighbor whose children attended school testified that he frequently went to the building early on cold mornings and built a fire; also that one of his sons carried a key, and that facilities were available to all who desired to use them. The place had been officially designated as a bus station. There is also testimony that the building was used as a community center, but this is not important. The controlling consideration is whether use of the premises as protection for children in the manner testified to was *a use for school purposes.*

Doubtless neither Tilley, nor any of those with whom he dealt in 1909, thought of the particular meaning now sought to be imputed to the language employed. On the other hand it must be borne in mind that the grantor probably entertained at most only a remote thought that the area embracing less than an acre, upon which there was no building, would ever be wholly abandoned for school purposes; but, if it should be, the reversionary clause was for his benefit.

The Chancellor was no doubt influenced by our holding in *McCullough* v. *Swifton Consolidated School District,* 202 Ark. 1074, 155 S. W. 2d 353. There, like the case at bar, districts had been consolidated, and the question was whether land conveyed in a deed should revert to the grantor if District No. 23 of Jackson County should abandon the property—which, according to the conveyance, was to be used "for school purposes only." We held that after consolidation, and while the building was being utilized in a manner similar to that shown by appellee here, it had not been abandoned. *Conner* v. *Heaton,* 205 Ark. 269, 168 S. W. 2d 399; *contra,* (the facts being

different), see *Williams* v. *Kirby School District No. 32,* 207 Ark. 458, 181 S. W. 2d 488.

Since a preponderance of the evidence show there had not been an abandonment for school purposes within the meaning of applicable decisions, it follows that the decree must be affirmed.

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

4-7916 195 S. W. 2d 39

Opinion delivered June 10, 1946.

[redacted]

Bob Bailey and *Bob Bailey, Jr.*, for appellant.

Thos. B. Pryor and *Brady Pryor*, for appellee.

ED. F. MCFADDIN, Justice. A fast east-bound train of appellee passed through London, Pope county, Arkansas, during the afternoon of January 15, 1944. The appellant's team became frightened, and ran away, resulting in appellant's personal injuries and his property damage, for the recovery of all of which he filed action against appellee in the circuit court. At the conclusion of all of the evidence the court directed a verdict for appellee, and this appeal challenges the correctness of such action of the trial court.

At the outset, we reiterate the well-known rule that, in reviewing in this court the action of the trial court in directing a verdict, the evidence is given its strongest probative force in favor of the party against whom the verdict was directed. Cases so holding are collected in West's Arkansas Digest, "Appeal and Error," § 927(7). We therefore view the evidence in the light most favorable to the appellant.

The railroad track of the appellee runs approximately west to east through the town of London, and crosses two parallel highways or streets, which are about 300 feet apart. These crossings are designated as "west crossing" and "east crossing." Eggleston's Store is about 175 feet south of the railroad track, and about midway between the two parallel streets. The space is open between Eggleston's Store and the track and the two crossings. On the day in question appellant drove his team (a horse and a mare) and wagon to Eggleston's Store, and left the team, headed east and unattended and unrestrained, while he went in Eggleston's Store to do

some shopping. Being thus engaged, the appellant heard the train blow for the first or west crossing, and immediately returned to his team. He had just reached over the front wheel of the wagon to grasp the reins (wrapped around the spring seat) when the train was even with the team. The whistle blowing of the train caused the team to lunge and run away, and injure the appellant. The team headed northeast and ran into the third or fourth coach of the train at the east crossing, killing the horse, permanently crippling the mare, and destroying the wagon and harness. The appellant sought recovery, based on two allegations of negligence of the appellee, to-wit: (1) the excessive speed of the train; and (2) the unnecessarily loud blowing of the whistle. We discuss these.

I. *Excessive Speed of the Train.* All of the proof in the case was that the train was going faster than fifty miles per hour through the town of London. To show that such speed was negligence, the appellant introduced in evidence ordinance No. 30 of the town of London, Arkansas, reading in part as follows: "It shall be unlawful for any railway company to operate any train within the limits of the incorporated town of London, Arkansas, at a speed greater than 35 miles per hour." Assuming—but not deciding—that the town could, by such ordinance, lawfully restrict the speed of the train, as here; and also assuming that proof of the publication of the ordinance was waived or conceded: still we are of the opinion that the speed of the train was not shown to have had anything to do with the action of the team. Appellant said that he was in the store when he heard the train whistle for the first or west crossing, and that he went immediately to his team. He testified: "Q. What did you do? A. I started to get up in the wagon, and just as I started to breast over in the wagon they made a lunge forward. Q. Where was the train at that time? A. The train had gotten then right even with the team. Q. Before the team lunged? A. Yes, sir. Q. When did the team lunge? A. They lunged when he let out that loud shrill whistle when the train was even with the team."

This evidence shows that it was the whistle and not the speed of the train that caused the untoward action of the team. The rule is well established that negligence is not actionable unless such negligence was the direct cause of the damage. As said by Mr. Justice MEHAFFY in *Mo. Pac. R. Co.* v. *Horner,* 179 Ark. 321, 15 S. W. 2d 994: "One is entitled to recover for negligence only when the negligence complained of causes the injury." See, also, cases collected in West's Arkansas Digest, "Negligence," § 56. Applying the rule of these cases to the evidence here, it is clear that the appellant made no case of actionable negligence based on the speed of the train; for it was not shown that the speed of the train caused the team to lunge or run away.

II. *Unnecessarily Loud Blowing of the Whistle.* The plaintiff testified: "I heard the train whistle for this other crossing; I started out of the store, he started his whistle above the crossing and held it down all of the way through. When the engine got even with the team he let out a continuous loud shrill blast, and the team became frightened, and I started to get to the wagon to get ahold of the lines. I was just bending over the wagon, there were no steps on the wagon. The team made a lunge and threw me against and off of the wagon. It sprained my arm——!" He further testified: "Q. You heard the whistle at the west crossing there in the town of London? A. Yes, sir. Q. After it whistled for this crossing tell the jury whether or not if it continued to whistle. A. Yes, sir; it continued to whistle. When it started whistling above the west crossing this engineer just held the whistle down all of the way through; never did stop whistling. Q. Was it an unusually loud whistle? A. Yes, sir."

It was established by many witnesses that the train started to whistle before it reached the west crossing, and continued to whistle until the engine had passed the east crossing; and likewise the fact was established that the whistle was loud, and that the team lunged and started to run away when the engine was even with the team. It was shown that the crossing whistle is two long blasts,

a short blast, and a long blast; and that this routine blowing was repeated from the time the blowing of the whistle began until the locomotive had passed the east crossing. The engineer testified that he first observed the team one-quarter of a mile away, and that the team was not then showing any excitement; and that as the train approached and the whistle continued to blow, the team showed no signs of nervousness until the engine was even with the team.

It was also shown by undisputed evidence that "there is only one way to blow a whistle; and that is to blow it." The engineer testified: "Q. After you went across the first crossing did you continue to whistle? A. I kept the whistle open—it is only a matter of about five seconds between the crossings. Q. Did you blow it often and loud? Were you blowing it loud? A. There isn't but one way to blow a whistle, and that is to blow it. You take an ordinary whistle, when you blow it, you blow it wide open, just like an automobile horn. Q. When you blow it, it blows? A. Yes, sir. Q. Can you blow it soft or loud? A. You would have to do an awful lot of tinkering. Q. Did you ever try to blow it soft? A. When you open the valve it is open. Just so much steam can go through the whistle. Q. What makes the whistle blow? A. Steam. It is just like an automobile horn, it is either on or off. Q. If you put it on full blast, it is on? A. Yes, sir; you have about 15 feet of iron pipes connected with it—and when you pull down it is open. Q. Why are some louder than others? A. Difference in the tone of the whistle. Q. Was this a high tone whistle or a low tone whistle? A. High tone whistle, locomotive whistle."

The whistle statute of Arkansas is § 11135, Pope's Digest (from § 34 of Act 71 of 1868), and reads as follows: "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of two hundred dollars for every neg-

lect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to the county,[1] and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect." Since eighty rods is a quarter of a mile, we see that the law required the railroad company to blow the whistle or ring the bell, beginning one-quarter of a mile west of the west crossing, and to continue until the locomotive had passed the east crossing—since the crossings were only 300 feet apart. The railroad had the right either to ring the bell or blow the whistle, or do both, but it had to do one or the other.

Since the appellee's employees were complying with the statute, how, then, can the appellee be liable? The appellant's theory of liability is that the whistle was blown too loud. The appellee's defense is that the Arkansas statute does not limit or restrict the volume of the whistle, by requiring it to be soft or loud. A brief review of some of our holdings will show that we have never directly passed on this question:

1. There are cases holding railroad companies liable where the operators of the train let off steam from the engine, thereby frightening animals and causing damage. Some of these cases are: *Ry. Co.* v. *Roberts,* 56 Ark. 387, 19 S. W. 1055; *Ry. Co.* v. *Lewis,* 60 Ark. 409, 30 S. W. 765; *St. L. I. M. & S. Ry. Co.* v. *Transmier,* 106 Ark. 530, 153 S. W. 817; *St. L.-San Fran. Ry. Co.* v. *Young,* 175 Ark. 487, 299 S. W. 750. But the case at bar differs materially from these reported cases, because the letting off of the steam from the engine is not a statutory duty; while the blowing of the whistle is a statutory duty, and in the case at bar there is only the question of the blowing of the whistle.

[1] It is immaterial to this case, but worth noting, that § 34 of Act 71 of 1868 says "the other half to the state"; § 4960 of Gantt's Digest of 1874 says "the other half to the school fund"; and § 5478 of Mansfield's Digest of 1884 says "the other half to the county"; and the subsequent digests have followed the wording found in Mansfield's Digest. The change by Gantt was possibly because of § 1 of Act 130 of 1873; and the change by Mansfield was possibly because of § 212 of Act 114 of 1883.

2. There are cases holding railroad companies liable where the operators of the train blew the whistle at a time and place not required by statute. One such case is *Weil* v. *St. L. S. W. Ry. Co.,* 64 Ark. 535, 43 S. W. 967; but the case at bar is not such a case as the one cited. Here the signals were given in compliance with a statutory mandate. Even in the cited case Mr. Justice BATTLE made clear that the giving of statutory signals (as under § 11135, Pope's Digest) was not within the purview of that case, when he used this language: "In the absence of statutory regulations, as in this case, it was limited to the reasonable use of signals, and 'is liable for injuries caused by the whistle, when sounded carelessly or recklessly, or at an improper place, or when not required in the prudent working of its engines and trains.' "

3. There are cases holding railway companies liable where the team was at a crossing and became frightened, either from the giving of signals or the lack of signals. Some such cases are: *P. & N. W. R. Co.* v. *Franks,* 111 Ark. 83, 163 S. W. 180, Ann. Cas. 1916A 773; *St. L. S. W. Ry. Co.* v. *Everett,* 125 Ark. 428, 189 S. W. 42. But in the case here the team was 175 feet away from the track, and midway between the two crossings. The "lookout statute," § 11144, Pope's Digest, was not pleaded by the appellant.

4. There are cases holding railroad companies liable where it was shown that the operators of the train had acted willfully, wantonly, or maliciously. One case so declaring is *C. O. & G. R. Co.* v. *Coker,* 77 Ark. 174, 90 S. W. 999. But in the case at bar there was neither allegation nor evidence that the operators had acted willfully, wantonly, or maliciously, so the rule of these cases should not apply here.

5. There are cases holding railroad companies liable where it was shown that, after the operators of the train discovered the frightened team, they failed to exercise due caution to avoid injury, when by giving another signal instead of the loud whistle, the runaway could have been averted. One such case is *C. O. & G. R. Co.* v. *Coker,*

89 Ark. 270, 116 S. W. 216. The rule of such cases is bottomed on the humanitarian doctrine, or the doctrine of the last clear chance. But the rule of these cases could not apply here, because the engineer observed the team for some distance and the team did not become frightened until the train was even with the team. It was only five seconds between crossings; the engineer could hardly have stopped the whistle more quickly than 2½ seconds, and he did stop then; and the engine and two coaches had passed the east crossing before the team ran into the third or fourth car of the train.

The listing of these instances in which recovery has been sustained is not intended to cover every possible situation that might arise; but the listing does show that recovery in other cases has always been on some evidence more than merely the loud blowing of the whistle. If the tone or volume of the whistle, alone, is to be considered negligence, then it is for the Legislature so to enact, rather than for the courts so to declare.

Turning to other states, we find cases which also hold that loud blowing of the whistle is not, alone, evidence of negligence. In *Louisville & N. R. Co.* v. *McCandless,* 123 Ky. 121, 93 S. W. 1041, 29 Ky. L. Rep. 563, the Court of Appeals of Kentucky had before it a case where recovery was sought against a railroad company for the loud blowing of a whistle, which frightened a horse driven on a highway parallel with the railroad tracks. The only charge of negligence was the loud and excessive blowing of the whistle; and the Kentucky court held that a directed verdict should have been given in favor of the railroad company. In *Wheeler* v. *Wabash R. Co.,* 159 Mo. App. 579, 141 S. W. 472, the Missouri Court of Appeals likewise held that a verdict should have been given for the railroad company, where the only proof of negligence was the loud blowing of the whistle, which was blown in compliance with the statutory regulations. Other cases of similar import, but with slightly different facts, are *Lyons* v. *C. M. & St. P. R. Co.,* 28 S. D. 31, 132 N. W. 679, 35 L. R. A., N. S., 1219, and *Engelsen* v. *Spo-*

kane P. & S. Ry. Co., 79 Wash. 39, 139 Pac. 599. There is a splendid annotation in 61 A. L. R. 1078, which cites cases from other jurisdictions, all going to sustain the rule that the loud blowing of a whistle, standing alone and without any other evidence tending to show negligence, does not make a case of liability against the railroad company. We so hold; and the judgment of the circuit court directing a verdict for the appellee is, therefore, affirmed.

[redacted]

DRENNEN *v.* WHEATLEY.

4-7920 195 S. W. 2d 43

Opinion delivered June 10, 1946.

[redacted]

Jay M. Rowland, for appellant.

Scott Wood, for appellee.

ROBINS, J. Appellant asks us to reverse order of the lower court by which she was denied the right to claim certain funds, arising from her voluntary sale of her homestead, exempt from seizure under decree in favor of appellee rendered pursuant to our mandate in the case of *Wheatley* v. *Drennen,* 209 Ark. 211, 189 S. W. 2d 926.

This litigation began as a suit by appellee to enforce specific performance by appellant of a contract to convey

to appellee the home of appellant situated in Hot Springs. It developed, however, that, prior to institution of appellee's action, appellant had sold the property to another purchaser (who had no notice of the contract with appellee) for $3,000 more than the purchase price fixed in her agreement with appellee; and appellee thereupon asked damages against appellant for breach of the contract to convey.

The lower court denied relief to appellee, and he appealed to this court, where the decree of the lower court was reversed and the cause remanded with directions to enter a decree in favor of appellee against appellant for $3,000 damages and to order payment of this judgment by Arkansas Trust Company from certain funds in its hands belonging to appellant. These funds had arisen from the collection, by the bank as agent for appellant, of the purchase money of the property involved in the suit, and had been impounded by garnishment issued at the instance of appellee.

After the lower court had entered a decree as directed by our mandate appellant filed what she designated as her "Claim of Homestead Exemption." In this pleading appellant alleged that the money impounded was a part of the proceeds of her homestead, and that she had planned, before the sale of her homestead, to invest same in another home, but that the funds were tied up by the garnishment before she could make the reinvestment. She further alleged that she was a resident of the state and that the property sold was the homestead of her deceased husband for many years and had been hers since his death. Her "claim" concluded with a prayer that the "homestead exemption claim be allowed and that this court order the Arkansas Trust Company to deliver the money now in its hands over to her so that she may purchase a home to live in." A demurrer by appellee to appellant's "claim" was sustained by the lower court.

The principal question presented on this appeal is whether one may claim as exempt, under our laws for the

protection of homestead rights, the proceeds of a voluntary sale of one's homestead.

The homestead exemption right of residents of Arkansas is conferred by § 3 of Art. IX of the Constitution as follows: "The homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity."

Neither in the quoted portion of the Constitution nor in any of the statutes enacted to safeguard homestead rights is there any provision (other than those relating to all personal property) by which the exemption of funds arising from the voluntary sale of a homestead by the owner is authorized. The only reference to any such an exemption in our laws is contained in § 4 of Act 402 of the General Assembly, approved March 27, 1941, by which the money obtained by the sale (authorized by the Act) of the dower, curtesy, or homestead interest of an incompetent person is made exempt from execution, attachment or garnishment; and this Act, of course, is in nowise applicable to the case at bar.

Appellant invokes the well established doctrine that exemption laws must be liberally construed, and argues that under such construction the proceeds of the sale of her homestead, intended for investment in another home, should be held not subject to seizure for her debt. While these laws should receive a most liberal interpretation in favor of the party asserting the homestead right, courts may not, under the guise of construction, read into the Constitution and statutes something that the framers thereof did not see fit to place there.

The general rule is that, in the absence of specific constitutional or statutory authority therefor, there is no right on the part of a debtor to claim exempt funds arising from the voluntary sale of his homestead. "In the absence of statutory provisions to the contrary, the voluntary sale of homestead property is held, in a majority of jurisdictions, to be a complete extinguishment of the homestead right; and consequently the proceeds of such a sale, until invested in other exempt property, may be subjected to the claims of creditors." 26 Am. Jur. 31.

The editors of A. L. R. (vol. 1, p. 483) state, as the "general rule," "It has been held that the purchase price of homestead property is not exempt from the claims of creditors, in the absence of express statutory provisions as to such proceeds."

This court, speaking through Chief Justice McCulloch, in the case of *Tucker* v. *Stell,* 169 Ark. 1, 272 S. W. 864, said: "The property was a homestead and therefore not subject to the payment of his debts, but the proceeds of the sale, while being held as money, were not exempt except to the extent of exemptions allowed in personal property to a debtor."

Appellant was not entitled to claim exempt the funds involved herein; and this conclusion obviates the necessity of determining whether appellant's application for order exempting these funds was seasonably made.

The lower court properly denied appellant's claim of exemption; and its order is accordingly affirmed.

Horsman *v.* Tokio School District No. 82.

4-7901 195 S. W. 2d 51

Opinion delivered June 17, 1946.

Rehearing denied July 8, 1946.

E. G. Ward, for appellant.

Kirsch & Cathey and *Phil Herget,* for appellee.

HOLT, J. Appellant, Mrs. Carmen Horsman, sued the appellees, School Districts, to recover balance alleged to be due her as teacher's salary. The cause was tried before the court, sitting as a jury, and there was a finding and judgment in favor of appellees. This appeal followed.

The material facts appear not to be in dispute. Appellant and another teacher, Mrs. French as principal, taught the 1944 summer term for appellee, Tokio School District No. 82. Appellant taught the first four grades and Mrs. French the fifth, sixth, seventh and eighth. Thereafter, appellant and Mrs. French were employed under separate written contracts by appellee, The Tokio School District, to teach the 1944 winter term. Appellant's contract, dated September 22, 1944, is involved here. Under its terms, appellant agreed to teach at a monthly salary of $115 the first four grades of the Tokio

School for a term of six and three quarters months, beginning November 6, 1944. The Tokio schoolhouse contained two rooms. The parties here stipulated: "That on the 6th day of November, 1944, both of said teachers began the winter term of said Tokio School as provided in said contracts, Mrs. French being the principal or superintendent, and was assigned the fifth, sixth, seventh and eighth grades therein; and the plaintiff (appellant) was assigned the first, second, third and fourth grades therein; that while said school was in progress, plaintiff (appellant) was notified by letter under date of November 24, 1944 . . . written by John Baumgartner, as president of the Marmaduke School Board, District No. 2 of Greene county, Arkansas, to the effect that said Tokio School District No. 82 has been dissolved and its territory thereof annexed to Marmaduke Special School District No. 2."

It further appeared that the Marmaduke School Board offered to permit appellant to teach the first four grades at the Marmaduke schoolhouse that she was teaching at the Tokio School under her contract with this latter district. The Marmaduke School is approximately two miles further from appellant's home than the Tokio schoolhouse. Appellant was offered free bus transportation to the Marmaduke School. Appellant refused to transfer and teach at the Marmaduke School, whereupon the Marmaduke School Board informed her by letter that it would not pay her the salary stipulated in her contract with the Tokio School District for any further services performed by her as teacher at the Tokio School.

It was further stipulated: "That at the end of the first school month of said winter term the plaintiff (appellant) was issued a warrant for her salary for said first month in the sum of $115, less withholding and teachers retirement tax, by the Marmaduke Special School District No. 2 of Greene county, Arkansas; that plaintiff (appellant) continued to teach the said first, second, third and fourth grades of school at Tokio School until the end of the six and three-fourths months period

shown in said contract, but received no further salary payments for said services therein; that plaintiff (appellant) continued to use the school books, school supplies, teacher's register and records in connection with the said Tokio School; that the patrons of said school sent their children to the plaintiff (appellant) to be taught by her at Tokio School; and plaintiff (appellant) met said classes each school day, heard their lessons and proceeded in approximately the same way and manner as she had been doing prior to the correspondence between her and said parties . . ., the janitor serving said Tokio School fired the stove, swept the room, dusted the furniture and performed the same janitor service for the plaintiff (appellant) as he did for Mrs. French who was then teaching the fifth, sixth, seventh and eighth grades of said Tokio School; that Mrs. French was paid for her services therein as provided by her contract with said Tokio School, by the Marmaduke Special School District No. 2."

It also appeared that after the Marmaduke School Board had notified appellant that she would not be compensated for services under her Tokio contract beyond the first month that she taught in the Tokio School, no further objections or steps were taken by the Marmaduke School Board. There appears to be no question here as to the validity of appellant's contract that she made with the Tokio School Distirct. When the Tokio District was by appropriate proceedings annexed to and became a part of the Marmaduke District, the latter district thereby assumed and became liable under our statutes for all contracts and obligations of the Tokio District. Such is the effect of the provisions of § 11489 of Pope's Digest: "No construction shall be given to any part of this Act (Act 169 of 1931, as amended by Act 184 of 1935) that would result in impairing the obligations or any valid contract of any school district, nor hamper any creditors of a school district in remedies for the prompt collection of indebtedness or securities for the payment thereof, but all obligations of any school district in the State shall be regarded as assumed and performed by the district

to which such first mentioned district may be annexed, etc.''

It was the position of appellees below, and they argue here, that under appellant's contract with the Tokio School District, the Marmaduke School District, after consolidation, had the implied authority to require appellant to teach the same grades in the Marmaduke School that she was teaching at the Tokio School, and that since she refused to teach in the Marmaduke School contrary to the orders of the Marmaduke School Board, she breached her contract and was not entitled to be compensated for any services as teacher at the Tokio schoolhouse beyond the first month of the winter term.

Appellant insists, however, that just the contrary is true and that in any event, since she went ahead without further objection on the part of appellees and taught the remainder of the full six and three-quarters months term at the Tokio schoolhouse, appellees thereby ratified her contract, accepted her services and must pay therefor.

It is our view that this latter contention of appellant must be sustained and is controlling on the undisputed facts before us. That appellant was an efficient and competent teacher and her services worth $115 per month is unquestioned. Without further objection after the notice to her, *supra,* she proceeded to teach the four grades assigned to her under her Tokio contract at the Tokio two-room schoolhouse for the remainder of her contract term. The school patrons continued to send their children to her. She was furnished school supplies, janitor services, etc., in the same manner as was Mrs. French in an adjoining room. At the close of the term, promotion of pupils was duly made and reported to the proper official. The School Board accepted her services, received the benefits, and must pay therefor.

The principles of law announced in such cases as *School District No. 56* v. *Jackson,* 110 Ark. 262, 161 S. W. 153; *Dell Special School District No. 23* v. *Johnson,* 129 Ark. 211, 195 S. W. 373, and *Bald Knob Special School*

District v. *McDonald,* 171 Ark. 72, 283 S. W. 22, are controlling here.

In the former case, *School District No. 56* v. *Jackson,* a school teacher entered into a written contract to teach a twelve weeks' school at a salary of $35 per month. After having taught for seven weeks, she was notified by the School Board to stop teaching, that her contract was invalid. Upon receipt of the notice, she suspended teaching for two weeks and then resumed and taught the remaining five weeks of her contract. "The directors refused to pay her for the five weeks taught by her after they had notified her to quit." She brought suit and secured a judgment for the five weeks' salary which she alleged to be due her under her contract. While holding that her contract was in fact invalid because signed by only two of the three school directors, the judgment in favor of the teacher was affirmed by this court on the ground that since the teacher, without further objection on the part of the School Board, after notifying her to stop teaching, had been permitted to finish out the term, there was a ratification of the contract with the teacher. It was there held: (Headnote 4) "When a teacher under contract to teach, stopped the school at the order of the directors, and reopened the school in two weeks after learning that the directors gave the order, thinking the contract with her was invalid, she will not be held to have committed a breach of the contract, "and in the body of the opinion, it was said: "She was permitted to teach for seven weeks without any objection and, under these circumstances, we think there was a ratification of the contract made with her."

Accordingly, the judgment is reversed and the cause remanded with directions to enter a judgment consistent with this opinion.

GRIFFIN SMITH, C. J., dissents.

4-7929 196 S. W. 2d 224

Opinion delivered June 17, 1946.

Rehearing denied September 30, 1946.

J. B. Milham and *Gladys Wied,* for appellant.

W. H. McClellan, for appellees.

SMITH, J. This suit, filed July 30, 1945, is a proceeding under § 8246, Pope's Digest, to vacate a decree rendered June 7, 1935, foreclosing a mortgage executed by Lee Smith and Poley, his wife, to the American Investment Company, which was transferred and assigned to C. W. Chapman. The mortgage was given to secure a note for $500, bearing interest at six per centum per annum, with interest at ten per centum after maturity, and ten interest notes, each for $30, which bore interest at ten per centum, after their maturity. The decree recited personal service on Smith, and that his wife was dead. The mortgagor died intestate March 26, 1944.

Smith was survived by four children, but only one of these was a party to the proceeding to vacate the decree.

The petition to vacate the decree, which was verified as required by law, alleges that the decree was procured through fraud practiced upon the court in the following particulars. The mortgagee, a foreign corporation, was not authorized to do business in this state, and Chapman, the plaintiff in the foreclosure suit, was not the owner of the mortgage; that the mortgage was given to secure a debt, void as being usurious; and the decree was prematurely rendered and was for a sum in excess of the debt due.

The foreclosure decree, which was made a part of the petition, recited the assignment of the mortgage, duly of record, whereby Chapman became the owner of the mortgage, that the principal note was wholly unpaid, that the mortgagor had failed to pay either the general or special improvement district taxes, for the years 1923 to 1933, all inclusive, which had been paid by the mortgagee, and that the total balance of $1,137.32, all secured by the mortgage, was due and unpaid, and judgment therefor was rendered, with directions to foreclose the mortgage in satisfaction thereof, through a sale of the land by a commissioner appointed for that purpose. It was alleged that the commissioner made the sale as directed, and pursuant thereto executed a commissioner's deed to Chapman on August 5, 1935. Chapman conveyed the land, covered by the mortgage, on November 4, 1941, to H. G. Toler, who was made party defendant, and the petition prayed that the foreclosure decree be vacated for the reason stated, and that the deed from the commissioner to Chapman, and the deed from Chapman to Toler be canceled. In the alternative, it was prayed that if this relief were denied, Chapman and Toler be held to be mortgagees in possession, and that an accounting be had, and that petitioner be permitted to pay any balance found to be due on the mortgage debt, if it were found that any balance was due, the existence of which was denied.

A demurrer and motion to dismiss was filed October 1, 1945, and in a decree rendered December 7, 1945, the

demurrer was sustained, and the petition dismissed. Following this there appears a pleading styled, "Amendment to Complaint," without filing date, which recapitulates substantially the allegations of the original petition to vacate the foreclosure decree, with the additional allegation that "the defendant, Lee Smith, was not served with summons and had no notice of the suit against him."

This pleading may be disposed of upon either of two grounds, First, it was not filed until the original petition had been dismissed, and it was not shown that the petition was reinstated; and second, it was not verified as required by § 8248, Pope's Digest.

Section 8246, Pope's Digest, names the grounds for vacating or modifying a judgment after the expiration of the term at which it was rendered, and § 8248 prescribes the procedure to obtain that relief, and that section requires that the complaint or petition be verified by affidavit. This is a jurisdictional requirement and we may not therefore consider the unverified allegations of the amended complaint. *Merriott* v. *Kilgore,* 200 Ark. 394, 139 S. W. 2d 387; *First Nat. Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575.

Returning to the verified petition, which was filed in apt time, we find no allegation, which if true, would constitute a fraud practiced upon the court in the procurement of the decree. If Chapman was without capacity to sue, and if the judgment was prematurely rendered, and for an excessive amount and, if further, the loan secured by the mortgage was in fact usurious, such of these allegations as were matters of defense should have been interposed in the foreclosure suit, and may not be interposed here.

In the recent case of *Gulley* v. *Budd,* 209 Ark. 23, 189 S. W. 2d 385, it was sought to annul and cancel a pardon issued by the governor of the state, upon the ground that fraud had been practiced in its procurement. A number of cases are there cited which dealt with the character and quantum of proof required to show that the pardon had been procured by fraud, and the holdings of these cases

there cited are summarized as follows: "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 act 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.' (Citing many Arkansas cases.)"

The demurrer to the petition was properly sustained and the decree is, therefore, affirmed.

HACKNEY *v.* SOUTHWEST HOTELS, INC.

4-7921 195 S. W. 2d 55

Opinion delivered June 17, 1946.

Charles Jacobson, for appellant.

House, Moses & Holmes and *W. Horace Jewell,* for appellee.

Ed. F. McFaddin, Justice. The appellee owns and operates the McGehee Hotel in Little Rock. The appellant was the plaintiff in the lower court, and sued for $300 as the value of a camera. The cause was tried on an agreed statement of facts, which we copy in full:

"That on February 27, 1945, plaintiff became a guest at the McGehee Hotel in Little Rock, Arkansas, the said hotel then being operated by the defendant; that a room was assigned to and occupied by him; that at the time he had in his possession a camera such as is described in the complaint; that the plaintiff delivered the said camera to the defendant for safekeeping to be returned to him when he checked out of the hotel; that no compensation was paid by the plaintiff to the defendant for this safekeeping; that the defendant issued to the plaintiff a check in words and figures as follows, to-wit:

" 'McGehee Hotel

" 'Check

" 'Room.....

" 'This check is issued with the understanding that this hotel is not responsible for any loss or damage to this baggage if left more than ten days.

" 'In no event shall the hotel's liability exceed the sum of twenty-five dollars. We will in no event be responsible for baggage checked by one not a guest of the hotel. The person accepting this check agrees to the above conditions.

" 'No. 2161'

"That the following day plaintiff checked out of the hotel and upon presenting his check was informed that the camera could not be located; the camera was never returned to the plaintiff; the plaintiff was offered the sum of $25 by the defendant which the plaintiff refused to accept; that the camera was small but valuable and was worth the amount sued for."

The trial court, a jury being waived, made the following findings and declarations:

"1. The loss of the property sued for and the liability therefor does not come within the terms of § 7202, Pope's Digest;

"2. That said loss is covered by § 7204, Pope's Digest;

"3. The liability for said loss is fixed by statute under § 7205, Pope's Digest, 'all other miscellaneous effects' at $50."

The appellant, by direct appeal, claims he is entitled to recover $300; and the appellee, by cross appeal, claims that the appellant is entitled to only $25 (being the amount stated on the claim check). We reach the conclusion that the appellant should recover $300, because the limitation in § 7205 does not limit or apply to § 7204. We elucidate:

I. Prior to Act 217 of 1913 a hotelkeeper was liable under the common law for losses sustained by a guest. In *Pettit* v. *Thomas*, 103 Ark. 593, 148 S. W. 501, 42 L. R. A., N. S., 122, Ann. Cas. 1914B 726, we said: "He is an

insurer of the safety of whatever baggage or other things he receives into his inn from his guest, whether in fact negligent in their keeping or not, except against the two overwhelming forces, termed the acts of God, or the public enemy."

The case of *Pettit* v. *Thomas, supra,* was decided by this court on May 27, 1912; and the next General Assembly of Arkansas adopted Act 217 of 1913, which substituted statutory liability for the previous common law liability. This Act 217 of 1913 is now § 7202, *et seq.*, Pope's Digest. We are concerned here with §§ 7202 to 7205, inclusive; and some of these sections have been before this court, directly or indirectly, in these cases: *Turner* v. *Weitzel,* 136 Ark. 503, 207 S. W. 39; *Huckins Hotels* v. *Smith,* 151 Ark. 167, 235 S. W. 787; *New York Hotel Co.* v. *Palmer,* 158 Ark. 598, 251 S. W. 34; *Fant* v. *Arlington Hotel Co.,* 170 Ark. 440, 280 S. W. 20, second appeal 176 Ark. 613, 4 S. W. 2d 7, Appeal to U. S. Sup. Ct., 278 U. S. 439, 73 L. Ed. 447, 49 S. Ct. Rep. 227; *Andrews* v. *Southwestern Hotel Co.,* 184 Ark. 982, 44 S. W. 2d 675.

II. Act 217 of 1913 is a comprehensive act, and covers the various situations that arise as to property of a guest in a hotel; so we proceed to consider the germane portions of the act, to determine which section is applicable to this case.

1. Section 7202, Pope's Digest, provides a method whereby a hotelkeeper may limit liability to a maximum of $300 for "money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable paper, and bullion." These are all the articles covered by § 7202. To limit the extent of liability as to these articles, the hotelkeeper must: (a) constantly have in his hotel a safe or vault, etc.; (b) keep on the doors of the sleeping rooms suitable locks; and (c) keep a copy of § 7202 printed in distinct type, constantly and conspicuously posted in not less than ten places in said hotel. Since the property here involved—*i. e.,* a camera—is not em-

braced in the list of property enumerated in § 7202, it is clear that this section does not apply to this case.

2. Section 7203 allows the guest and hotelkeeper to make a special contract in writing concerning the extent of liability of the hotelkeeper, for any of the property referred to in § 7202. Appellee contends that this § 7203 refers to "any property," and not merely property referred to in § 7202. But we cannot agree with appellee's contention. Section 7203 in one place refers to property "for deposit in such safe or vault," and in another place refers to "the above enumerated articles." Since the only articles enumerated prior to § 7203 are the articles enumerated in § 7202, it necessarily follows that the operation of § 7203 is limited to the articles enumerated in § 7202, which are the articles for which the hotelkeeper must provide a safe or vault, as mentioned in § 7202.

3. Section 7204 refers to "any baggage or other articles or property of such guest for safekeeping (elsewhere than in the room assigned to such guest)." In the case at bar the camera of the appellant was left with the hotel for safekeeping *elsewhere than in the room of the appellant*. So, it is clear that the liability of the appellee to the appellant is covered by § 7204 of Pope's Digest, just as was held by the Circuit Court.

4. Section 7205 refers to "personal property placed by his guests under his care, other than that described in the preceding sections." When we remember that any property which is in the hotel, and not in the instant control of the guest, is entrusted to the hotel for safekeeping, it is clear that this section embraces all property not covered by any of the three preceding sections. It relates to property left in the room while the guest is out of the room. Such was our holding in *Turner* v. *Weitzel*, 136 Ark. 503, 207 S. W. 39, which was our first case construing Act 217 of 1913, and in which case the hotelkeeper was held liable (under this section) for clothing that the guest left in the room. This section contains a limitation of liability which reads "provided, however, that in no case shall such liability exceed the sum

of $150 for each trunk and its contents, $50 for each valise and its contents, and $10 for each box, bundle, or package and contents, so placed under his care, and all other miscellaneous effects including wearing apparel and personal belongings, $50, ..."

The Circuit Court held that the camera of the appellant came under the $50 clause last quoted. We reach the conclusion—as previously stated—that the limitation of liability in § 7205 does not apply to § 7204, because the limitation of liability in § 7205 is only a proviso and is attached to § 7205 and not to § 7204. In *Zaccanti* v. *State,* 105 Ark. 60, 150 S. W. 122, in speaking of the effect to be given a proviso in a statute, we said: "The proviso is to be construed with reference to the immediately preceding parts of the clause, to which it is attached. Lewis' Sutherland, Statutory Construction, §§ 352, 420; *Friedman* v. *Sullivan,* 48 Ark. 213, 2 S. W. 785; *United States* v. *Babbitt,* 1 Black 55, 17 L. Ed. 94; *McRae* v. *Holcomb,* 46 Ark. 306; *Towson* v. *Denson,* 74 Ark. 302, 86 S. W. 661."

In 50 Am. Juris. 459 the rule here applicable is stated: "The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows. Indeed, the presumption is that a proviso in a statute refers only to the provision to which it is attached, and, as a general rule, a proviso is deemed to apply only to the immediately preceding clause or provision." See, also, 59 C. J. 1090. Since the proviso in § 7205 applies only to that section, and not to § 7204, it follows that there is no limitation of liability as to the value of property entrusted by the guest to the hotelkeeper under § 7204.

III. The appellee here is liable as a bailee for hire under § 7204. The agreed statement admits the receipt of the property by the hotel, and the hotel has offered no explanation for its non-return. In *Phoenix Cotton Oil Co.* v. *Pettus,* 134 Ark. 76, 203 S. W. 19 we held that the bailee for hire in exclusive possession of the property must explain its loss before the bailor is required to show the

bailee's negligence. Since no explanation of non-return is contained in the agreed statement, therefore the bailee stands liable on the evidence before us. The bailee for hire is liable for the value of the property, and that value here is agreed to be $300, which is the amount sued for.

IV. The cross-appeal of the appellee is based on the language found on the claim check, as previously copied, and which reads in part: "In no event shall the hotel's liability exceed the sum of twenty-five dollars. . . . The person accepting this check agrees to the above conditions."

Appellee invokes the cases of *Mo. Pac. R. Co.* v. *Fuqua,* 150 Ark. 145, 233 S. W. 926, and *Mo. Pac. Trans. Co.* v. *Williams,* 207 Ark. 750, 182 S. W. 2d 762 as cases wherein we sustained somewhat similar language on a claim check as a valid limitation on the extent of liability. There is a big difference between the two cited cases and the case at bar. In each of the cited cases there was involved the liability of a carrier maintaining a checkroom for the public, and the carrier was under no obligation to maintain such a checkroom. Here there is involved the liability of a hotelkeeper maintaining a checkroom for his guests in order that the hotelkeeper—by such checkroom—might be released from the common law liability of absolute insurer. Statutes in derogation of the common law are to be strictly construed. (See cases in West's Arkansas Digest, "Statutes," § 239. See, also, 50 Am. Juris. 425.) We would be reading into the statute (§ 7204, Pope's Digest) something that is not there if we permitted the hotelkeeper by language on the claim check to limit the extent of his liability concerning property especially entrusted to his care, and concerning which property he would be an absolute insurer but for the statute, and concerning which property the Legislature did not provide for the limiting of the extent of the liability of the hotelkeeper.

There is the significant fact that the Legislature prescribed in § 7202 a limit of liability; and in § 7203 allowed the hotelkeeper and the guest to make special contracts concerning the articles in § 7202; and in § 7205 the Legis-

lature limited the extent of liability. But in § 7204 the Legislature did not limit the extent of liability or provide that the hotelkeeper might limit the extent of his liability for property coming under the purview of that section. The rule of "*expressio unius est exclusio alterius*" (the expression of one is the exclusion of the other) applies to this statute. See *Cook* v. *Ark.-Mo. Power Corp.*, 209 Ark. 750, 192 S. W. 2d 210, and see, also, 50 Am. Juris. 238, and 59 C. J. 984. The failure of the Legislature to limit liability in § 7204 or to provide that the hotelkeeper and the guest might agree to limitation of valuation liability in § 7204 signifies a legislative intent that, as to property falling within the purview of § 7204, the hotelkeeper should be liable for the actual value of the property as a bailee for hire.

In short, the Fuqua case and the Williams case refer only to carriers maintaining checkrooms for the convenience of the public, and cannot be extended to hotelkeepers who are covered by Act 217 of 1913. The case of *Huckins Hotels* v. *Smith,* 151 Ark. 167, 235 S. W. 787 affords no support to the appellee here: for in the reported case the claimant was not a guest, while here the guest relationship existed between the appellant and the appellee.

There are many cases from other jurisdictions construing statutes of somewhat similar language aimed at limiting the common law liability of hotelkeepers. An exhaustive review of these cases would serve no useful purpose; because, as stated in 28 Am. Juris. 592: "Although statutes providing for the limitation of an innkeeper's common law liability for the property of his guests usually specify the classes of property to which they apply, the cases construing such statutes are not in harmony."

We conclude that the judgment of the Circuit Court should be reversed, and the cause remanded to the Circuit Court with directions to render judgment for the appellant for $300 and interest and costs. It is so ordered.

4-7928 195 S. W. 2d 59

Opinion delivered June 17, 1946.

[redacted]

Claude B. Brinton, for appellant.

E. D. McGowan, for appellee.

MINOR W. MILLWEE, Justice. Appellant, J. E. Settles, a native of Jonesboro, Arkansas, enlisted in the

U. S. Navy in September, 1925. In September, 1935, he married appellee in New London, Connecticut, and the parties lived together until June or July, 1945. On October 9, 1945, appellant filed suit for divorce in the Chancery Court of Craighead county on the statutory ground that appellee had offered such indignities to his person as to render his condition in life intolerable.

Appellee filed an answer on November 7, 1945, in which she specifically denied the charge of indignities and alleged that she had been a faithful and deserving wife, and asked that the complaint be dismissed. The cause was submitted to the court upon the pleadings and the depositions of appellant, his mother, and appellee. This appeal is prosecuted from a decree dismissing the action because of the insufficiency of the evidence to sustain the allegations of the complaint.

Appellant testified that his wife "continually embarrassed me with my friends" during their married life; that the first occasion was in the home of her uncle in Weymouth, Massachusetts, shortly after their marriage when "my wife embarrassed me so in front of her relations that we argued and I felt obliged to leave the house." He also testified that appellee was jealous and "continually, without cause, accused me of being untrue to her with other women." Three instances were mentioned by appellant as occurring in the presence of their mutual friends in Tacoma, Washington, in March, June and July, 1945, in which he says "my wife accused me of infidelity."

The mother of appellant testified that the parties had visited in her home at Jonesboro on four different occasions during their married life for a day or two at a time. She testified that appellee was fractious toward everybody and more particularly toward appellant. "If he wanted to go anywhere, she never wanted him to go. She just wasn't satisfied in other words—just didn't want him to do anything." She also testified that appellee was always accusing appellant of going with other women.

Appellee testified that she last saw appellant on June 15, 1945, at Jonesboro, Arkansas, where they were visiting. They were then residing in Tacoma, Washington, where appellant was stationed, but appellant was given a new assignment and, at his suggestion, she went to the home of her parents in New London, Connecticut. There was no separation because of any trouble between the parties at that time. Appellant had been trying to get her to divorce him for more than a year, but was never serious about it until he got into trouble with another woman at Tacoma, Washington. He told her all about the trouble, but she was willing to forget and forgive and did not want a divorce. She stoutly denied that she had argued with appellant or accused him of infidelity before their friends in Washington. She also testified that their married life was pleasant and congenial prior to the difficulty with the other woman.

Appellee introduced five letters written to her by appellant from his ship between the dates of July 12, 1945, and September 30, 1945. In these letters, appellant confesses his unfaithfulness to appellee and his ardent love for another. Appellee is repeatedly implored to divorce him and is held entirely blameless for appellant's own state of unhappiness. Appellee testified that she ignored the requests in these letters that she seek a divorce upon the advice of a navy chaplain.

Each party charged the other with the practice of contraception. While appellant testified that appellee indulged in the practice without his consent, there is little to indicate that he wanted children. Appellee testified positively that he did not want children and never wanted to discuss such personal affairs.

In the case of *Bell* v. *Bell,* 105 Ark. 194, 150 S. W. 1031, this court said: "It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complain-

ing party so intolerable as to justify the annulment of the marriage bonds. This determination must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt and indignities complained of. . . . The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce." To the same effect, see *Dunn* v. *Dunn,* 114 Ark. 516, 170 S. W. 234; *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1; and *Walldren* v. *Walldren,* 187 Ark. 1077, 63 S. W. 2d 845.

This court has also repeatedly held that, to sustain the charge of indignities there must be evidence from which settled hate and estrangement on the part of the offending spouse may be deduced. In the case of *Welborn* v. *Welborn,* 189 Ark. 1063, 76 S. W. 2d 98, it was said: "Moreover, appellee's testimony, giving it its most charitable view, relates no facts or circumstances establishing indignities under our statute. True, he testified to certain 'fussing,' 'blow-ups,' etc., and other conclusions, but he does not undertake to detail the facts which superinduced these conclusions. Not only this, but appellee's testimony falls far short of the rule announced by us many, many times, to the effect that to entitle a complaining spouse to a divorce for indignities, the conduct of the offending spouse must be of such nature as to connote settled hate and a plain manifestation of alienation and estrangement, and must have been followed habitually and continually through such period of time as to show settled hate and malevolence. *Rose* v. *Rose,* 9 Ark. 507; *Preas* v. *Preas,* 188 Ark. 854, 67 S. W. 2d 1013."

The testimony offered by appellant in support of his general charge of indignities does not measure up to that standard of sufficiency which is required by our cases on the subject. The statements of appellant that appellee embarrassed him with his friends and accused him of in-

fidelity are in the nature of conclusions. There is no corroboration of his testimony relating to the three instances in which he says his wife accused him of infidelity in the state of Washington. Appellee flatly denies that she made such accusations. However, if such charges were made, the letters of appellant tend to show that the accusations were neither false nor groundless. In Schouler Divorce Manual by Warren, § 104, p. 133, it is said: "To constitute indignities, accusations of infidelity must not only be false, but must have been made without foundation and with the intent to wound, and when made in good faith and on the basis of doubts and suspicions reasonably born of appearances, they are not to be treated as indignities." This principle was approved by this court in the case of *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86.

Appellant testified in rebuttal that he made false statements concerning his own misconduct in his letters because of an agreement with appellee that she would use the letters to obtain a divorce from him. It is insisted that the letters should not be considered under these circumstances and the case of *Marshak* v. *Marshak,* 115 Ark. 51, 170 S. W. 567, L. R. A. 1915E 161, Ann. Cas. 1916E 206, is relied upon to sustain this contention. In that case the parties wrote letters to each other after institution of the divorce suit for the apparent purpose of each obtaining advantage over the other in the trial of the case, and the court said that it did not regard the letters of any importance.

The letters involved in the instant case were all written prior to institution of the suit for divorce and for the avowed purpose, now advanced by appellant, of perpetrating a fraud upon some court. If we accept appellant's testimony concerning the admissions made in his letters as true, this certainly does not tend to improve his standing in a court of equity. As this court said in *Meffert* v. *Meffert, supra*: "It is true of divorce cases, as in others, that a party must come into a court of equity with clean hands. Divorce laws are made to give relief to the innocent and not to the guilty."

Appellant also argues that appellee unintentionally corroborated the testimony of appellant when she testified that appellant had caused her much worry wondering where he was, what he was doing and whether he had told her the truth. While we do not construe this testimony as an admission of the truth of the charge of indignities made by appellant, this court has held that divorces are not granted upon the uncorroborated testimony of the party and the adverse party's admissions of the truth of the matters alleged as grounds therefor. *Rie* v. *Rie,* 34 Ark. 37; *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098; *Chappell* v. *Chappell,* 83 Ark. 533, 104 S. W. 203; *Shelton* v. *Shelton,* 102 Ark. 54, 143 S. W. 110.

In *Sutherland* v. *Sutherland,* 188 Ark. 955, 68 S. W. 2d 1022, this court, in an opinion by Chief Justice JOHNSON, said: "It should be distinctly kept in mind that marriage vows are solemnly assumed and should be sacredly kept. The interest of society demands that the bonds of wedlock should not be severed, except upon grounds prescribed by statute and established by testimony. One, two, or three trivial instances of petulance are entirely insufficient to establish indignities as defined by our statute.*"

The burden was upon appellant to prove the charge of indignities and to show that the conduct of appellee toward him had been such as to render his condition in life intolerable. The evidence adduced by appellant in an attempt to discharge this burden fails to establish that there was any condition of enduring alienation, estrangement or settled hate on the part of the appellee toward the appellant. The chancellor correctly so held, and the decree is accordingly affirmed.

* Pope's Dig., § 4381.

Opinion delivered June 17, 1946.

Shaver, Stewart & Jones, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

McHANEY, Justice. Appellant was charged by indictment with the crime of assault with intent to kill one Fred McGlothlin by shooting him with a gun. He was tried and convicted of aggravated assault, and his pun-

ishment was fixed at a fine of $500 and 60 days imprisonment in the county jail.

The assignments of error argued for a reversal of the judgment relate to the giving of certain instructions on the court's own motion, the modification and giving as modified instruction No. 10 requested by appellant, and the introduction of certain testimony over his objection and exception.

At the conclusion of all the testimony in the case, the court gave 15 instructions to the jury, to which there was no specific objection and no exception. After all the 15 instructions were given appellant made this objection and exception: "The defendant at this time objects generally to the instructions given by the court and excepts and asks that his exception be noted of record, which is accordingly done." Assuming that this objection was presented to and ruled upon by the court, which does not so appear, still it is an objection to the instructions *en masse* and if any one of them is good, the objection fails to present any error for review as to the others. *Ruffin* v. *State,* 207 Ark. 672, 182 S. W. 2d 673. Moreover, we have carefully examined all the instructions and find that they fully and fairly present the law on the charge of assault to kill and aggravated assault.

Appellant also urges error of the court in an instruction given to the jury after the argument of counsel, relating to the form of the verdict. The court told the jury to "first consider whether or not" appellant is guilty of assault with intent to kill, and set out a form of verdict if they so found him guilty with the limits of punishment they could impose. The court then charged: "If all of you cannot agree upon that verdict (assault to kill), then you will next consider whether or not he is guilty of aggravated assault," and set out a form of verdict with punishment limits. He then said: "If you find him guilty of aggravated assault and cannot agree upon a punishment, you may leave it to the court to fix his punishment. If you find the defendant not guilty on either charge, then you will say by your verdict, 'We, the

jury, find the defendant not guilty.' " Appellant objected to that part of the above instruction which says: "If you find him guilty of aggravated assault and cannot agree upon a punishment, you may leave it to the court to fix his punishment," which was overruled and an exception was taken. Section 4070 of Pope's Digest provides: "When a jury find a verdict of guilty and fail to agree on the punishment to be inflicted . . . the court shall assess and declare the punishment and render judgment accordingly." The objection seems to be that the court should not have instructed them in advance of a disagreement as to the punishment, that they could leave it to the court. We think this objection is not well taken. In the recent case of *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304, appellant there took the opposite view, that the court should have so instructed the jury before they retired, and not after they had disagreed as to the punishment. While the question was not there definitely decided the court said: "Since the case is to be reversed on other grounds, we deem it unnecessary to determine that question, but it may be well to observe in passing that in those cases where it appears that such an instruction is or may become necessary or proper, it is much the better practice for the court to give it before the jury first retires to consider its verdict." There are many cases holding that verdicts of guilty may be returned in which the punishment is left to the court. See *Link* v. *State,* 191 Ark. 304, 86 S. W. 2d 15; *Harrison* v. *State,* 200 Ark. 257, 138 S. W. 2d 785, and cases there cited. It appears, therefore, that the trial court literally followed what we said the better practice is.

Error is also urged in the modification and giving as modified appellant's requested instruction No. 10, in which the jury was told that if they believed from the evidence that, if death had resulted from the shooting, the appellant would have been guilty of only manslaughter, then he would not be guilty of assault to kill and they should acquit him of that charge. The court added to the request the words: "and consider his guilt or innocence of the crime of aggravated assault." We think this

modification was not error, but proper. The charge of aggravated assault is included in a charge of assault with intent to kill. *Quinn et al.* v. *State,* 114 Ark. 201, 169 S. W. 791; *Alford* v. *State,* 110 Ark. 300, 161 S. W. 497. So, if appellant was found not guilty of the higher offense of assault with intent to kill, it was then the duty of the jury to consider his guilt or innocence of the lesser offense of aggravated assault. This was the effect of instruction 15 given on the court's own motion.

It is finally urged as error the admission in evidence of the record of the District Court of McCurtain county, Oklahoma, showing that a decree of divorce had been granted appellant from his wife, Irene Knighten, in that court on January 24, 1945, prior to the shooting of McGlothlin on December 28, 1945, and the substitution of a certified copy of said decree for the record itself, this on the ground that the record had not been properly authenticated under the Acts of Congress for admission in evidence as a foreign judgment in the courts of this state. Said decree of divorce was canceled and set aside by order of said Oklahoma court on January 9, 1946. The same facts were testified to by appellant and his wife, and we cannot see how the admission of certified copies of the divorce decree and that cancelling it was in any way prejudicial to appellant.

No error appearing, the judgment is affirmed.

SMITH *v.* SMITH.

4-7894 195 S. W. 2d 45

Opinion delivered June 17, 1946.

Ben E. McFerrin, for appellant.

Len Jones, for appellee.

GRIFFIN SMITH, Chief Justice. D. L. Smith died in September, 1931. Surviving sons were W. L., Jesse, Benton, and Edward. There were two living daughters; Clemmy Morris and Bertie Jackson. C. L. Smith, who is a party to this litigation by representation, is the minor son of Benton Smith and his wife, Laura. Laura also appears as one of the appellees.

It is conceded that when D. L. Smith died he owned two eighty-acre tracts, two forty-acre tracts, a more productive area containing 110 acres, and a third interest in seventy-eight acres. D. L. and Benton were operating a store. Buildings and lot occupied four and a half acres. Appellant W. L. Smith, who was plaintiff below, brought suit in February, 1945. There were subsequent amendments and interventions.

Effect of the procedure was to demand an accounting, and partition. This in part was decreed, but the Court sustained contentions by Benton, his wife, and their son, that land had been acquired by them through tax pur-

chases. The defendants (appellees here) agreed that as to the four-and-a-half-acre tract, one hundred and twenty acres, and the seventy-eight acres heretofore mentioned, no interest was claimed except through inheritance. The stipulation's concluding paragraph is: "The only question[s] [relate] to the deeds to Mrs. [Laura] Smith (80 acres); C. L. Smith, (40 acres) and Benton Smith (110 acres)."

While testimony is far from satisfactory—due in part to the fact that appellant undertook to prove certain facts by some of the appellees—none of the statements by interested litigants can be regarded as uncontradicted. Benton contends that he acquired 110 acres through purchase. This land (one description covering 80 acres, the other 30) was offered for sale by the Collector in June, 1931. It was "struck off" for $12.46, ostensibly to a third party. The certificate so acquired was assigned to Smith February 11, 1932. July 15, 1933, the Clerk issued a deed to Smith.

Eighty acres forfeited in 1932. The State's deed of February 11, 1944, was executed in favor of Mrs. [Laura] B. Smith, for a consideration of $129.

Forty acres delinquent for 1930 taxes went to G. L. Smith under the State deed of March 12, 1945, for $65.

Benton testified that when D. L. Smith died each of them (D. L. and Benton) owned a half interest in the stock of merchandise, "and in the mercantile business." Benton explained that there were debts, but he was vague regarding them, and does not appear to have made any accounting. When asked on cross-examination if his father did not own forty-three head of cattle, the answer was, "I don't know." In response to the question, "Don't you think you could have raised $12.46 to redeem [the 110 acres of land]," the witness said, "I didn't feel like it was to my interest."

When the decree went largely against appellant he filed what was designated a motion for a new trial. It contained affidavits and a tender of records not previously offered.

As Mr. Justice Wood said in *Bradley* v. *Holliman,* 134 Ark. 588, 202 S. W. 469, where a [chancery] cause is heard upon testimony *ore tenus,* and taken down in shorthand by a stenographer, and on the Court's direction is reduced to writing, [statements thus made become] a part of the record and [are to be] treated as depositions taken in the regular way. In such cases motion for a new trial and bill of exceptions are not necessary "to present to this Court the issues of fact that were passed upon by the trial court." *LeMay* v. *Johnson,* 35 Ark. 225; *Western Coal & Mining Co.* v. *Hollenbeck,* 72 Ark. 44, 80 S. W. 145.

Although appellant's proffered proof was not appropriate for the purpose expressed, it might have been treated as a motion to reopen the cause and to take additional testimony. Ordinarily this is within the Court's discretion. We think, however, that in the case at bar Benton, Laura, and G. L. Smith were too intimately identified with the D. L. Smith estate to make personal purchases in the manner shown. Redemption by one tenant in common or one of several cotenants inures to the benefit of all, in the absence of special circumstances or waiver. Effect of *Spikes* v. *Beloate,* 206 Ark. 344, 175 S. W. 2d 579, is that a tenant in common cannot strengthen his interest by bidding in the entire property at a tax sale, or by purchasing it from a stranger who has bought at such sale. These acts amount to no more than redemption. This confers no right upon the purchaser except to justify a demand that contribution be made by other tenants.

The rule is that one in possession enjoying the rents and profits, cannot acquire title by permitting property to sell for taxes and then buying at the sale. *Zimmerman* v. *Franklin County Savings Bank & Trust Co.,* 194 Ark. 554, 108 S. W. 2d 1074; *Wright* v. *Davis,* 195 Ark. 292, 111 S. W. 2d 565; *Smith* v. *Davis,* 200 Ark. 147, 179 S. W. 2d 657. There are, of course, many other cases to the same effect.

In respect of the disputed land the attempts to purchase were ineffective. The Court should have decreed cancellation of the questioned deeds, allowing *pro rata*

reimbursement of the money necessarily expended in the common cause. There was sufficient evidence to sustain the Chancellor's holding that the property was not susceptible of division in kind, hence a sale is necessary.

Reversed, with directions to enter a decree not inconsistent with this opinion. All costs will be apportioned against the parties according to their interests.

RIDDLE *v.* STATE.

4410 196 S. W. 2d 226

Opinion delivered June 24, 1946.

Rehearing denied September 30, 1946.

Willis & Walker, for appellant.

Guy E. Williams, Attorney General and *Earl N. Williams,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Ben Riddle, was charged by information filed by the prosecuting attorney with the crime of murder in the first degree for the alleged killing of Walter Ashmead on November 20,

1945. The jury found appellant guilty of murder in the second degree and fixed his punishment at 10 years in the state penitentiary.

For reversal of the judgment, appellant first challenges the sufficiency of the evidence to support the verdict.

The appellant and deceased were rural neighbors and had lived within two miles of each other in a rugged and sparsely settled section of Marion county for eleven years prior to the killing. Ashmead was killed in the late afternoon of November 20, 1945, while walking home from work at a sawmill located about two miles southwest of his home. He was shot in the back with a shotgun loaded with buckshot when he had reached a point about a quarter of a mile from his residence.

According to the testimony of the wife of deceased, she heard a gun fire about 5:30 p. m. In the words of witness: "We heard the gun fire and then he hollered and me and the children started to him. When I got there to where he was at I asked him what was the matter and he told me that he was shot, that Ben Riddle had shot him. He had got him this time. He was hid in that garden in the patch behind that tree and bunch of sprouts there and had shot him, and for me to look and I would find his tracks."

Mrs. Ashmead further testified that she immediately sent two of the children to the home of John King, a neighbor, for help. Her husband told her that he saw appellant behind a tree in some sprouts, and showed her where appellant ran off after the shot was fired. Later that night, she, in the company of an officer, examined the place pointed out to her by her husband by the tree and the vegetation was mashed and trampled down at this point. It was not dark when the gun fired and she could see her husband lying in the path for a considerable distance before she reached him. When John King, his three sons, and Arley Keeter arrived, her husband was getting weak and the party carried him to the house where he died about an hour later. She told the Kings and

Keeter that her husband had been shot, but did not tell them that appellant did the shooting.

The fourteen year old son and eleven year old daughter of deceased testified that, when they returned with the Kings, their father told them that the defendant shot him and that he saw the defendant in the garden behind the tree.

There was evidence of considerable trouble between appellant and deceased which began about four years prior to the killing, when a disagreement arose over the ownership of some hogs. In the spring of 1945, appellant suspected Ashmead of planting dynamite powder and dynamite wrappers in appellant's pasture for the purpose of killing his cattle, it being shown that cattle would eat the wrappers which were poisonous. At the request of appellant, the sheriff searched the premises of Ashmead's father where appellant suspected the dynamite had been secured, but nothing was found and further investigation failed to connect Ashmead with the planting of the dynamite wrappers.

Ashmead worked in the state of Washington for a time, but returned to his home in Marion county in August, 1945. Appellant made two or three trips to the sheriff and prosecuting attorney in the latter part of August complaining that someone was shooting around his house at night and that he suspected Ashmead. The sheriff refused to arrest Ashmead. On September 5, 1945, appellant procured the issuance of an insanity warrant for the deceased. It appears that the officers concluded there was no basis for the insanity charge, and what was designated as a "hearing" developed into a meeting of 12 or 15 friends and neighbors who had been summoned by the sheriff in an effort to make peace between the two men; and avoid serious trouble between them. According to the testimony of the sheriff, the parties "agreed to try to get along," as a result of this meeting.

There was also evidence that appellant accused Ashmead of poisoning his spring a day or two before the hear-

ing. He requested the sheriff to get Ashmead out of the community and paid an attorney a fee to get the state patrolman to persuade Ashmead to move. After Ashmead returned from Washington, appellant was seen by several persons at different places in the vicinity with a rifle. A bus driver testified that he saw appellant with the gun about a quarter of a mile from Ashmead's house about 5:30 p. m. on the day before Ashmead was killed.

Ashmead had been employed in the sawmill four weeks prior to his death. He usually rode to work in a truck, but was forced to walk to work on Monday and Tuesday of the week prior to the killing when the truck was not available. There was evidence that it took deceased about 30 minutes to walk from the mill to his home. Photographs were introduced without objection which give a clear picture of the scene of the killing. The path used by deceased follows the side of a rail fence until it reaches the corner of the fence within a few feet of the tree where the deceased stated that he saw appellant. Deceased was shot after he had reached a point about 40 or 50 feet from the corner of the rail fence. The only obstruction of the view revealed by the photographs at this point is the low rail fence and some sprouts growing near the tree where the assailant is alleged to have stood.

There was ample evidence that the statements of deceased were made under consciousness of impending death. We think the dying declarations of deceased together with the surrounding circumstances as set out above, when considered in the light most favorable to the state, were legally sufficient to warrant the jury in find- appellant guilty of the charge.

It is contended, however, that the trial court erred in the admission of the dying declarations. It may first be pointed out that appellant made no objection to the testimony of Mrs. Ashmead in which she related the dying statements of her husband. This court has held, even in cases where the defendant has been convicted of a capital offense, that objections must be made to the proceedings in the trial court in order to obtain a review of the alleged

errors in this court. *Morris* v. *State,* 142 Ark. 297. 219 S. W. 10; *Snead* v. *State,* 159 Ark. 65, 255 S. W. 895; *Sullivan* v. *State,* 161 Ark. 19, 257 S. W. 58; *Howell* v. *State,* 180 Ark. 241, 22 S. W. 2d 47.

It is earnestly insisted that it was dark and that, since deceased was shot in the back from a distance of 20 yards, it was physically impossible for him to have seen or recognized his assailant. In support of this contention, appellant relies on the case of *Jones* v. *State,* 52 Ark. 345, 12 S. W. 704. In that case deceased was shot at night by his fireside by someone who fired through a crack from the outside, and it was held that a declaration by deceased that a person other than defendant shot him was inadmissible, because a mere opinion, it having been a physical impossibility for the deceased to have seen who shot him. The court there said: "A mere expression of opinion by the dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration is mere opinion appears from the statement itself, or from other undisputed evidence showing that it was impossible for the declarant to have known the fact stated. If, upon any view of the evidence it is possible for the declarant to know the truth of what he states, his declarations, being otherwise competent, should be received and considered by the jury in the light of all the evidence."

It is also well settled that a dying declaration is only admissible to the extent that the deceased could have testified had he been alive at the time of the trial, and such declaration should not contain matter which would be excluded if the declarant were a witness. *Walker* v. *State,* 39 Ark. 221; *Rhea* v. *State,* 104 Ark. 162, 147 S. W. 463; Underhill's Criminal Evidence, 4th Ed. § 217. When tested by these rules, most of the dying statements attributed to Ashmead in the case at bar would have been competent testimony had he been alive, and on the stand, as a witness. Nor can we say, from all the circumstances, that it was physically impossible for the deceased to have seen or known who shot him. The testimony of Mrs. Ashmead to the effect that it was not dark when she reached

her husband is to some extent corroborated by the testimony of John King, a witness for appellant, who stated that it was "beginning to get a little dark" when the children reported the tragedy to him some 20 or 30 minutes later.

Nor does the fact that deceased was shot in the back necessarily preclude the admission of the dying declaration when considered in connection with the other facts in the case. As was stated by the Alabama court in *Marshall* v. *State,* 219 Ala. 83, 121 So. 72, 63 A. L. R. 560, "One may not see another shoot him in the back, and yet may look so quickly that what he sees justifies him in swearing as a fact that a certain person shot him in the back. This must be carefully distinguished from instances where he could not have known, but only expressed a surmise based upon suspicion."

The trial court did not err in admitting the statements attributed to Ashmead as dying declarations. After such statements are admitted, it is then the province of the jury to determine the circumstances under which they were made and the weight and credit that should be given to them. *Evans* v. *State,* 58 Ark. 47, 22 S. W. 1026; *Burns* v. *State,* 155 Ark. 1, 243 S. W. 963. The Kings and Arley Keeter testified on behalf of appellant to statements made by deceased which were similar to some of those testified to by Mrs. Ashmead, but none of these witnesses heard deceased say that appellant shot him, nor did they hear deceased make such statement to the deceased's two children. But these differences in the testimony of the witnesses were matters affecting the credibility to be given them by the jury as evidence in the case. *Gray* v. *State,* 185 Ark. 515, 48 S. W. 2d 224.

It is finally insisted that the trial court erred in the admission of the testimony of W. M. Markel and in failing to admonish the jury not to consider the testimony as well as the remarks of counsel for the state in connection therewith. Markel operated the sawmill where Ashmead was employed at the time of his death and testified that deceased had been working at the mill four weeks and worked 8 hours on the day he was killed. In answer

to a question by the prosecuting attorney as to his furnishing a truck for conveyance of the employees to and from work, Markel testified that the truck broke down and deceased walked to work on Monday and Tuesday of the week preceding the killing and that the truck broke down again, resulting in deceased being forced to walk to and from work the following week when he was killed. In the same answer to the question of the prosecuting attorney, Markel also testified that deceased told him that he could walk home in 20 or 30 minutes. Counsel for appellant objected to the testimony "because there is no connection with the issues in this case," and the objection was overruled. Upon cross-examination of the witness it developed that he was not present when deceased quit work on the day of his death, and counsel for appellant requested that all the testimony of the witness be excluded on the ground that there was no proof that appellant knew anything about the operation of the truck. After a colloquy between opposing counsel, the following ruling was made: "The Court: The court will let it go to the jury, and unless it is connected up, then the jury will be admonished not to consider it: Mr. Willis: All right." The record is silent as to any further ruling, or request for a ruling by the court on appellant's request for total exclusion of the testimony of Markel.

It was clearly competent for Markel to testify that Ashmead walked to and from work on the dates mentioned. This was a circumstance to be considered by the jury in connection with all the other facts and circumstances in evidence in determining whether appellant knew, or had an opportunity to know, the activities of the deceased. Markel's statement that deceased told him the time required to walk home was hearsay and incompetent, but no objection was made to the testimony on this ground. If such objection had been made, the court would doubtless have ruled it out. It also appears that other testimony had been admitted without objection to establish the time required for deceased to make the trip; therefore, no prejudice resulted to appellant. Since a part of the testimony was competent, it would have been

improper for the court to grant the request of appellant to exclude all the testimony of the witness. *Smith* v. *State,* 107 Ark. 494, 155 S. W. 508.

In the colloquy that took place between opposing counsel when appellant requested the court to exclude the testimony of Markel, special counsel for the state told the court that the testimony was offered on the theory that appellant knew Ashmead was using the route to his home; that appellant was familiar with the country, had been up there the day before with a gun and, profiting by his knowledge, had carefully laid and executed the crime. It is now insisted that this statement was highly prejudicial and that the trial court erred in failing to admonish the jury not to consider it. A careful examination of the record fails to disclose an objection by appellant to the statement made by special counsel, or a request for the court to admonish the jury not to consider such statement. The objections were made to the testimony of Markel, and not to the statement by counsel for the state of the theory upon which such testimony was offered. Since the objection was not made in the trial court, it may not be raised for the first time on appeal. Then too, there was evidence in the record from which the jury might have found that appellant knew that Ashmead was walking to and from his work. There was at least sufficient evidence to permit counsel for the state to present their theory of the case to the jury on this issue, and no error would have resulted from an argument to the jury based on the theory thus advanced by the state.

We find no prejudicial error in the record, and the judgment is affirmed.

KENEIPP *v.* PHILLIPS.

4-7932 196 S. W. 2d 220

Opinion delivered June 24, 1946.

Rehearing denied September 30, 1946.

Paul Shafer, Lee Seamster and *Karl Greenhaw,* for appellant.

G. T. Sullins and *Rex W. Perkins,* for appellee.

HOLT, J. The custody of James Ronald Keneipp, 7 years of age, the son of appellant, James V. Keneipp, and appellee, Leota G. Phillips, the former wife of James V. Keneipp, is involved here. Appellants, James V. Keneipp and Mrs. O. M. Dennison, are brother and sister.

September 7, 1944, appellee, Mrs. Phillips, then Mrs. Keneipp, secured a decree of divorce in Indiana from appellant, James V. Keneipp, and was awarded the custody of Ronnie, the little boy here involved. Thereafter, on September 15, 1944, Mrs. Keneipp went to Fayetteville, Arkansas, and married her present husband, A. R. Phillips, and has since resided with her husband in Fayetteville. In August, 1945, appellee brought her son to Fayetteville where he has since continued to reside with her and his stepfather.

Thereafter, on September 11, 1945, appellant, father of Ronnie, applied in the Indiana court that had rendered the divorce decree on September 7, 1944, for a modification of that decree as to the custody of Ronnie, and on September 26, 1945, an order was entered by the Indiana court modifying its former decree as to custody and awarded the custody of Ronnie to his aunt, appellant, Mrs. O. M. Dennison, as requested by the father. In this suit for modification there was no personal service on appellee in Indiana.

As has been indicated, appellee and her son, Ronnie, were living in Fayetteville, Arkansas, and residents of Arkansas, at the time the application, *supra,* for modification was made, and at the time it was granted, by the Indiana court.

November 14, 1945, appellants, father and aunt of Ronnie, as plaintiffs, filed the present suit in Washington Chancery Court in which they sought to have the custody of the child awarded to Mrs. Dennison, the aunt. Upon a hearing, the court denied appellants' prayer for custody of the child and found that the mother, appellee, "is the proper and suitable person to have the care, custody and control of said child; that the complaint of the plaintiffs (appellants) is without equity and should be dismissed."

From the decree comes this appeal.

Appellants say that the trial court erred in awarding the child's custody to appellee "(1) In failing to give full faith and credit to the modified decree of the Superior Court of Vigo county, Indiana, there being no allegation or proof of changed circumstances or conditions arising since September 26, 1945, the date of the modified decree to warrant a change in custody of said child. That said modified decree was *res judicata,* . . . (2) That the preponderance of the evidence showed that the present and future welfare and interest of said minor child would be best served by awarding his custody to appellant, Mrs. O. M. Dennison, instead of the child's mother, the appellee herein."

(1) In answering appellants' first contention, it becomes necessary to determine the extraterritorial effect of the divorce decree of the Indiana court in favor of appellee on September 7, 1944, in which she was awarded the custody of the child, and the effect that an Arkansas court should give to the modified decree of September 26, 1945, in which the appellant, Mrs. Dennison, the aunt, was awarded its custody. The rule is well established here and elsewhere that a foreign decree, such as the September 7th decree of the Indiana court, *supra,* in a child custody proceeding is *res judicata* as to all matters and issues at the time of its rendition, but not as to facts and changed conditions affecting the child's welfare that may arise subsequent thereto.

In *Tucker* v. *Turner,* 195 Ark. 632, 113 S. W. 2d 508, this court, quoting with approval from 15 R. C. L., p. 940,

§ 417, said: "A judgment of a court of one state awarding the custody of minor children in a divorce proceeding is not *res judicata* in a proceeding before a court of another state, except as to facts and conditions before the court upon the rendition of the foreign decree. As to facts and conditions arising subsequently thereto, it has no controlling force, and the courts of other states are not bound thereby."

As to the effect to be given the modified decree, *supra,* procured by appellant, husband, while his son and former wife were residents of Fayetteville, Arkansas, the general rule, as well as that declared here by this court, is that it has no extraterritorial effect beyond the boundaries of Indiana where it was rendered, and that when the domicile of a child is changed and it becomes a citizen of another state, as in the present case, such child is no longer subject to the control of the courts of the first state. In the *Tucker* v. *Turner* case, *supra,* this court announced the rule, continuing the quotation from § 417 Ruling Case Law, *supra*: "Nor is a decree of a court of one state awarding the custody of a child binding upon the courts of another state under the full faith and credit clause of the federal constitution after the child had become domiciled in the latter state. Such a decree as to a child has no extraterritorial effect beyond the boundaries of the state where it is rendered, and the courts of the second state will not remand the child to the jurisdiction of another state, especially where it is against the true interest of the child. The reason for this rule is found in the fact that children are the wards of the court and the right of the state rises superior to that of the parents. Therefore, when a child changes his domicile and becomes a citizen of a second state, he is no longer subject to the control of the courts of the first state."

(2) We proceed, therefore, to consider whether, on the record presented, there have been such changed circumstances and conditions since the Indiana decree of September 7, 1944, to warrant change of custody from the appellee, mother, to appellant, Mrs. Dennison, the child's aunt.

At the outset, it may be observed that the appellant, father, has never sought, and does not now seek, the custody of his child. This is a contest between the real mother and the child's aunt.

In custody cases such as is presented here, of primary consideration is the well being and best interest of the child involved. "The infant child is a silent party to this litigation and her interests and rights cannot be ignored. Infant children are regarded as the wards of the courts, and the good of the children is always the chief thing to be considered by the judge in determining their care and custody." *Tucker* v. *Turner, supra.*

"As between the parent and grandparent, or anyone else, the law prefers the former unless the parent is incompetent or unfit, because of his or her poverty or depravity, to provide the physical comforts and moral training essential to the life and well-being of the child." *Baker* v. *Durham,* 95 Ark. 355, 129 S. W. 789. See, also, *Miller* v. *Miller,* 208 Ark. 1058, 189 S. W. 2d 371.

"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,* 209 Ark. 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,* 189 Ark. 917, 75 S. W. 2d 817, and *Seigfreid* v. *Seigfreid,* (Mo. App.), 187 S. W. 2d 768." *Blake* v. *Smith,* 209 Ark. 304. 190 S. W. 2d 455.

On a trial here *de novo,* the rule is that unless we can say from all the evidence presented that the findings of the trial court are against the preponderance thereof, we must affirm.

The evidence discloses that following the birth of this child in 1938, the father did not furnish support for the

mother and child and that it became necessary for her to seek work, which she proceeded to do, until she secured a divorce from her husband and the custody of her son September 7, 1944. In that decree, the Indiana court found that the plaintiff (appellee) "is a fit and proper person to have the care and custody of the minor child, James Ronald, age six years." Since that decree, both of Ronnie's parents have remarried.

Appellant, Mrs. Dennison, the child's aunt, lives with her husband, a man 56 years of age, on a farm in Illinois, just over the Indiana line, and with the child's grandmother, 80 years of age, who is very feeble. The farm house contains only three rooms. Mrs. Dennison and her husband are tenants and have no substantial property of their own. Mrs. Dennison's husband has a serious heart affliction and can do very little work. She works about five days a week and is away from home while at work. The appellee, mother, and the father of the child left it in the home of Mrs. Dennison and her husband for more than three years prior to the divorce decree of September 7, 1944, and they have become very much attached to it. The child received good care and attention and was sent to school and church. Mrs. Dennison testified that appellee, the mother, never promised or agreed to give the child to her, that in fact "we did not talk it over." During the time Ronnie was with his aunt, the mother made frequent visits to him, took him with her at various times for short intervals and helped in his support.

Since appellee's second marriage in Arkansas, she, Ronald and her husband live in a rented home. They own two restaurants, one in Fayetteville and the other in Prairie Grove. The husband owns a farm of 132 acres near Fayetteville, has leased an adjoining tract of 211 acres and deals extensively in livestock. They send the child to school regularly where he is making good progress. Appellee has not as yet started him to Sunday school and church for the reason,—so she says,—that her doctor advised that she keep the boy in the open air and sunshine as much as possible, and that she, her husband and the boy spend their Sundays on their farm where the

little boy can ride a pony and play with other children. The child's stepfather seems devoted to him and says he wants his custody, is willing to educate him, that he had taken out a policy of insurance for the boy before he had seen him.

Of some significance is the testimony of appellant, Keneipp, the child's father, bearing upon the wishes of this little boy. "A. Then I asked him if he wanted to go home with me; he hesitated and said, 'Well, I would like to go to school here, and come up there in the summer time.' I said, 'I do not think you could do that; you will have to be here all the time or up there all the time.' Q. So he said he would like to stay here in school? A. He did say that. Q. You do not want the baby boy? A. I want my sister to have him."

There is evidence that beer is being sold at the two cafes and that disturbances have occurred in the Fayetteville cafe, and that the child frequently eats there. Appellee testified that the family had practically all their breakfasts and evening meals at home. There was also testimony that appellee and her husband intended to discontinue the sale of beer when their present supply was exhausted.

We think it unnecessary to set out the testimony more in detail. It suffices to say that after carefully reviewing it all, we have reached the conclusion that the findings of the court below are not against the preponderance of the evidence. We fail to find evidence of such changed conditions and circumstances since the Indiana decree, *supra,* of September 7, 1944, as would warrant a change in the custody of this little boy from its real mother to its aunt.

Accordingly, the decree is affirmed.

OLIVER *v.* MARTIN.

4-7923 195 S. W. 2d 338

Opinion delivered June 24, 1946.

J. V. Spencer, for appellant.

T. O. Abbott, for appellee.

SMITH, J. In a written opinion the chancellor reviewed the testimony in this case, and stated that because of the irreconcilable conflicts, the truth might never be known. There are, however, certain facts established by the preponderance of the evidence which control the decision. These are as follows:

Lessie Oliver owned a lot in the city of El Dorado, which was certified to the state on December 18, 1944, on account of her failure to pay the general taxes due thereon. One Tom Greenwood obtained a deed from the State Land Commissioner, dated January 2, 1945, and on January 10, 1945, Greenwood conveyed this lot to W. J. Allen, and on the same day Allen conveyed the lot to Lessie Oliver for a cash consideration of $225. This purchase money was loaned to Lessie Oliver by Robert R. Martin, and as security therefor she gave Martin a warranty deed for the lot, dated January 10, 1945. It was agreed, but not recited in the deed, that this loan should be repaid as follows: $25 on February 1, 1945, and $15 on the first of each month thereafter until the debt was paid.

Lessie admitted signing the deed, but testified that she thought she was signing an agreement for Martin to straighten up the title. The chancellor did not credit that

testimony, nor do we. Allen, her grantor, testified that she proposed to pay him $225 for the deed, and that he executed the deed to her for that consideration, which was paid to him by Martin, whose testimony is to the same effect. The notary public who took the acknowledgment testified that he explained to Lessie, when he took her acknowledgment, that she was deeding away her property, which she was apparently doing, but she, no doubt, knew that the instrument she was signing, while in the form of a deed, was in fact a mortgage.

Payments were not made as agreed, and Martin brought this suit to foreclose the deed as a mortgage, which had been filed for record at 2:32 p.m., January 11, 1945, the day after its execution.

The complaint alleged that at the time of its filing there was of record a warranty deed from Lessie Oliver to Mary Almstedt, dated January 10, 1945, acknowledged before O. T. Brewster, a notary public, on January 11, 1945, and filed for record January 11, 1945, at 11:46 a.m. The complaint further alleged that this deed was a part of a scheme to defraud plaintiff and that Miss Almstedt paid nothing for her deed, and was not an innocent purchaser.

Miss Almstedt, who had been made a party defendant, filed an answer in which she alleged that the deed to her was executed pursuant to a prior agreement to buy the lot for the consideration of $200, part of which had been previously paid, and was completed by a payment of $50 made on January 10, 1945, and that she had no knowledge of the deed to Martin when she bought the land.

There is much conflicting testimony, which we will not review, but there was one circumstance which controlled the chancellor's decision, and which also controls our own. Miss Almstedt introduced the deed to herself, and asked and obtained permission to substitute a typewritten copy therefor, and the original of this deed is not in the record, and has not been presented for our inspection. We have before us a photostatic copy of the deed

from Lessie Oliver to Martin, and photostatic copies of certain writings bearing Lessie Oliver's genuine signature. The original of all of these writings were before the chancellor, and were inspected by him, and in his opinion he made the following comment upon them:

"In the first place, the signature on this deed dated the 10th day of January, 1945, signed by Lessie Oliver to Mary Almstedt, and acknowledged before O. T. Brewster, notary public, on the 11th day of January, 1945, is not the signature of Lessie Oliver. If it is, then she did not sign the other deed. One of these deeds is an absolute forgery, in my opinion. I think anyone who ever saw her handwriting will acknowledge that the signatures on the two deeds is different handwriting, and it is not even the same name. There is no question in my mind, looking at the two deeds, both dated January 10, 1945, one acknowledged before O. G. Smith and signed Lessie Oliver, that is the deed the Rev. Allen testified he saw her sign in the presence of O. G. Smith, and Smith testified he saw her sign it and took her acknowledgment. If Allen testified to the truth, and if Smith testified to the truth, and she really signed the deed, it is my opinion that she did not sign and acknowledge this other deed to the lot before Brewster. If Lessie Oliver's testimony is true that she wrote these receipts, then she executed the deed to Mr. Martin. I have looked at all these signatures and it is my opinion that one of them is not hers, therefore one of these deeds is a forgery. She testified she wrote these receipts (for certain payments which Miss Almstedt testified she had made to Lessie Oliver) and signed them, and they are in the same handwriting, the same signature as is on her deed to Martin, and if she signed the receipts and the deed to Martin, then she did not sign the deed to Miss Almstedt. Whoever signed her name to that deed spelled it *Leslie,* and whoever wrote the deed wrote it *Leslie.* Lessie Oliver testified that Brewster wrote the deed in her presence and took her acknowledgment to it. A twelve-year-old school boy would know it is not the same. I asked Lessie Oliver the second time to look at this deed to see if she knew what she was talking

about. I do not see how it can be possible that both of these deeds can be correct. I think Miss Almstedt has paid her money out, and I think it is Lessie Oliver's name on the receipts. The undisputed evidence shows, and I have no reason to doubt it, that she purchased this property back in 1944, and that she was very negligent for two years. She was charged with the knowledge, or with the finding out what the records showed. The truth is the title was in the State of Arkansas."

If this definite finding of fact is not contrary to the preponderance of the evidence, the chancellor was correct in ordering, as he did order, the foreclosure of the mortgage from Lessie Oliver to Martin, as a lien prior to the claim of Miss Almstedt. This is a question of fact which we are unable to decide, for the reason that the testimony upon which the chancellor made his finding was before him, but is not before us. The rule has been many times stated that where material evidence is omitted from the record, the presumption will be indulged that the omitted evidence would support the judgment or decree. That rule must be applied here, and the decree is, therefore, affirmed.

WALLACE *v.* JEWELL.

4-7893 195 S. W. 2d 340

Opinion delivered June 24, 1946.

[redacted]

J. K. Mahoney, H. S. Yocum, Emon A. Mahony and *C. A. Wright,* for appellant.

Wayne Jewell, pro se, for appellee.

GRIFFIN SMITH, Chief Justice. Jessie Lee Wallace was killed September 13, 1944, through injury arising out of and in the course of his employment by Urbana Manufacturing Company. The employer reported to Arkansas Compensation Committee September 19th; and, with its insurance carrier, admitted liability to the widow and minor child September 26th. The initial payment of $22.74 covering the period from September 14th to 27th was dated September 26th. Funeral expenses of $217.95 were paid by the insurer September 20th.

Appellee, an attorney, petitioned the Commission for the allowance of a fee, asserting that "on or about" September 25th he was interviewed by Roosevelt Wallace (a brother of the dead man) and Boss Stewart. Roosevelt told appellant about Jessie Lee's death and stated that Tressie Mae had asked him (Roosevelt) to "contact" an attorney. Appellee testified that he investigated the law, prepared a trial brief, and made two or three trips in an endeavor to ascertain the facts. A contract dated September 27th, signed by Tressie Mae and appellant, by its terms employed appellee as attorney, the attorney's compensation to be twenty-five percent "of any and all sums covered, together with any expenses advanced, . . . whether such sums be obtained by compromise or by an award."

Appellee says he lost a signed copy of the instrument intended for his files, but he testified in respect of Tressie Mae's copy: "If I remember correctly, that contract was drawn up on the 25th [and] signed on the 26th: I don't know for sure."

Tressie Mae testified that when she signed the paper the insurance carrier's letter, with check, had been received, but she did not understand the transaction.

Section 32 of Act 319 of 1939 is a limitation upon the amount that may be paid for legal services.[1]

When petition for compensation was disapproved by the Referee, appellee appealed to the full Commission, alleging he was employed "on or about Sept. 23d," and asking that he be allowed "twenty-five percent of any and all amounts paid the claimants."

The Commission, in denying the fee, found that its award had been made upon information supplied in a timely manner by the employer; that there was no contest, and that the insurance carrier promptly assumed full liability. Act 319 of 1939, §§ 19 (a) and 19 (b).

On appeal to Circuit Court appellee was allowed a fee of $200, from which Tressie Mae has appealed.

It is first argued that appellee's contract for 25% of all sums recovered by contest or compromise was void. *Prima facie* the contract is not void: for the amount of recovery might have been $1,000, and in that event 25% would have been lawful, with approval of the Commission, or by court order on appeal. Total amount payable to Tressie Mae and for the benefit of her child over a period of 450 weeks would be $5,116.50, and 25% of this is $1,279.12.

Circuit Court had before it the record made for the Commission's consideration, and apparently thought, in respect of mixed questions of law and fact, that the award of $200 should be on a *quantum meruit* basis. But the Commission had found from the same record, and as a matter of fact, that no substantial services were rendered. We do not think that in doing this the Commission infringed upon the rules we have heretofore announced, which in effect constitute it a jury charged with

[1] Section 32. "No claim for legal services or for any other services rendered in respect of a claim or award for compensation, to or on account of any person, shall exceed 25% on first $1,000 or part thereof, plus 10 per centum on all of excess of $1,000, nor be valid unless approved by the Commission [;] or if the proceedings for review of the order of the Commission in respect of such claim or awards are had before any court, unless approved by the court. Any claims so approved shall, in the manner and to the extent fixed by the Commission or such Circuit Court, be a lien upon such compensation."

the duty of weighing all pertinent evidence that is admissible and drawing conclusions upon which action for or against the claimant must be taken. If on appeal there is substantial evidence to sustain factual findings, we do not reverse for want of evidence.

In the case at bar the Commission was not without evidence essential to its action, and Circuit Court erred in reversing. We reverse the Circuit Court judgment with directions that it reinstate the Commission's order.

LACEY *v.* BENNETT.

4-7935 195 S. W. 2d 341

Opinion delivered June 24, 1946.

J. R. Crocker and *Frank S. Quinn,* for appellant.

McRae & Tompkins, for appellee.

McFaddin, J. This appeal challenges the correctness of the chancery court decree: (a) quieting appellee's title to certain lands; and (b) refusing appellant's prayer for specific performance of an alleged contract of appellee to convey the lands to appellant.

Appellee, H. C. Bennett, had owned for many years 260 acres of land in Nevada county. On December 31, 1941, appellant inquired of appellee by letter:

". . . your best terms on the above described property, least cash down and the length of time you will grant us to liquidate the balance. Terms under this agreement subject to acceptance on or before thirty days from date."

Appellee replied by telegram of January 2, 1942:

". . . the best price I could consider at this time is $3,500 cash."

To this the appellant replied by telegram of January 5, 1942:

"Accept your price of $3,500 cash. Send deed draft attached to Commercial Bank here in Shreveport and forward abstract to the firm of Smitherman and Smitherman, attys., attention Mr. David Smitherman. Regards."

It will be observed that the appellant in one sentence agreed to the $3,500 in cash, but in the next sentence wanted the deed sent to Shreveport, attached to a draft. The appellee replied to this telegram by letter of January 13, 1942, inquiring whether the appellant wanted the abstract as it was, or wanted it brought to date; and appellee also said:

"Would also like to have you arrange for the bank to write us directly that they have funds to your credit, and are ready to pay for the deed upon delivery."

Appellant answered under date of January 21, 1942, advising that he was having a supplemental abstract made at his own expense, and then said:

"As soon as the abstracting is completed, that is to say, your abstract is received and the supplemental abstract completed, I shall have the title examined by my attorney and if the title is marketable, funds will immediately be placed in the Commercial National Bank of Shreveport, Louisiana, to cover the purchase of the land, which bank I will have to write you to that effect and when this is done I understand that you will execute and mail a deed covering the land, to said bank, for delivery upon the payment of a draft to be drawn by you for $3,500 and attached to the deed, is paid."

It will be observed that appellant did not comply with appellee's request that the bank advise direct about the money, but stated that such would be done later, and after approval of title.

The letter of January 21st was the last written communication between the parties. Thereafter there were interviews by phone and messenger in which appellant was insisting that the abstract and deed be sent to the Shreveport bank, attached to a draft, and the appellee was insisting that appellant produce evidence that he had $3,500. Appellant failed to do this—in fact, until October, 1945.

During the time of the correspondence and prior to the interviews, appellant, on January 21, 1942, executed, acknowledged and placed of record in Nevada county, Arkansas, an affidavit which—omitting signature and acknowledgment—reads as follows:

"Before me the undersigned, a notary public, within and for the county aforesaid, personally appeared A. M. Lacey, who after having been duly sworn by me, on oath states: That he has had an agreement with Mr. H. C. Bennett, of Chicago, Illinois, for the purchase of the following lands, situated in Nevada county, Arkansas, to-wit:

"The northeast quarter of the southeast quarter and the southwest quarter of the southeast quarter, and the west half of the southeast quarter of the southeast quarter of section 21, and the northeast quarter of section 28,

all in township 14 south, range 22 west, containing in all 260 acres, more or less.

"That under said agreement the purchase price of the land is to be paid and the deed executed upon completion of abstracts and approval of title."

Appellee did not learn of this affidavit until some time later, and thereafter made no further effort to ascertain appellant's ability to obtain $3,500 in cash. With the affidavit on file, the appellant was apparently content to let the matter rest, except for infrequent inquiries made to appellee as to when appellee "would send the deed."

Thus, the matter remained from January, 1942, until May 7, 1945, when appellee filed this suit against appellant to have the affidavit removed from the record as a cloud on the title of the appellee. Appellant, by cross-complaint, filed September 9, 1945, claimed that the correspondence and telegrams between the parties made a valid and binding contract for appellee to convey to appellant; and alleged appellee's refusal to convey; and that appellant had "at all times stood ready, willing and anxious to comply with said contract." Appellant further pleaded:

"The defendant shows that the said plaintiff should be required to specifically perform his said contract, and this defendant here and now offers to pay to the said Bennett the said price agreed upon for said land, to-wit, the sum of $3,500 in cash."

The above quotation was the only tender ever made, except that the clerk of the court exhibited, at the trial, a telegram received by himself on October 24, 1945, from the Union National Bank of Laredo, Texas, which reads:

"We hold thirty-five hundred dollars to be paid to you upon acceptance of title by A. M. Lacey's attorneys, J. R. Crocker and Frank S. Quinn, on Bennett land which is now involved in your court."

In the alternative to specific performance, appellant, in his cross-complaint, asked $26,000 as damages, saying:

". . . that thereafter in the summer and fall of 1942, just a few months after defendant's said purchase, said lands rose in value to the sum of $100 per acre, the market value of said lands at its highest price since the purchase thereof by the defendant was and is the sum of $26,000."

Against appellant's cross-complaint for specific performance, appellee filed answer denying all allegations, and affirmatively pleading delay and laches, in this language:

"That defendant Lacey is guilty of laches, and has never tendered to plaintiff the $3,500 in question, but has sat idly by, for over three and one-half years, taking no affirmative action, speculating on the possible increase in the value of the minerals and timber in, under and upon said lands."

At the trial the parties introduced evidence to support their respective contentions as heretofore outlined; and, in addition, appellee testified that his previous dealings with the appellant (in 1937) had convinced him that appellant did not have, and could not secure, $3,500 unfettered money in January, 1942; and therefore appellee refused to send the deed to Shreveport until he received proof of the availability of the money. To support appellee's view of the financial condition of the appellant, several witnesses testified that in January, 1942, appellant could not get any money from anyone, and so admitted to some of the witnesses; that appellant had broken with his financial backer, and in January, 1942, was unable to finance any deal involving any sum of money.

The trial court entered a decree refusing specific performance and quieting appellee's title against the recorded affidavit. This appeal challenges the correctness of that decree. If appellant was not entitled to specific performance, then it necessarily follows that the appellee's title should be quieted against appellant's recorded affidavit. We proceed therefore to examine appellant's claim for specific performance.

There are certain essentials that must be proved by a party who seeks specific performance. A few of these are:

1. The existence of a valid and definite contract. As stated in 49 Am. Juris. 25: "In order for equity to decree specific performance, it is necessary that there be in existence and in effect a contract valid at law and binding upon the party against whom performance is sought, for specific performance is never applicable where there is no obligation to perform. If the existence of a valid contract is a matter of doubt, equity will not decree specific performance."

And, again, in 49 Am. Juris. 34: "In order for a court of equity to decree specific performance of a contract, the court must be able to determine what must be done to constitute performance. The indefiniteness of an agreement is an adequate reason for refusal to direct specific performance thereof. The contract itself must make the precise act, which is to be done, clearly ascertainable.

. . .

"Whenever it appears that material matters are not clear, certain, and complete, but are left by the parties so obscure or undefined that the court cannot say whether or not the minds of the parties met upon all the essential particulars, or if they did, the court cannot say exactly upon what substantial terms they agreed, the case is not one for specific performance."

2. The party seeking specific performance must show that he has all the time been ready, able and willing to perform his part of the contract, and has not been guilty of unreasonable delay in seeking equitable relief. As stated in 49 Am. Juris. 53:

"The complainant coming into equity for specific performance must show not only that he has a valid, legally enforceable contract, but also that he has complied with its terms by performing or offering to perform, on his part, the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under

the contract, in their entirety, and to do whatever has been made a condition precedent on his part, or show a valid excuse for the nonperformance of the covenants incumbent upon him. . . .

"The failure or inability or refusal to carry out the terms of the contract at the time when performance is due will ordinarily be grounds for refusing specific performance, since specific performance will not generally be decreed in favor of a party who has himself been in default, or who has willfully violated his part of the contract, whereby the defendant has been deprived of a substantial benefit under it."

It is, furthermore, stated in 49 Am. Juris. 89:

"The well-established equitable principle that equity aids the vigilant and refuses to help those who sleep on their rights to the prejudice of the party against whom relief is asked is fully applicable to parties seeking specific performance of contracts. It is universally recognized that inexcusable laches or default on the part of the party seeking such relief will be a sufficient ground for the denial of the relief. While equity does not regard time as of the essence of the contract unless expressly made so by the contract, yet it requires that one who seeks specific performance of such contract shall not be guilty of unreasonable delay, and shall seek his redress with reasonable promptness. Any unreasonable delay or inexcusable negligence on the part of the plaintiff may be sufficient to prevent his procuring a decree in equity for specific performance. In a suit for specific performance of a contract to convey land, the vendor, to make the plaintiff's delay available as a defense, must have performed or been ready and willing to perform all the terms of the contract stipulated for on his own part. Laches is less excusable in regard to certain classes of property than others. For example, promptness in seeking specific performance is especially required in reference to contracts involving property likely to fluctuate suddenly in market value."

Appellee contends with much force that appellant has failed on both of these essentials, as above numbered and listed. Assuming—but not deciding—that the appellant has satisfied the first essential, still we are of the opinion that appellant has not proved the second such essential; and therefore the court of equity was correct in refusing him specific performance. Here are some of the matters reflected by the record:

1. Appellant claims that he made a contract by the correspondence previously mentioned. But when the appellee asked for some assurance from the bank that appellant had $3,500, the appellant parried the request and delayed furnishing any such bank assurance from January 13, 1942 (date of the request), until October 24, 1945, (date of the telegram from the Laredo, Texas, bank to the clerk of the court). This constituted a delay of more than three years and nine months.

2. Appellant placed the affidavit of record on January 21, 1942, but took no action to secure specific performance until he filed his cross-complaint on September 11, 1945. He acted then only after the appellee had hailed him into court on the proceeding to quiet the appellee's title. In the intervening time—January, 1942, to September, 1945—there had been, according to appellant's own allegations, an "oil play" regarding this land, which caused the value of the land to increase to $26,000. It is true that the "oil play" subsided, and that—at the time of the trial—some witnesses placed the value of the land at $4,000; but there had been a fluctuation in land values, and appellant, by his affidavit, had clouded the appellee's title, and then delayed for over three and one-half years to seek specific performance.

Appellant's delay under the facts in this case is entirely unreasonable, and fully justified the refusal of a court of equity to decree specific performance. In *Uzzell* v. *Gates,* 103 Ark. 191, 146 S. W. 495 and 1184, Chief Justice McCulloch said:

"We are of the opinion, however, that Gates did not proceed with sufficient diligence to warrant a court of

equity, under the circumstances, in granting him the relief prayed for and to require appellant to specifically perform the contract. The rule is of well-nigh universal application that a purchaser of land under an executory contract, who is out of possession and has not paid the purchase price, must proceed within a reasonable time, otherwise he will be barred by his own laches from seeking the aid of a court of equity to require specific performance. 36 Cyc. 721; Pomeroy on Specific Performance of Contracts, §§ 403-4. In *Milward* v. *Earl Thanet,* 5 Ves. 720, Lord Alvanley said that 'a party can not call upon a court of equity for specific performance unless he has shown himself ready, desirous, prompt and eager.' And in *Eads* v. *Williams,* 4 De G., M. & G. 691, Lord Cranworth stated the rule, as Prof. Pomeroy says, 'in a manner not quite so rhetorical, but perhaps more accurate,' that 'specific performance is relief which this court will not give, unless in cases where the parties seeking it come as promptly as the nature of the case will permit.' "

Likewise, in *Bracy* v. *Miller,* 169 Ark. 1115, 278 S. W. 41, 43 A. L. R. 114, we said:

"It is a general rule of equity that a party entitled to a specific conveyance of property will not be permitted to hold back from an assertion of his rights and thus speculate on the advantage of performance, but he is required to be vigilant and prompt in the assertion of those rights; otherwise equity will refuse its aid and leave the party to such redress which the law had left him by a suit for damages. *DeCordova* v. *Smith,* 9 Tex. 129, 58 Am. Dec. 136.

". . . He could not have asked the enforcement of his contractual rights without complying with the implied condition of the contract that he act with reasonable promptness, and this is a condition which equity also imposes as a prerequisite before granting the relief of specific performance." See, also, *Hargis* v. *Edrington,* 113 Ark. 433, 168 S. W. 1095, and *Henley* v. *Engler,* 118 Ark. 283, 176 S. W. 330.

Sharpe v. *West,* 150 Fed. 458, was a case decided in the U. S. District Court for the Western District of Arkansas. Judge ROGERS delivered the opinion, which is so apropos to this case that we quote at length:

"It is also insisted that inasmuch as no tender was ever made and no suit begun until over three years after the alleged contract was made, it would be inequitable and unjust for a court of equity, under such circumstances, to compel specific performance, even if the alleged contract was originally valid and binding. This court, upon authorities quoted in the case of *Erastus Jones* v. *Lawrence A. Byrne, et al.,* 149 Fed. 457, said:

" 'Specific performance is not of absolute right. It rests entirely in juridial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case. *Willard* v. *Tayloe,* 8 Wall. 557, 567, 19 L. Ed. 501; *Marble Co.* v. *Ripley,* 10 Wall. 339, 357, 19 L. Ed. 955; 1 Story's Eq. Jur., § 742; *Seymour* v. *Delancey,* 6 Johns. Ch. (N. Y.) 222, 224. "The question in cases of specific performance," Lord Eldon said, "is not what the court must do, but what, under the circumstances, it may do, in the exercise of its discretion to grant or withhold relief of that character." *White* v. *Damon,* 7 Ves. 30, 35; *Radcliffe* v. *Warrington,* 12 Ves. 326, 331. It should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or, where it is left in doubt, whether the party against whom relief is asked in fact made such an agreement. *Colson* v. *Thompson,* 2 Wheat. 336, 341, 4 L. Ed. 253; *Carr* v. *Duval,* 14 Pet. 77, 83, 10 L. Ed. 361; *Huddleston* v. *Briscoe,* 11 Ves. 583, 591; *Lanz* v. *McLaughlin,* 14 Minn. 72 (Gil. 55); *Waters* v. *Howard,* 1 Md. Ch. 112, 116.'

"In this case there is not the semblance of any reason or face assigned why the institution of this suit was delayed over three years after the alleged contract was made. . . . The general rule governing cases of this kind will be found in Warvelle on Vendors, vol. 2, par.

746, and is substantially this: That a specific performance will not be decreed where any unreasonable delay has occurred, and especially if the value of the property or the conditions of the parties has changed in the meantime. In other words, where the lapse of time has been very great, or where the value of the property has materially changed, the laches of the one will excuse performance by the other, and equity refusing to interfere will leave the parties to their remedies at law."

Fry on "Specific Performance" is a British publication; but, even so, has long been recognized as a standard authority in this country, and was cited with approval by this court in *Bracy* v. *Miller, supra,* in 1925. In the Sixth Edition of Fry on "Specific Performance," there is a discussion on the subject of lapse of time as defeating specific performance; and on page 516, this appears:

"In many of the cases there has been a general dilatoriness in all the proceedings, so that it is almost impossible to state briefly the actual amount of delay which has been considered to bar the plaintiff's right to relief; but some notion of the present doctrine of the courts on this point will be gained from the following cases:

"In the old case of *The Marquis of Hertford* v. *Boore,*[6] a delay of fourteen months was not considered a bar to the plaintiff's bill. But in *Eads* v. *Williams*[7] where the contract was for the lease of a coal mine), a delay of three and a half years was considered fatal; in *Southcomb* v. *The Bishop of Exeter,*[8] a delay from the 17th of January, 1842, to the 30th August, 1843, was held to have the same effect; and in *Lord James Stuart* v. *The London & North-Western Railway Co.,*[9] Knight Bruce, L. J., seemed to think that a delay from October, 1848, to July, 1850, must be fatal to such a bill."

"[6] 5 Ves. 719.

"[7] 4 De G. M. & G. 674; 24 L. J. Ch. 501; cf. *supra,* § 1082.

"[8] 6 Ha. 213.

"[9] 1 De. G. M. & G. 721. See, also, *Spurrier* v. *Hancock,* 4 Ves. 667; *Harrington* v. *Wheeler,* 4 Ves. 686; *Guest* v. *Homfray,* 5 Ves. 818; *Thomas* v. *Blackman,* 1 Coll. 301, 313; *Sharp* v. *Wright,* 28 Beav. 150; *Moore* v. *Marrable,* L. R. 1 Ch. 217."

In 65 A. L. R. 7 there is an extensive annotation on specific performance; and, on page 53, scores of cases from Federal and State and English courts are cited to sustain this summary:

"To secure the aid of equity in enforcing the performance of a contract, it must be made to appear that the plaintiff or complainant has been prompt, ready, able, and eager to perform and abide by the same. If he has failed or refused to claim or act under the contract for such a length of time as to give the impression that he has waived or abandoned the sale or purchase, especially if circumstances justify the belief that his intention was to perform the contract only in case it suited his interests, he will be denied this equitable relief. The rule that, to be entitled to the specific performance of a contract, the party seeking such relief must show that he has been at all times ready, able, and willing to perform on his part, is quite universally recognized in holding that inexcusable laches or default on the part of the party seeking such relief will be a sufficient ground for the denial of the relief."

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

PARK *v.* HOLLOMAN.

4-7938 195 S. W. 2d 546

Opinion delivered June 24, 1946.

Abe Collins and *George E. Pike,* for appellant.

Virgil R. Moncrief and *John W. Moncrief,* for appellee.

ROBINS, J. The sole question presented on this appeal is whether Mrs. Gussie Park, widow of Dr. C. E. Park, deceased, took a life estate or a fee simple estate in lots 10, 11 and 12 of block 33, of DeWitt, Arkansas, under the following provisions of the will of Dr. Park, to-wit:

"I hereby give, bequeath and devise unto my dear wife, Gussie Park, in the event she survives my decease, the following property lying in the original town of DeWitt, to-wit: Lots 1, 2, 3, 10, 11, 12, block 33. This being the property on which my residence is located in the town of DeWitt. I hereby request and direct that lots 1, 2, 3 on which the residence is located be retained as the home of my wife, Gussie Park, as long as she lives in DeWitt and at her death I direct that this property go to my daughter, Eleanor Park. Lots 10, 11 and 12, block 33, above mentioned, may be sold to suit the pleasure and needs of my wife, Gussie Park."

A subsequent provision in the will directed an equal division of other property between Mrs. Park and his only child, Eleanor Park, the appellant, who was a daughter of the testator by a previous marriage.

Dr. Park died in 1934, and his will was duly probated. Mrs. Gussie Park died intestate in 1944 without descendants, leaving surviving, as her only heirs, her

brother, appellee, J. W. Burnett, and her sister, appellee, Mrs. Hattie M. Holloman.

This suit was begun in the chancery court by appellees, who asked in their complaint that their title to lots 10, 11 and 12 be quieted. Appellant answered, asserting ownership of the property under the terms of her father's will as above quoted.

The dwelling house of Dr. Park was located on lots 1, 2 and 3, block 33, and after his widow's death appellant took charge of that portion of the property and sold it.

The lower court found that under the will of Dr. Park his widow took a fee simple title to lots 10, 11 and 12; and from decree quieting title to this property in appellees as heirs at law of Mrs. Park appellant prosecutes this appeal.

Appellant cites as supporting her contention the case of *Smith* v. *Bell,* 6 Pet. (U. S.) 68, 8 L. Ed. 322, in which after a devise of certain property to the wife, with power of disposal, there was this provision in the will of the testator: "The remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin (a son of testator)." The language creating this remainder was held by Chief Justice MARSHALL as pointing with certainty to the fact that the testator intended to create an estate for life in his widow and a remainder to his son. But in his opinion in that case the great Chief Justice said: "The first part of the clause which gives the personal estate to the wife would undoubtedly, if standing alone, give it to her absolutely. . . . In the case before the court, it is, we think, impossible to mistake the intent. The testator unquestionably intended to make a present provision for his wife, and a future provision for his son. This intention can be defeated only by expunging, or rendering totally inoperative, the last clause of the will." It thus appears that a controlling factor in that case was the presence in the will of language creating a limitation over in favor of the son. Here we have no such limitation over in favor of appellant as to the property in dispute.

The case of *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, is also cited by appellant as authority for her position. In that case we found that there were in the will of ex-Governor Eagle certain obvious errors in the descriptions of the lands devised to the Eagle heirs, and we upheld a construction of the will under which the clearly expressed intention of the testator as to a division of his property was put into effect. There was not involved in that case any question, such as we have in the case at bar, of the kind of estates devised.

Another authority relied on by appellant is the case of *Berner* v. *Luckett,* 299 Ky. 744, 186 S. W. 2d 905, in which a provision in a will to the effect that all property not disposed of by the wife should go to the testator's children was held to vest in the wife to whom the property was devised in a preceding part of the will a life estate with remainder over to the children. But in that case, too, there was in the will a provision—entirely absent from Dr. Park's will as to the lots involved herein—vesting the remainder in the testator's children.

The function of a court in dealing with a will is purely judicial; and its sole duty and its only power in the premises is to construe and enforce the will, not to make for the testator another will which might appear to the court more equitable or more in accordance with what the court might believe to have been the testator's unexpressed intentions. "The appellants are correct in the statement that the purpose of construction is to arrive at the intention of the testator; but that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will." *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417.

Before the necessity for judicial interpretation of a will may arise there must be found in the language of the will an ambiguity or uncertainty; and where no such ambiguity or uncertainty is found, there is no need for the application by the court of any of the rules for construction. In *Quattlebaum* v. *Simmons National Bank of Pine Bluff,* 208 Ark. 66, 184 S. W. 2d 911, we quoted from Thompson on Wills, 2d Ed., § 210, as follows: " 'The pur-

pose of construction and interpretation being the ascertainment of the testator's intention, it follows that where such intention is expressed in the will in clear and unequivocal language, there is no occasion for judicial construction and interpretation, and it should not be resorted to or allowed.' "

The polestar of the court, in construing a will, should always be the intention of the testator; and the will itself is ordinarily the only place to which the court should resort to find such intention. If it be in the will expressed in language that is clear and unmistakable the court should go no further, but should put in effect the intention of the testator, as thus clearly set forth in his will. *Hoyle* v. *Baddour,* 193 Ark. 233, 98 S. W. 2d 959.

In *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. 2d 810, we quoted with approval this from our opinion in *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S. W. 2d 491: " 'It is a fundamental rule of construction of both deeds and wills to ascertain the intention the grantor had in mind, as to the course he desired his property to take, from the language used in the instrument, and to give effect to such intention, if it may be done without doing violence to the law.' "

We said in *Lavenue* v. *Lewis,* 185 Ark. 159, 46 S. W. 2d 649: " 'The first great rule in exposition of wills (to which all other rules must bend)' said Chief Justice MARSHALL, in *Smith* v. *Bell,* (6 Pet.) 31 U. S. 68, 8 L. Ed. 322, 'is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law.' "

"It has been many times said that the paramount rule in the construction of wills is to ascertain the intention of the testator from the language used, giving force and meaning to each clause in the entire instrument. *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20; *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018; *Kelly* v. *Kelly,* 176 Ark. 548, 3 S. W. 2d 305; *First National Bank of Fort Smith* v. *Marre,* 183 Ark. 699, 38 S. W. 2d 14;" *Kirk* v. *Mason,* 188 Ark. 1000, 68 S. W. 2d 1012.

The language used in Dr. Park's will is clear and unambiguous. By it he devised the land in dispute here to his wife, without using words that might be construed as vesting in her less than a fee simple estate. While anciently it was held that a devise of land to A, without further language defining the estate to be enjoyed by A, created in A only a life estate, the modern rule, followed with virtual unanimity by the courts, is that under such language in a will a fee simple estate is vested in A. Schouler on Wills, vol. 2 (6th Ed.), § 1177. The last sentence in the paragraph of the will under consideration here, "Lots 10, 11 and 12, block 33, above mentioned, may be sold to suit the pleasure and needs of my wife, Gussie Park," certainly cannot be said to impair in any way the fee simple estate in these lots that had been devised to Mrs. Gussie Park by the first sentence of this paragraph; in fact this language in a measure emphasizes and confirms the absolute title in Mrs. Park already created.

Lots 1, 2 and 3, on which his dwelling was located, and which were adjacent to the ones involved herein, Dr. Park willed to his wife, with a limitation over to appellant conceded to have the effect of vesting in appellant the remainder in fee simple. He did not so limit the estate created by the will in his wife as to lots 10, 11 and 12, nor did he use in his will any language indicating intention to create an estate by remainder, as to these lots, in appellant; and, regardless of whether it might appear that it was proper or natural for him to have disposed of all six of the lots in the same manner, he did not see fit to do so. We have no right to alter, under the guise of construction, the definite and unequivocal disposition of his property as made by him.

The decree of the lower court was correct, and it is affirmed.

NORTH LITTLE ROCK TRANSPORTATION COMPANY
v. SANGSTER.

4-7925 195 S. W. 2d 549

Opinion delivered June 24, 1946.

Frederick U. Andres, for appellant.

Guy B. Reeves, for appellee.

McHaney, Justice. On October 29, 1945, appellant sued appellees, Sangster and Arkansas Transfer & Moving Company, in the Little Rock Municipal Court to recover $75.20 as damages to one of its taxicabs as a result of a collision between it and a car owned by appellee, Arkansas Transfer & Moving Company, and driven by its employee Sangster, at Ninth and Broadway Streets in the City of Little Rock, on October 18, 1945. Service was had on appellees on the date of the suit, notifying them to answer at 2:00 p. m. on Monday, November 12, 1945. On November 6, 1945, appellees filed a general demurrer to the complaint, and on November 19, 1945, judgment was entered for appellant against appellees for said sum with interest and costs, on proof of the amount of said claim. The judgment recites that "defendants come not but make default." After the time for appeal had expired, on December 20, 1945, appellant caused an execution to issue on said judgment, and on the same date appellees filed a motion to set aside the judgment rendered on November 19, on the ground that it was obtained without their knowledge by fraud, without stating what the fraud consisted of, and that they were entitled to a trial, after time given to file an answer. On December 31, the motion to set the judgment aside was overruled.

Nothing further was done by appellees until February 5, 1946, when they petitioned the Circuit Court for a writ of certiorari to the Municipal Court. The petition alleged, in addition to the above, that "said judgment was taken by default, without knowledge to this plaintiff (petitioners) and before action was taken on the demurrer filed in that cause by this plaintiff," and that the record shows on its face that the judgment was rendered with-

out action on said demurrer. On the same day, the Circuit Court ordered the writ to issue, and in obedience to it the record of the Municipal Court was sent up, and on March 2, 1946, the Court, on the record before it, remanded the cause to the Municipal Court with instructions to dissolve and set aside the judgment and to proceed in the regular manner therein, on the ground that "the Court doth find that it was an error to enter judgment by default before disposing of the demurrer then pending." This appeal followed.

We think the learned trial court fell into error in granting the writ and in ordering the judgment of the Municipal Court set aside. The judgment was not void but valid on its face. Personal service was had on appellees, they entered their appearance in the action by demurrer filed, and apparently paid no further attention to the suit against them. Assuming without so holding that it was error to enter judgment against them with their demurrer undisposed of, as the Court found, still it was a mere error to be corrected by appeal. It did not render the judgment void. As said by the late Judge BUTLER for the Court, in *Twin City Bank of North Little Rock* v. *McWilliams Auto Co.*, 182 Ark. 1086, 34 S. W. 2d 229, ". . . the judgment of the justice court was not void on its face as the Circuit Court will look only to the face of the record on certiorari and quash only where from such inspection it appears that the Court rendering the judgment had no jurisdiction, and that its judgment was void." Citing cases.

Here, the record shows on its face that the Municipal Court had jurisdiction of the subject matter, and of the parties through personal service and entry of appearance. The only contention is that it was erroneous, because the demurrer was not disposed of. This should have been corrected by appeal. It is no answer to say they did not know it had been rendered in time to appeal. They were in court and should have known about it. No fraud or unavoidable casualty is alleged or shown. In the motion to set aside the judgment it is alleged that it "was obtained upon these defendants and this court by fraud," and if

we assume this means fraud practiced upon the court or the defendants, still it does not allege what the fraud was, and was no more than a mere conclusion not based on facts. That the Court will look only to the face of the record on certiorari to determine whether the Court rendering the judgment had jurisdiction has been decided in many cases, *Hill* v. *Taylor,* 199 Ark. 695, 135 S. W. 2d 825, being one of the more recent. *Burgett* v. *Apperson.* 52 Ark. 213. 12 S. W. 559. was there quoted from as follows: "The writ of certiorari may be used not only to correct a want of jurisdiction, but also the erroneous proceedings of an inferior tribunal. But, it will not lie to review mere errors at the instance of one who has lost the right of appeal by his own fault, or, who neglects to apply for the writ as soon as possible after the necessity of resorting to it arises. . . The period within which the writ of certiorari may be granted is not limited by statute. Where, however, it is sought as a substitute for appeal the time within which an appeal might have been prosecuted is adopted by analogy." See, also, *Black* v. *Brinkley,* 54 Ark. 372, 15 S. W. 1030; *Pruitt* v. *International Order, etc.,* 158 Ark. 437, 250 S. W. 331.

We think appellees, petitioners, lost their right of appeal through their own inattention, and are seeking to use the writ as a substitute for appeal; also, that they did not apply for the writ promptly when their motion to set aside was denied. They waited from December 31, 1945, to February 5, 1946, to apply for the writ.

While the statute, § 2856 of Pope's Digest, confers power on the Circuit Court to issue the writ of certiorari to any inferior tribunal "to correct any erroneous or void proceeding," this Court has held that said section does not enlarge the writ into an appeal or writ of error for the correction of mere errors in judicial proceedings. *St. L. I. M. & S. Railway Co.* v. *Barnes,* 35 Ark. 95.

The judgment is, therefore, reversed and the cause remanded with directions to quash the writ and dismiss the petition.

ROBINS, J., dissents.

ADAMS *v.* WHITTAKER.

4-7999 195 S. W. 2d 634

Opinion delivered June 26, 1946.

Leffel Gentry, for appellant.

H. B. Stubblefield and *Parker Parker,* for appellee.

SMITH, J. The question presented on this appeal is that of the constitutionality of Act 107 of the Acts of 1945, p. 253, entitled: "AN ACT Providing for Separate Primaries for the Selection of Candidates for Federal Offices, and for Other Purposes."

The Act in its entirety reads as follows:

"Section 1. Separate primaries, preferential and run-off, for the selection of candidates for federal offices, including those of United States Senators and Representatives, shall be held respectively on the third Tuesday in July and the first Tuesday in August preceding the general election, and they shall be governed by the primary election laws of the state as far as applicable. No. citi-

zen shall be denied the right to vote in any primary election for the selection of federal offices on any ground prohibited by the Fifteenth Amendment to the Federal Constitution.

"Section 2. The costs of primary elections for the selection of candidates for federal offices shall be borne by the several counties in which the election is held.

"Section 3. This act is cumulative to Act 238 of 1943 and to all other existing laws governing primary elections not inconsistent with it, and it shall take effect and be in force from and after passage."

We are, of course, not concerned with the wisdom or policy of the legislation as this is a question solely for the General Assembly. We may consider only the power of the General Assembly to enact the legislation. In the case of *Eagle* v. *Beard,* 33 Ark. 497, Justice EAKIN said: "Comity towards a co-ordinate department of the government forbids the discussion of matters of discretion, when the power is conceded." The power to enact this statute exists unless in contravention of our own or the federal Constitution, and in passing upon that question every doubt must be resolved in favor of its validity.

The legislation is not an innovation in this state. Section 8 of art. III of the Constitution reads: "The general elections shall be held biennally on the first Monday of September, but the General Assembly may, by law, fix a different date." The elections, state and federal, were not consolidated until the adoption of Initiated Act No. 2, at the 1926 general election; thus for more than half a century these elections were separate.

In a recent issue of the Law School Bulletin of the University of Arkansas, there appears an article by the Dean of the Law School criticizing the act, but he does not express the opinion that the legislation is unconstitutional. The last sentence of § 1 of the act makes certain the fact that the act is not violative of the 15th Amendment to the federal constitution.

The decree from which is this appeal recites the reasons inducing the court below to hold the act uncon-

stitutional, one of these being that the act is so indefinite that its enforcement is not possible. Read by itself alone, this would be true, but not so when read in conjunction with legislation in force when it was passed, as the act expressly recites that it is cumulative to all other existing laws governing primary elections.

The first attempt to legalize primary elections in this state was made by the passage of Act CLIV, of the Acts of 1895, p. 240. By this act it was provided that primary elections might be made legal elections, if and when the county committees of the respective parties so ordered. By subsequent legislation, which we find it unnecessary to review, all primary elections are made legal elections. The present state of the law is that political parties are not required to hold primary elections to nominate candidates for office. They may do so or not, as the governing authorities of the parties may direct; but if a primary election is held, that election is a legal election, and must be held in conformity with the applicable laws of the state.

The petitions out of which this litigation arose were filed by two persons who are candidates for the Democratic nomination for Congress in the Fourth and Fifth Districts of the state respectively, and they allege invalidity of Act 107 and seek by mandamus to require the proper parties of the Democratic party to certify their names as candidates to be placed on the ballot, ignoring Act 107. They allege they have complied with all the laws of the state and the rules of the Democratic party which authorized them to become candidates for such nominations. They allege various reasons why Act 107 should be declared unconstitutional. In the decree of the court below awarding the relief prayed, there is an enumeration of the reasons inducing the court to declare Act 107 invalid and we consider them in their order.

First. That the act is void because of its indefiniteness. That objection has already been considered and disposed of.

Second. It violates § 1 of Amendment 14 to the Federal Constitution, in that it denies petitioners the equal

protection of the law. This objection may be answered by saying that Act 107 does not accord to any other person any right which is denied them.

Third. It violates § 18 of art. II, and § 2 of art. III, and § 28 of art. VII, and § 5 of art. XII of the Constitution of the State.

Section 18 of art. II provides that the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. It is not alleged by petitioners, or either of them, that any other person has been granted a right to become a candidate, at what we will call the Congressional primary, which has been denied them.

Section 2 of art. III provides that elections shall be free and equal, and that no power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage. It is not alleged in what respect this has been done, and we find nothing in the act which does so. On the contrary, this act, when read in connection with other acts on the subject, under which the Congressional Primary election will be held, manifests the purpose to make the election free and equal and to prevent fraud or other abuses in holding it.

Section 5 of art. XII prohibits any county, city, town or other municipality from appropriating any money for, or lending its credit to any corporation, association, institution or individual. Act 107 does not authorize such action. What it does do is to impose upon counties the expense of holding a legal election, and of this more will be said in another connection.

Section 28 of art. VII defines the jurisdiction of the county courts, and gives them jurisdiction of matters of "local concern" of their respective counties. There is nothing about this act involving the jurisdiction of the county court, except indeed to order the payment of the expenses of the election for which the act provides. In the case of *Little Rock* v. *N. Little Rock*, 72 Ark. 195, 79 S. W. 785, there was involved an act permitting the dismemberment of the city of Little Rock, pursuant to a pro-

ceeding under an act of the 1903 General Assembly, the validity of which was there attacked. Judge RIDDICK said: "It thus appears that the local concerns over which the county court is given exclusive jurisdiction are those which relate specially to county affairs, such as public roads, bridges, ferries and other matters of the kind mentioned in the section referred to and we do not think that the formation of towns and cities or the change of their boundaries is a local concern of which the county court has exclusive jurisdiction. This conclusion is, we think, sustained by the former decisions of this court."

Nor do we think the county court has been given jurisdiction to permit, or prohibit, the holding of an election which the General Assembly has said should be held.

Another objection to the act, and the one which has given us the most concern, is that provision imposing the expenses of the elections upon the counties in which they are to be held. It is alleged by one of the petitioners that only one county in his congressional district has made an appropriation to pay the expenses of the election, and it is alleged by the other petitioner that no county in his district has made such appropriation. It is argued that the congressional primary election cannot and will not be held because no provision is found in the act for the payment of the expenses of the election, except by the counties themselves, and that this is an expense which may not be imposed upon the counties.

The act does provide for the payment of the expenses of the election, its provision being that the counties shall pay the expense. Was it beyond the power of the General Assembly to so enact?

This question would be fraught with more difficulty than it is, but for the recent decision of the Supreme Court of the United States in the case of *Smith* v. *Allwright,* 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987, 151 A. L. R. 1110. However revolutionary this decision may be, it stands as the law of the land, and is as binding upon

us as it is upon the state whose primary election law was there involved and invalidated.

The General Assembly of the State of Texas had passed what was called a presidential primary act which imposed the cost of the primary election there provided for upon the counties of the state. It was held by the Supreme Court of Texas in the case of *Waples* v. *Marrast,* 108 Tex. 5, 184 S. W. 180, L. R. A. 1917A, 253, that: "A primary election to select candidates of the various political parties for public office is not a public purpose for which taxes may be levied, or public funds expended." This was, of course, upon the theory that a party primary election was a private or party and not a public purpose.

Laboring under the same impression, this court in the case of *Robinson* v. *Holman,* 181 Ark. 428, 26 S. W. 2d 66, 70 A. L. R. 1488, held that a primary election was a private or party action, and that the party holding it had the right to say who might participate therein, and one of the reasons given for so holding was that the expenses were not paid by public funds, but by the party holding the election. Entertaining the opinion that the primary was private or party proposition, we said: "There is no more reason to say that the Democratic party in Arkansas cannot make the rule in question, (excluding negroes from the right to participate) than there is to say that the Masonic bodies in Arkansas may not exclude them on account of color." Certiorari was applied for, but was denied by the Supreme Court of the United States, 282 U. S. 804, 51 S. Ct. 88, 75 L. Ed. 722.

As pointed out by Prof. Leflar in his article above referred to, there can be no doubt that the case of *Smith* v. *Allwright, supra,* has overruled this case.

In this *Smith* v. *Allwright* case, the Supreme Court reviewed the laws of Texas relating to primary elections saying "despite Texas' decision that the exclusion (of the negro) is produced by private or party action" that the federal courts must appraise the facts leading to that conclusion.

The court's summary of the effect of the Texas primary election laws was as follows: "We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party."

To reach this conclusion it was necessary, of course, to disregard the decision of the Supreme Court of Texas interpreting the primary election laws of that state, and also to overrule its own decision in the case of *Grovey* v. *Townsend,* 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292, 97 A. L. R. 680, which it did in express terms.

At § 156, chapter entitled "Elections," 18 Am. Jur., 285 it is said: "It is a rule in some jurisdictions that a primary election to select candidates of the various political parties for public office is not a public purpose for which taxes may be levied or public revenues expended." The only case cited to sustain that text is that of *Waples* v. *Marrast,* which was in effect overruled by the *Smith* v. *Allwright* case, *supra.* And, inasmuch as that Texas case was predicated upon the proposition that the primary election was a private or party and not a public purpose, it cannot now be regarded as applicable here. But the text from which we have just quoted proceeds to say: "In other states, however, the view is taken that primaries are not the private affairs of the political parties, but constitute a part of the election machinery of the state, so that the payment of the expenses thereof by the state, or a political subdivision, does not constitute an expenditure of public money for other than a public purpose." Cases are cited in the note to sustain that view. See, also, 20 C. J. S. 1056.

We consider finally the objection that the congressional primary will not be held because the quorum courts have made no provision for the payment of the

expenses of the election. Several answers may be made to this objection, the first being that this failure, if true, does not affect the constitutionality of the act. But inasmuch as the power and duty of the courts to pay these expenses is involved, and is one of the reasons assigned for holding the act invalid, we proceed to decide that question.

In the first place, no specific appropriation by the quorum court is required to authorize the county to pay these expenses. The act has imposed this expense upon the counties and it will be their duty to discharge it.

In holding in the case of *Pearson* v. *State,* 56 Ark. 148, 19 S. W. 499, 35 Am. St. Rep. 91, that the legislature had the power to release a county treasurer from liability for school and county funds stolen by burglars, without fault on the treasurer's part, from a safe furnished him by the county, Judge HEMINGWAY said: "The power of the legislature to release a debt due to a municipality is of the same kind as its power to impose a debt on a municipality. It can do neither arbitrarily or capriciously, and must do either within the scope of a proper superintending control and trusteeship."

Opposing the view that such an expense may be imposed upon the county, we are cited the case of *State* v. *Craighead County,* 114 Ark. 278, 169 S. W. 964. In that case it was sought to require Craighead county to pay a bounty promised in consideration of the location of an agricultural school in that county. It was held that inasmuch as the school was a state institution, the burden of its erection and operation rested upon the state, and could not be imposed upon the county, inasmuch as the county could not be required to pay any part of the expenses of the state government. It may be noted that Chief Justice MCCULLOCH and Justice WOOD dissented from that holding. The case of *Cotham* v. *Coffman,* 111 Ark. 108, 163 S. W. 1183, involving the payment of a part of the salary of a circuit judge is to the same effect.

But the holding of an election in a county is a matter of vital concern to the citizens of the county, who other-

wise would be deprived of their right to participate in the election of their public officials. A county election is a public and a county purpose and a very important one, and if so the General Assembly has the power to impose its cost upon the county holding the election. Had the state seen proper to do so, it might have assumed the entire cost of the election. Indeed the primary election law of the State of Louisiana, § 2682.39, chapter, Election, La. General Statutes, apportions the cost of such elections between the state, parish and the towns of the state, and the candidates. If the right exists to assess any of the cost against the parish, or county, all costs might have been so assessed.

The cases of *Crawford County* v. *City of Van Buren,* 201 Ark. 798, 146 S. W. 2d 914, and *Jackson County* v. *Pickens,* 208 Ark. 15, 184 S. W. 2d 591, are decisive of the question. In each of these cases there was involved the question of the liability of the respective counties for the expenses of the municipal court, created by ordinances authorized by the laws of the state, which ordinances had in both instances been passed subsequent to the last prior meeting of the quorum courts of the respective counties. Consequently there was no appropriation for the payment of the portion of the expense of these courts imposed upon the counties. In the last of these cases, affirming the holding in the first one, that the counties were liable for and could be required to pay this expense, it was said: "There was therefore no discretion in the county court to allow or disallow the claims, funds being available for their payment, and it was not essential that there should have been a specific appropriation for their payment inasmuch as there was an unexpended balance of the appropriation for general county purposes sufficient to pay the claims." The holding in the case of *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S. W. 1002; and *Phillips County* v. *Arkansas State Pen.,* 156 Ark. 604, 247 S. W. 80, 248 S. W. 11, announced like principles.

But for the fact that it would protract and extend an opinion already too long, many acts of the General

Assembly might be cited which have imposed various duties upon the counties of the state, the expenses of which were to be paid by the counties.

Moreover, if an appropriation were required before the counties were liable for the expenses of the election, we must assume that a sufficient appropriation was made, for so it would have been if the quorum court in its sessions had followed the provision of § 2527 of Pope's Digest, which provides for the proceedings and order of business of these courts.

The sixth paragraph of this section taken from Act 301 of the Acts of 1909 (to which act reference was made in an opinion presently to be referred to), as amended by Act 112 of the Acts of 1937, provides the order in which, and the purpose for which appropriations may be made, and makes no specific reference to the expenses of holding elections of any kind. But the seventh paragraph of this section reads "to defray such other expenses of county government as are allowed by the laws of this state." This is in the nature of a "lest we forget" provision and covers any and all other expenses of the county government fixed by the laws of the state, and though no specific reference is made to elections, these expenses have always been paid and the obligation and power to pay them has never been questioned. Primary elections are legal elections and obligation to pay the expenses thereof has been imposed upon the counties by Act 107.

The case of *State, Use Prairie County,* v. *Leatham & Co.,* 170 Ark. 1004, 282 S. W. 367, involved the expense of an audit of the books and accounts of the county made pursuant to a contract with the county court. The right to pay was resisted upon the ground, among others, that no appropriation had been made to pay this expense. In holding that the claim should be paid notwithstanding that fact, Judge Wood there said: "It is not necessary that a specific appropriation be made to defray the expense of auditing the books and accounts of officers of the county in order to justify the county court in entering into a contract for that purpose. This does not fall within

the category of objects for which special appropriations must be made, under the acts of May 31, 1909, § 2, p. 902, § 1982, C. and M. Digest, subdiv. sixth, (1-6). But it does come within the category of (7), to-wit: 'to defray other expenses of county government as are allowed by the laws of this state.' *Craig* v. *Grady,* 166 Ark. 344, 266 S. W. 267."

It follows from what we have said that the act is constitutional and that the counties are liable for the expenses of the election. The decree of the court below will therefore be reversed and the cause dismissed.

SIMPSON *v.* STATE.

4412 195 S. W. 2d 545

Opinion delivered July 1, 1946.

O. A. Featherston, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

HOLT, J. Appellant, Dr. W. B. Simpson, was found guilty by a jury on a charge of obstructing a public road and a fine of $1 assessed as punishment. This appeal followed.

The evidence is to the following effect. The road in question passes over an 80-acre tract of land owned by

appellant and had been used by the public for thirty-five or forty years. In 1928 or '29, appellant erected gates obstructing this road, one where the road enters his land and the other on the opposite side where it passed off his property. The gates were opened and closed by those who made use thereof. There was no statutory dedication of this road and the county court exercised no jurisdiction over it by appointing a road overseer or otherwise. No money was spent by the county in its upkeep and it was never recognized as being a part of any road district.

Some time in early November, 1945, appellant locked the two gates and denied further use of the road to the public.

In these circumstances, appellant earnestly insists that there was no substantial evidence that the road obstructed was a public road, and we think he is correct in this contention. It was necessary, of course, for the State to prove that it was a public road before a conviction could be had.

Prosecution was had under § 3434 of Pope's Digest which provides: "If any person shall obstruct any public road by felling any tree or trees across the same, or placing any other obstruction therein, he shall be guilty of a misdemeanor, etc."

Any prescriptive right that the public might have acquired in this road prior to 1928 or '29 was lost by it when appellant, without objection on the part of the public, was permitted to erect the gates, *supra,* and thereafter for a period of seven years, in fact for approximately seventeen years, maintain them across this road.

In *Porter* v. *Huff,* 162 Ark. 52, 257 S. W. 393, this court said: "It is unnecessary to decide whether the public acquired a right to the use of the road as a public road by prescription, or seven years adverse possession, for it lost any right it may have acquired by acquiescing in a permissive use thereof for a period of more than seven years after the road was closed by gates. When appellee inclosed his land and placed gates across the road, it was notice to the public that thereafter they

were passing through the land by permission, and not by right. The undisputed evidence shows that these gates were maintained by appellee across the road for ten or eleven years, without objection on the part of the public." See, also, *Howard* v. *State* and *Howard* v. *State,* 47 Ark. 431, 2 S. W. 331, and *Pierce* v. *Jones,* 207 Ark. 139, 179 S. W. 2d 454.

Since it appears therefore that the road which appellant was charged with having obstructed was not a public road, he was guilty of no offense in obstructing it, or in denying its further use to the public. Accordingly, the judgment is reversed and the cause dismissed.

SIMMONS NATIONAL BANK *v.* BROWN.

4-7949 195 S. W. 2d 539

Opinion delivered July 1, 1946.

Buzbee, Harrison & Wright, for appellant.

Henry Donham, Leffel Gentry and *John Park,* for appellee.

MINOR W. MILLWEE, Justice. A hearing before the chairman of the Arkansas Workmen's Compensation Commission resulted in an award of compensation to appellee, George Brown, for the loss of a substantial portion of the vision of an eye while employed as a bank teller for appellant, Simmons National Bank. Upon a review by the full commission, the award was sustained. The insurance carrier and employer have appealed from the judgment of the circuit court affirming the award of the commission.

It is urged on this appeal that the evidence is insufficient to sustain the commission's finding that appellee sustained an accidental injury arising out of and in the course of his employment.

The statement, finding of fact, and conclusions of law are set out in the opinion of the commission as follows:

"*Statement of the Case*

"The claimant was employed as a teller in a bank operated by the respondent employer on May 11, 1944. While performing his duties in this capacity on that date, about 1:00 p. m., the claimant became aware of an itching in his right eye and thought he had got dust in his eye. He was in the teller's cage at the time, having returned to work at the end of his lunch period, 12:45 p. m. He mentioned his difficulty to Assistant Cashier E. L. Williams, who advised him to consult a doctor. The claimant then telephoned Dr. Clark who prescribed an eye wash. The following day the claimant was still in pain and went to see Dr. Clark who referred him to Dr. Caldwell, an eye specialist of Little Rock. Thereafter, the claimant was treated without success by several eye specialists of Little Rock, Dr. Caldwell, Dr. Schwarz, and Dr. Cosgrove, and Dr. Ellet of Memphis, until Dr. Cosgrove resorted to the use of penicillin which resulted in immediate improvement.

"The medical testimony is to the effect that the claimant was suffering from a corneal ulcer which could have been caused by dust or some other foreign body or by focal infection. No source of infection was found by the doctors.

"Upon the above statement, the Commission makes the following

"*Finding of Fact*

"1. The claimant sustained an accidental injury to his right eye on May 11, 1944, which arose out of and in the course of employment.

"Upon the above finding of fact, the Commission bases the following

"*Conclusions of Law*

"The claimant first became aware of the condition of his right eye while performing his duties. The first

doctor who saw him made a diagnosis of: 'either foreign body or some irritant within the eye.'

"The claimant is not required to prove his case to a mathematical certainty. The doctors were of the opinion that the condition was due to foreign substance or infection, and none discovered a source of infection. This is a factor which strongly supports the claimant's contentions. We believe it amply sufficient to create a doubt that should be resolved in favor of the claimant.

"Having reached the conclusion that the claimant got foreign substance in his eye while performing his usual duties in his customary place of work, and during his regular hours of employment, we cannot escape the conclusion that the resulting injury was accidental and arose out of and in the course of employment."

In addition to the facts disclosed by the opinion of the commission, there was evidence that claimant had been employed in the bank since 1929 and was wrapping currency and silver in the teller's cage when he had a definite sensation that something was in his eye. The bank was not air-conditioned and "blow fans" were used for ventilation. None of the doctors found a foreign object in appellee's eye, but an eye wash prescribed by Dr. Clark was used by appellee on the afternoon of May 11 and the morning of May 12 before he was examined by the doctor. Dr. Caldwell and Dr. Cosgrove were witnesses before the commission and both testified that appellee, in giving his case history, told them he thought he got dust or some other foreign object in his eye while at work. They also testified that appellee's condition could have been caused by getting some foreign substance in his eye or by an infection in the body, but neither was able to find any systemic infection which would have produced the condition. Appellee had a loss of vision of 80 per cent and had been unable to work since May, 1944.

The rule to be applied in testing the sufficiency of the evidence to support an award of the commission is stated in 71 C. J., p. 1279, as follows: "Where the board

or commission has made an award in favor of the employee, the evidence must be viewed in the light most favorable to support the award, and every legitimate inference will be drawn in favor of the employee.'' This court is also committed to the rule that the findings of fact by the commission are, on appeal, given the same verity that would attach to a jury's verdict, or to facts found by the judge of the circuit court where a jury was waived. If the findings of fact made by the commission are supported by any 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 282; *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 82.

It is first insisted that there is no proof that a foreign body lodged in appellee's eye during the course of his employment, and that the commission's finding that appellee suffered an accidental injury is, therefore, wholly conjectural and without evidence to support it. A similar contention was made in a case involving a death claim in *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252, where this court said: ''In all cases of this kind it is difficult to show with certainty the exact cause of death, and we do not believe that it is required by the law that the claimant should be compelled to prove the alleged cause of death to a mathematical certainty. The California Supreme Court, in the case of *Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 19 Cal. 2d 622, 122 P. 2d 570, 141 A. L. R. 798, lays down this rule: 'Circumstantial evidence is sufficient to support an award of the commission, and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required.'

''The rule as to the *quantum* of proof necessary to sustain an award in a case of this kind is thus expressed in 71 C. J., p. 1087: 'In determining the sufficiency of evidence, doubts should be resolved in favor of claimant, and the evidence should be reasonably and liberally con-

strued in his favor.' " When we look to the evidence in the light most favorable to the award, and consider all reasonable inferences that may be drawn from the facts and circumstances, we think there was sufficient competent evidence to support the conclusion of the commission that appellee suffered an accidental injury in the course of his employment by getting some foreign substance in his eye.

It is next insisted that the injury, though accidental, did not arise out of the employment. Our attention is called to the rule often quoted that the words "arising out of" employment refer to origin and cause of accident, and that an injury arises out of employment, when there is apparent to a rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. 71 C. J. 648; Words and Phrases, Perm. Ed., vol. 4, pp. 166-174. In this connection this court, in the cases of *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579, and *McGregor & Pickett* v. *Arrington, supra,* approved the following statement of law appearing in the case of *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 418, 30 A. L. R. 532: "The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause."

The McGregor & Pickett case, *supra,* involved a claim where death resulted from a heart attack, and the court said: "It may be admitted that deceased would not have died if he had not had heart trouble, but, even so, it was shown that his labor in the course of his employment pre-

cipitated his trouble, and this employment was 'a connection substantially contributory' to his death."

In discussing the requirement that an injury be one "arising out of" the employment, the Massachusetts court in Caswell's Case, 305 Mass. 500, 26 N. E. 2d 328, said: "It need not arise out of the nature of the employment. An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment." While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. *Baum* v. *Industrial Commission,* 288 Ill. 516, 123 N. E. 625, 6 A. L. R. 1242. Nor is it of any significance whether the injury was the natural and probable, or unusual and extraordinary, consequence of the employment. *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961.

The trend of recent decisions on the question is reflected in the following statement from Horovitz on Workmen's Compensation, pp. 152-153: "To say that 'in the course of' the employment is sufficient would make the employer an insurer, and be health and accident insurance in the guise of workmen's compensation. But where *any reasonable relation* to the employment exists, or the employment is a *contributory* cause, the court is justified in upholding an award as 'out of' the employment. The rule of liberal and broad construction is especially justified, as the acts usually severely cut down the amounts individuals can recover, with the intent that the recoveries be spread over a larger number of cases and thus benefit larger groups of workers, and to effectuate the humane purposes for which the acts were enacted. Hence board or commission awards based on a liberal construction of the words 'out of' are upheld whenever 'rationally possible'." Our case of *Hunter* v. *Summerville, supra,* is cited by the author in support of this rule of liberal construction.

There was substantial evidence that appellee sustained an injury within the period of his employment at

a place where he was required to be, and while he was fulfilling the duties of his employment. Applying the rules of liberal construction which must be accorded to the award made by the commission, we think the evidence substantially established his employment as a contributory cause of his disability, and that a reasonable relation existed between his injury and the conditions and incidents of his employment. It follows that there is sufficient competent evidence to support the commission's finding that the injury arose out of the employment.

The judgment of the trial court affirming the award of the commission is accordingly affirmed.

HAGGER, ADMINISTRATRIX, *v.* WORTZ BISCUIT COMPANY.

4-7942 196 S. W. 2d 1

Opinion delivered July 1, 1946.

D. L. Grace and *I. S. Simmons*, for appellant.

Hardin, Barton & Shaw, for appellee.

ED. F. MCFADDIN, Justice. The issues here are: (1) constitutionality of the Arkansas Workmen's Compensation Law; and (2) applicability of that law to the appellant's complaint against appellee.

Wortz Biscuit Company (hereinafter referred to as appellee) operates a baking establishment in Fort Smith. On December 30, 1944, Sylvia Johnson, aged 20, employee of the appellee, lost her life in a fire which occurred at the bakery. Appellant is the mother and administratrix of the estate of Sylvia Johnson, and, as such, brought action in the circuit court against appellee and Glen Kendall. In addition to the matters above stated, the complaint alleged: that Sylvia Johnson was duly at work when she received her fatal injuries; that the fire which caused the death of Sylvia Johnson was caused by the illegal storing of gasoline in glass containers in the bakery; that the breaking of one or more of such containers near the stoves and ovens caused an explosion and resultant fire; that gasoline in an underground storage tank was used for servicing company cars and delivery trucks; and that all such acts, of storing the gasoline in glass containers and in the underground tank, were violative of city ordinances and state laws, and were "gross, wanton and unlawful"; and that the death of the said Sylvia Johnson was caused by such unlawful and negligent acts.

The complaint further alleged that Glen Kendall was liable as joint tort feasor; because he was the shipping clerk of the appellee, and had charge of the shipping room where Sylvia Johnson was employed; that "the defendant, Glen Kendall, did knowingly, willfully, wrongfully, recklessly and unlawfully store or permit to be stored gasoline in glass containers in the Wortz Biscuit Company plant over which he had supervision and in which the deceased, Sylvia Johnson, was working at the time." The action against Glen Kendall is still pending,

so far as the record here shows. At all events we are now concerned with only so much of the case as involves Wortz Biscuit Company, which is the sole appellee.

To the plaintiff's complaint, the appellee filed a motion to dismiss, alleging that the complaint showed on its face that Sylvia Johnson was, at the time of her death, an employee of appellee, and in discharge of her duties as such employee; and that any claim or cause of action against Wortz Biscuit Company for the death of Sylvia Johnson would have to be brought and prosecuted under the Workmen's Compensation Law of Arkansas, and before the Workmen's Compensation Commission rather than in the circuit court. Appellant resisted the motion on the grounds (1) that the Workmen's Compensation Law was unconstitutional; and (2) that the death of Sylvia Johnson was caused by the gross negligence and unlawful acts of appellee, and therefore the Workmen's Compensation Law did not apply. At the hearing on said motion to dismiss, it was stipulated:

". . . that the deceased Sylvia Johnson was an employee of Wortz Biscuit Company and died on December 30, 1944, while on duty as an employee as the result of injuries received in a fire which occurred on the premises of the Wortz Biscuit Company on that day.

"That the Wortz Biscuit Company at that time employed approximately 150 employees and that it was an employer under the definition contained in section 2 of the Workmen's Compensation Act. That the Wortz Biscuit Company had complied with the terms of the Workmen's Compensation Act by procuring and maintaining in force adequate and complete Workmen's Compensation insurance as required by the Workmen's Compensation Act to secure the payment of compensation."

The circuit court sustained the motion, and entered final judgment dismissing the action against the appellee; and this appeal follows:

I. *The Constitutional Question.* The Arkansas Workmen's Compensation Law is Act 319 of 1939. It

was enacted by the Legislature after the people had adopted Amendment 26 at the General Election on November 8, 1938. The said Amendment 26 reads as follows:

"The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted."

In *Young* v. *G. L. Tarleton, Contractor,* 204 Ark. 283, 162 S. W. 2d 477, we upheld the constitutionality of Act 319 of 1939, saying:

"That legislation similar to our Act 319 is not violative of the Federal Constitution is definitely settled by the opinion of the Supreme Court of the United States in the case of *Mountain Timber Co.* v. *State of Washington,* 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. Nor does Act 319 violate our own Constitution, for full authority for its enactment was given by Amendment No. 26 to the Constitution, adopted at the 1938 general election. . . .

"This amendment confers upon the General Assembly the power to enact legislation prescribing the amount of compensation to be paid employees for injury or death, and to whom such payments shall be made. It confers power to prescribe the means, methods and forum for the adjudication of such claims, and for securing the payment thereof. It was pursuant to this amendment, and under the authority there conferred, that Act 319 was passed and became a law. The amendment provides

that otherwise, that is, except in cases arising between employer and employee, no law shall be passed limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property. The effect of this amendment is to amend both § 7 of Art. 2 and § 32 of Art. 5 of the Constitution in the respects indicated.

"It appears that every state in the Union, save only the State of Mississippi, now has legislation more or less similar to our Act 319, all of which have the same general purpose, and that such legislation has been uniformly upheld. The legislation has been attacked upon almost every ground which the ingenuity of learned counsel could conceive. At § 14, p. 64, vol. 1, Honnold on Workmen's Compensation, it is said: 'Every conceivable constitutional objection has been made to the various acts. They have been quite uniformly upheld as against general objections that they are unconstitutional, and as against the objections that they are class legislation and make unreasonable classifications, deny equal protection and due process of law, impair the obligation of existing contracts, though applying to such contracts, and interfere with the right to contract, the right to jury trial, and vested rights by abolishing existing statutory and common-law remedies, and that they abridge privileges and immunities.' "

The holding in *Young* v. *Tarlton* is a complete answer to appellant's first contention, which concerns the constitutionality of the Arkansas Workmen's Compensation Law.

II. *The Applicability of the Workmen's Compensation Law to This Case.* Appellant contends that the death of Sylvia Johnson was caused by the willful, wanton and reckless negligence of appellee concurring with like negligence on the part of Glen Kendall; and that the Workmen's Compensation Law does not cover the *willful negligence* of the employer, but only the *accidental acts* of the employer.

Appellant argues (a) that § 5 of the Workmen's Compensation Law says: "Every employer . . .

shall . . . pay or provide compensation for . . . disability or death from *injury* arising out of and in course of their employment . . .''; (b) that § 2(f) of the law, in defining ''*injury,*'' says that it means ''*accidental injury or death*''; (c) that the death of Sylvia Johnson was not an *accident,* because her death occurred through the *negligence* of the appellee; and (d) that ''an accident is an unavoidable casualty that occurs without anyone being guilty of negligence.'' The four steps in this argument (numbered ''a'' to ''d'' as above) are really all bottomed on the appellant's definition of an *accident,* as above quoted. To sustain this quoted definition of an *accident,* appellant cites such cases as *St. L. Ry. Co.* v. *Barnett,* 65 Ark. 255, 45 S. W. 550, and *Walloch* v. *Heiden,* 180 Ark. 844, 22 S. W. 2d 1020. These cases define an accident substantially as quoted by appellant.

The fallacy in the appellant's argument is in the fact that the words ''accidental injury'' have one meaning in traffic cases and damage cases, such as those just cited, but have an entirely different meaning in cases arising under the Workmen's Compensation Law. The words, ''accidental injury,'' used in the Workmen's Compensation Law, mean something happening without the design of, and being unforeseen and unexpected by the person to whom the injury happens. As stated in 71 C. J. 571:

''*By Whom Event Must Be Unexpected, Unforeseen, or Undesigned.*—Within the meaning of the statutory word 'accident' and the like, as used to indicate when compensation shall be paid, and construed to mean an unlooked-for and untoward event which is not expected or designed, it is the expectation, intention, or design of the workman that is to be regarded; . . .''

And again in 71 C. J. 579 it is stated:

''*Intention or Design as Affecting Accidental Nature of Injury.*—In accordance with the view that the 'undesigned' element in the definition of a compensable 'accident' within the meaning of the compensation acts has

reference to the design of the victim rather than to the design of another whose act may have inflicted the harm for which compensation is sought, it has been broadly stated that an injury may be the result of accidental means so as to be compensable notwithstanding the act producing the injury was intentional and that a death resulted from the intentional act of another does not preclude compensation under a statute providing that compensation shall be paid for 'accidental injury,' and these rules have been applied to disability or death resulting from intentional assaults by third persons and to injuries sustained by an employee by reason of the intentional act of an employer."

And in Honnold on "Workmen's Compensation," § 87, it is said:

"The circumstance that the injury was the result of a willful or criminal assault by another does not exclude the possibility of injury by accident. An injury caused by the attack of a third person may be accidental so far as the injured person is concerned."

To the same effect, see Horovitz on "Workmen's Compensation," p. 86.

In the case at bar the alleged negligence of the appellee and/or Glen Kendall does not prevent the death of Sylvia Johnson from having been an accidental death from the viewpoint of Sylvia Johnson; and that is the viewpoint from which the Workmen's Compensation Law sees the unfortunate event.

Appellant cites and relies on our language in *Murch-Jarvis Co.* v. *Townsend,* 209 Ark. 956, 193 S. W. 2d 310, in which we said:

"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 566-568."

The above quotation is not in conflict with the holding in this present opinion. In the Murch-Jarvis case we were discussing the inhalation of dust as an accident, and not the question of the negligence or design of the employer, or of a third person, which is the situation here. It is elementary that the language of any case must be read in the light of the facts there under consideration.

Section 4 of Act 319 of 1939 provides, in part:

"The rights and remedies herein granted to an employee subject to the provisions of this Act, on account of personal injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next kin, or anyone otherwise entitled to recover damages from such employer on account of such injury or death, . . ."

We discussed that section in *Odom* v. *Arkansas Pipe & Scrap Material Co.*, 208 Ark. 678, 187 S. W. 2d 320; and what we said there is apropos here:

"The lower court properly dismissed appellant's complaint. Under the provisions of the Workmen's Compensation Law the liability therein created is the only liability against the employer that may arise out of the death or injury of an employee subject to the act."

The judgment of the circuit court dismissing the circuit court action against the Wortz Biscuit Company is in all things affirmed.

LEWIS *v.* TATE, MAYOR.

4-7996 195 S. W. 2d 640

Opinion delivered July 1, 1946.

[redacted]

Creekmore & Robinson, for appellant.

Batchelor & Batchelor, for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether bonds Mulberry proposes to issue are valid: or, rather, whether matters of which complaint is made deprive municipal officials of power to execute the securities.

Mulberry was incorporated in 1880. October 2, 1945, its Council passed Ordinance No. 78, calling an election under Act 211 of 1939, the issue being whether the town should be advanced to a City of the Second Class. Notice was published in out-of-town newspapers, there being none in Mulberry. The Mayor also caused notices to be posted. November 6, 96 votes were cast in favor of the ordinance and none against it. A certified copy of the result was duly made, and on November 23, at a regular meeting of the Council, that body passed Ordinance No. 80, calling for a special election ". . . to submit to the voters the question of issuing bonds under Amendment No. 13 to the Constitution . . . for the purpose of constructing sewers." The complaint incident to this appeal recites that "The County Board of Election Commissioners appointed qualified electors of Mulberry as judges and clerks of the election, . . . held January

2, 1946." The vote was 103 for the issue, and none against it.

March 5, 1946, the Council unanimously passed Ordinance No. 86. It provides for an issue of $34,000 3¼ sewer *revenue* bonds, converted to $36,250 3% bonds.

Contention is: (a) the Sheriff did not proclaim an election, as provided by § 4672 of Pope's Digest; (b) there was no reorganization of the city government after November 15, 1945, when the State Board of Municipal Corporations authorized the upgrading to a City of the Second Class, and prior to April 2, 1946, when new officers were elected, three wards were designated, and other municipal procedure consonant with the new status was taken; (c) requirements of Amendment No. 13 to the Constitution in respect of notice was not complied with, and (d) the City is proposing to issue two kinds of bonds for the same purpose.

The answer admits most of the material facts alleged; but insistence is that authority was appropriately exercised. On this final point the contention is that ". . . there is no Constitutional or statutory prohibition upon [the City's] right to issue bonds under Amendment No. 13 and [under] the provisions of Act 132 of 1933, as amended; that the bonds are separate issues and are payable from entirely separate funds, and there is nothing in either the Amendment or the statute which requires that either issue by itself be large enough to pay the entire cost of the sewer system."

The Court found that the answer stated defenses to the complaint. Appeal is from the Court's action in overruling a demurrer to the answer.

Our attention is first directed to Amendment No. 13 to the Constitution. It amends Art. XVI, § 1, of the Constitution of 1874. Cities of the First and Second Class are authorized to issue bonds for enumerated purposes, one of which is construction of sewers and comfort stations. In *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223, it was held that the Amendment did not pro-

hibit cities and towns from making improvements for which interest-bearing evidences of indebtedness might be issued, if the debt be payable solely from revenues derived from such improvement. In discussing the question Mr. Justice MEHAFFY said for the Court: "It was manifestly the intention of the framers of Amendment No. 13 to prohibit cities and towns from issuing interest-bearing evidences of indebtedness, to pay which the people would be taxed, or their property appropriated to pay the indebtedness, or any indebtedness that placed any burden on the taxpayers. (Citing *McCutchen* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. 2d 1037.)"

It must be observed, however, that Amendment No. 13 only allows Cities of the First and Second Class to issue bonds payable from a tax not to exceed five mills; "towns," so-called, are not within the purview of the Amendment's exceptions. Preceding the proviso just referred to, the language is: ". . . nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874."

The case turns upon power by the town authorities to authorize a millage tax. It is not necessary to discuss the want of a proclamation by the Sheriff. Assuming, without deciding, that appellee had the right to pledge surplus revenues to cover the issue of $34,000 converted bonds, (see *City of Harrison* v. *Braswell,* 209 Ark. 1094, 194 S. W. 2d 12)[1] still there was no authority for issuance of tax-secured bonds until Mulberry became a City of the Second Class. This status had not been acquired when the election was held, except to the extent that the serving officers were *de facto* officials with power to function regarding those things an Incorporated Town might do.

[1] The Chief Justice, and Mr. Justice MCFADDIN, wrote separate dissenting opinions in the Harrison-Braswell case. While the dissents were noted in The Reporter, the opinions were not published, but appear in official report of this case, and will be printed in the 209th Arkansas Reports.

It is insisted that § 9494 of Pope's Digest confers the necessary authority. The section is taken from Act 212, approved March 23, 1915. The Act is curative. It deals with governments of municipalities "which the Legislature has declared to be Cities of the Second Class," and makes officers so serving the *de facto* officials of such governments. There is reference to the fact that some time must elapse before a government can be organized in such municipalities as incorporated towns, [therefore] the present officers of such municipalities are confirmed . . . and declared to be the *de facto* and *de jure* officers of said municipalities.

The next section requires the Governor to call special elections, "to be held in all municipalities which have been raised by Act of the General Assembly from the grade of Incorporated Towns to the grade of Cities of the Second Class."

Act 334, approved March 25, 1937, authorized "any incorporated town which is a county seat" to become a city of the second class by following the procedure outlined. The 1937 law was amended by Act 211, approved March 9, 1939. The requirement that the incorporated town be a county seat was eliminated. Prior to 1937 an incorporated town could not be advanced unless its population was in excess of 1,750. See Act 119, approved March 9, 1931; Pope's Digest, § 9483.

In *Cotten* v. *Hughes,* 125 Ark. 126, 187 S. W. 905, it was held that acts of municipal officers in creating a local improvement district and levying assessments (such acts having been performed subsequent to the passage of Act 212 of 1915, and before new municipal officers were elected) were valid. The opinion, however, carefully pointed out that ". . . creation of the improvement district was entirely within the statutory power of an Incorporated Town, as much so as within the powers of cities of either class, and the Legislature did not attempt to confer any new power in authorizing the Council to perform acts for and on behalf of the Incorporated Town."

Board of Improvement of Gravette Waterworks Improvement District v. *Carman,* 138 Ark. 339, 211 S. W. 170, is in point. In respect of Act 212 of 1915 it says: "This Act undertook to legalize the acts of *de facto* governments of . . . municipalities and to constitute the *de facto* governments the *de jure* governments until such time as an election could be held for the election of the officers provided for by law for Incorporated Towns." But § 2 of Act 212 required the Governor to call special elections, and it was never contemplated that the *de facto* status should be unending.

The Carman case also held—as to the principle there presented: "We would have a very different question if there had been no legislative authority to create improvement districts in Incorporated Towns."

The Carman opinion says: "But [in the Cotten-Hughes case] we expressly pretermitted any discussion of the validating effect of [Act 212] on acts [of municipalities] which had been performed prior to its passage. That case is distinguishable from the instant case in this, that the improvement district, the organization of which was there upheld, was created by the Council of the town of Benton after the passage of Act 212 of 1915 and while the Council was acting under the authority there conferred by that Act as the Council of the Town of Benton pending the election of their successors, which had not then been held; while here the improvement districts were established by aldermen who were assuming to act as aldermen of a City of the Second Class and prior to passage of the act."

Unless Act 212 of 1915 was intended as a bridge between incorporated towns and cities of the second class, the provisions of which should continue until altered by the General Assembly, there was no authority in the instant appeal for procedure under Amendment No. 13; but since an Incorporated Town may pledge a surplus the right to issue revenue bonds existed. This is the majority view, although the writer of this opinion, in dissenting in *City of Harrison* v. *Braswell, supra,* ex-

pressed the view (which he still entertains) that any pledge involving funds "in excess of the revenue for such City or Town for the current fiscal year" is void. See Amendment No. 10 to the Constitution.

The decree is reversed.

HOLT, J. (dissenting). With all due regard for the opinion of the majority, I am impelled to dissent.

The facts are not in dispute. By appropriate procedure, the incorporated town of Mulberry, Arkansas, was raised to a city of the second class and officially so declared to be by the State Board of Municipal Corporations on November 15, 1945. During the period between November 15, 1945, and April 2, 1946, on which latter date an election was held and municipal officers, for the second class city of Mulberry, were elected and took office, the municipal officers who were serving Mulberry, while it was an incorporated town, continued to hold over and function. It was during this interim, or hold over period, and, as indicated, after Mulberry had been raised to a city of the second class that the holdover officials of the city passed the ordinance giving to the electorate of Mulberry the opportunity to vote upon themselves the bond issues for the construction of the sewer system here in-

[2] The record in this case shows that $34,000 of 3¼% revenue bonds were authorized to be sold with privilege of conversion to 3% bonds. The record also discloses that when converted the amount would be $36,250. In a memorandum it is insisted that the municipality sold $34,000 of 3½% bonds, instead of 3¼%, with the privilege of conversion to 3%. The memorandum also shows that 3½% bonds so converted to 3% would correspond to an issue of $36,250, which amount would appear to be approximately correct. Seemingly, however, if 3¼% bonds were sold by the municipality (as reflected by the record) then approximately only $35,000 in principal of 3% bonds could be issued. Either the record is wrong as to the rate of interest to be borne by the bonds prior to conversion, or the conversion to $36,250 at 3% is wrong. Actually, if the municipality authorized the sale of $34,000 of 3½% bonds, then the conversion to $36,250 of 3% bonds, although not a true conversion, for all practical purposes would be correct. However, if 3¼% bonds were authorized, then the conversion to 3% would indicate an issue of approximately $35,000, if the computations here made are correct. The net result would seem to be that if 3½% bonds were authorized, the municipality should receive $34,000; but if 3¼% bonds were authorized, the excess, or over-issue, would be more than $1,000.

volved. The election was duly held and by an almost unanimous vote, the bond issues carried.

In these circumstances, the appellant contends and the majority opinion holds, as I construe it, that the acts of the holdover officers or city council of the town of Mulberry subsequent to November 15, 1945, when Mulberry was raised to a city of the second class, are absolutely void and of no effect in so far as their acts permitted the issuance of "tax secured bonds," and therefore, that any ordinance which these officials attempted to pass in order to permit the people of Mulberry to vote upon themselves tax secured bonds was of no effect, or invalid.

It is my view, both by present statute and former decisions of this court, authority is found for the acts of these holdover officers for the reason that they were acting at least in the capacity of *de facto* officers and while so acting, their acts in the circumstances were valid and binding. Section 9793, Pope's Digest, provides in part as follows: "The corporate authority of incorporated towns organized or to be organized for general purposes shall vest in one mayor, one recorder and five aldermen, who shall be qualified electors residing within the limits of the corporation, and shall hold their office for two years and until their successors are elected and qualified."

It is obvious that some time must elapse after the incorporated town of Mulberry was officially declared to be a city of the second class and the date on which municipal officers could be elected, and qualified and take office in Mulberry, as a city of the second class.

It seems to me that any other construction would mean that there would be an interim when Mulberry would be without any kind of government, and as this court said in *Board of Improvement of Gravette Waterworks Improvement District* v. *Carman,* 138 Ark. 339, 211 S. W. 170: "It is intolerable that there could be a period during which a governmental entity (referring to the incorporated town of Gravette) should be without a government."

I think that the old officers of the town of Mulberry held over and continued in office until their successors were elected and qualified as the statute seems to provide.

It must be noted here that what these holdover officers attempted to do was within the power of cities of the second class, under Amendment 13 of the Constitution of Arkansas, to perform. I think, as holdover officers, they had the same powers that would be accorded to officers duly elected and qualified after Mulberry became a city of the second class.

Here, there is no suggestion or intimation of fraud or lack of good faith on the part of these holdover officers. The people of Mulberry were given the opportunity by these officers to vote, and did vote these bond issues upon themselves. This small progressive city now operates and owns a waterworks system and I can conceive of no improvement that would be more effective in preserving and protecting the health and welfare of the people within Mulberry than an adequate sewer system.

In *Faucette, Mayor,* v. *Gerlach,* 132 Ark. 58, 200 S. W. 279, Judge HART, speaking for this court, quoted with approval from Kent's Commentaries, 14 Ed., vol. 2, p. 295, and said: "In the case of public officers, who are such *de facto* acting under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in the case of sheriffs, constables, etc.; their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice."

Accordingly, it is my view the decree of the lower court should be in all things affirmed.

Mr. Justice MCHANEY concurs in this dissent.

BRACK *v.* COBURN.

4-7941 196 S. W. 2d 230

Opinion delivered July 1, 1946.

Rehearing denied September 30, 1946.

Horace Chamberlin, for appellant.

Chas. B. Thweatt and *Cooper Thweatt,* for appellee.

ROBINS, J. The controversy presented by this appeal arose from an application made to the lower court by

appellant, as widow of Milton G. Brack, deceased, for allotment of her dower. Appellant makes no objection to any part of the order made on her petition except that part by which the court, treating as real estate the one-third interest of Milton G. Brack in two long-term leases, in the one instance made by Brack's father as lessor, and inherited by appellant's husband, and in the other made by Brack himself as lessor of inherited land, by which two different parcels of real estate in Little Rock were demised to two different corporations as lessees, one of these leases being for a term of 99 years and the other for a term of 30 years, allotted to appellant as dower an undivided one-half interest for her life only in the interest of her deceased husband in these leases and in the reversion retained therein. Appellant, insisting that these leases should be treated as personal property and that she should be awarded an absolute undivided one-half interest as her dower in the rents payable thereunder on the share of her husband, has appealed from the lower court's order.

There is no controversy whatever as to the essential facts in this case, which are as follows: Milton G. Brack died intestate on July 29, 1945, leaving his widow, the appellant, and no child or other descendant surviving him. His collateral heirs are the appellees, who are the children of a deceased brother of said Milton G. Brack. Milton G. Brack had inherited from his father an undivided one-third interest in lot 12 and the north 10 feet of lot 11, of block 74, original city of Little Rock, subject to a lease of said property for 99 years to the State Bank Building Company, which was later assigned to the Boyle Realty Company, executed effective as of January 1, 1909, by Milton G. Brack's father and other owners thereof, and of which lease Milton G. Brack inherited an undivided one-third interest. Said Milton G. Brack was the owner by inheritance of an undivided one-third interest in the south 40 feet of lot 11, block 74, original city of Little Rock, which said Milton G. Brack had, along with the other owners, leased to the Capital Realty Company effective as of June 1, 1938, which lease was later assigned

to the M. M. Cohn Company, for a term of 30 years. Milton G. Brack also owned (in addition to the one-third interest inherited), by purchase made by him, an undivided one-sixth interest in this last-mentioned tract, but there is no controversy as to the rights of the parties as to this interest. All debts owed by Milton G. Brack have been paid. It is agreed that the estate of Milton G. Brack in both properties, extent of dower in which is involved herein, was an ancestral one.

The statutes applicable here are §§ 4420 and 4421, Pope's Digest, as follows:

"Section 4420. A widow shall be entitled, as part of her dower, absolutely and in her own right, to one-third part of the personal estate, including cash on hand, bonds, bills, notes, book accounts and evidences of debt, whereof the husband died seized or possessed.

"Section 4421. If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seized, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs; but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and of one-third of the personal property absolutely, Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors."

Appellant insists that the leases were evidences of debts, because they both contained the promise of the lessee to pay a stipulated annual rental—$12,000 payable in quarterly installments under one lease, and, under the other, $14,334 for the first year, $17,200 per year for the next nine years, $18,000 per year for the next ten years, and $19,000 per year for the last ten years, payable in equal monthly installments. Appellant argues that, since these leases were evidences of debt, and therefore per-

sonal property, she was entitled, under the provisions of § 4421, Pope's Digest, to one-half thereof "absolutely and in her own right, as against collateral heirs."

To support her contention that the interest of appellant's deceased husband in the leases was personal property, and not real estate as the lower court held, appellant cites certain language used by this court in its opinion in the case of *Stull* v. *Graham,* 60 Ark. 461, 31 S. W. 46, and the reference to this language in the case of *Mayo* v. *Arkansas Valley Trust Company,* 132 Ark. 64, 200 S. W. 505.

In the Stull case, *supra,* it appeared that Stull, the decedent, had rented to Swepston the farm land appurtenant to his (Stull's) home for the year 1892 for a rental of $3,274, evidenced by a promissory note. Stull died February 29, 1892, and, the widow's dower not having been assigned to her by the heir during the year in which her husband died, Mrs. Stull claimed that under § 2537 of Sandels & Hill's Digest (§ 4416, Pope's Digest) she was entitled to the use of the "chief dwelling house of her late husband, together with the farm thereto attached," and that therefore she was entitled to all of the note executed by Swepston to Stull and representing the rental for the year 1892. This court decided against her contention that the entire note should be awarded to her, but held that she was entitled to dower therein "as in the other personalty." The question as to whether the rent note was chattel or real property was not an issue at all in that case. She had lived beyond the end of the year for which the property had been rented, and until long after the note matured. Hence the extent of her dower interest therein would have been the same, whether the rent was treated as a chattel or as incidental to the real estate. Therefore this language in the Stull case was in reality mere *obiter dicta,* and, though it was referred to in the case of *Mayo* v. *Arkansas Valley Trust Company,* 132 Ark. 64, 200 S. W. 505, a determination of the character of rentals on land of a decedent accruing after his death was not necessary to the decision in that case. In fact the court in the Mayo case indicated an unwill-

ingness to make any declaration on the question now under consideration, saying in the opinion: "In view of the fact that the widow's rights are not affected by the determination of that question, she being given the same proportion under our statute whether the rent be treated as personalty or as a part of the realty, it is immaterial to decide that question." In the reference made in the opinion in the Mayo case to the Stull case it is somewhat inaccurately stated that it had been held in the Stull case that rents accruing after the death of the owner from a lease *for a term of years* (italics ours) is personal property which goes to the representative of the decedent. A careful examination of the opinion in the Stull case discloses that there was no lease of lands for a term of years, the lease there involved being for only one year.

There is a very material difference between the property rights involved in the Stull case and those under consideration here. In the Stull case, the decedent had rented out his farm land for one year and had taken a promissory note for the rent for that year. The rent note in dispute there conferred no right on the holder thereof except the privilege of collecting the rent—it carried with it no sort of interest or title in the land or right pertaining thereto.

But, under the leases involved here, the lessors have the right of re-entry not only at the end of the respective terms fixed in the leases, but the leases confer on the lessors, under certain conditions, the authority to take possession of the property before the expiration of the respective terms thereof. Both of these leases contained provisions to the effect that, if the lessees failed to pay the rent promptly, or failed to construct the kind of buildings required in the lease to be erected by lessees, or failed to pay the taxes when due, the lessors might immediately take possession of the property, in which event the lessors would thereupon own, free from any claim of the lessees, the modern and costly buildings on the demised tracts. This power of the lessors to end the leases and to take over the buildings constructed on the lots by lessees is a very valuable and important one. The

rights of the lessors, during the terms of the leases here involved, is something much more than a mere authority to collect rent from the lessees; and this right of the lessors to cancel the lease and become the owners, without cost to them, of these buildings certainly partakes of the nature of an interest in realty.

It is also urged by appellant, as a further reason why the interest of her deceased husband in the leases must be held to be personal property, that, under the statute, a widow may be endowed of only real estate of which her husband died *seized and possessed,* and she argues that her husband was not seized and possessed of this property when he died, because the actual possession thereof had been transferred by the leases to the lessees. In the first place, it may be pointed out that this position of appellant is somewhat inconsistent, because she is asking not only that she be given dower in the rentals, but she also demands her dower in the reversionary interest of her deceased husband, in spite of the fact that she contends that her husband was not "seized" of the property at the time of his death.

A complete answer to this contention of appellant is that her husband was seized of this property when he died, because his tenant was in possession thereof, and, under the law, the possession of the tenant is the possession of the landlord. "An estate for years or other mere chattel interest interposes no impediment to a title of dower, because such an interest does not interfere with the seizin, but preserves it, possession under the chattel interest being regarded as the possession of the owner of the fee." 17 Am. Jur. 669. The "chattel interest" referred to in this citation is, of course, the interest of the tenant or lessee, which is generally held to be a chattel rather than an interest in real estate. *Lenow* v. *Fones,* 48 Ark. 557, 4 S. W. 54.

"The grant by a tenant in fee of a term of years in no way affects the seizin of the grantor, whose interest is then freehold in possession subject to the term." 31 C. J. S. 126.

In the case of *Sykes* v. *Sykes,* 49 Miss. 190, And. 21 A. L. R. 1080, the court said: " 'At the common law, seizin in law was sufficient to sustain the claim of dower. We do not suppose that any special significance is to be attached to the word "possessed" in the clause of the statute, "lands . . . tenements . . . of which the husband died seized and possessed." The statute does not mean that there shall be an actual occupancy by the husband in addition to the seizin. The statute is satisfied if the husband died seized of an estate of inheritance, although at the time an outstanding term might be in a tenant, and he in actual possession.' "

To the same effect are holdings in these cases: *Bates* v. *Bates* (1697), 1 Ld. Raym. 326, 91 Eng. Reprint, 1113; *Sheaf* v. *Cave* (1857), 24 Beav. 259, 53 Eng. Reprint, 357; *Boyd* v. *Hunter* (1870), 44 Ala. 705; *Sykes* v. *Sykes* (1873), 49 Miss. 190; *Weir* v. *Tate* (1845), 39 N. C. (4 Ired. Eq.) 264; *Houston* v. *Smith* (1883), 88 N. C. 312; *Prasser's Will* (1909), 140 Wis. 92, 121 N. W. 643.

An interest such as that owned by Milton G. Brack in the two leases involved herein is an estate in land and not a chattel interest. If it were a chattel interest, title thereto would, on the death of the lessor, pass to the administrator; but the authorities are practically unanimous to the effect that such an interest descends to the heirs, subject to the statutory right of the administrator to hold same for the purpose of paying debts of the estate.

In *Phillips* v. *Grubbs,* 112 Ark. 562, 167 S. W. 101, we said: "The decree ought, however, to be modified with respect to the order on Grubbs to pay the rent to Frank A. Wright as executor of the estate of Mrs. Carr. It does not appear that the lands or the rents and profits thereof are necessary for the payment of debts; therefore, the heirs are entitled to collect the same."

"At common law, and in the absence of the circumstances or contingencies contemplated by . . . testamentary or statutory provisions, the personal representative has no authority or duty to collect rents and profits

accruing after the death of his decedent, the right thereto being in the heir or devisee of the realty." 33 C. J. S. 1270. See, also, 17 Am. Jur. 678; 32 Am. Jur. 375.

In the case of *Fay* v. *Holloran* (N. Y.), 35 Barb. 295, the Supreme Court of New York said: "It has been often decided that if the landlord dies before the rent becomes due, it goes to the heir, as incident to the reversion."

Almost the same question as that involved here was decided by the Supreme Court of Tennessee in the case of *Combs* v. *Combs,* 131 Tenn. 66, 173 S. W. 441. In that case a widow, who rejected the provision made for her in her deceased husband's will, sought to have set apart to her, as a part of her allowance, notes executed to the deceased for the rent of real estate devised to his children, which notes did not mature until after the death of the husband. The court, holding that the widow could not obtain such allowance, said: "A dissenting widow's allowance may be set apart to her out of any personal assets of her deceased husband's estate. Code (Shannón), § 4020. But by such personal 'assets' is meant those which go into the hands of the administrator or executor for the payment of debts. *Agee* v. *Saunders,* 127 Tenn. 680, 157 S. W. 64, 46 L. R. A., N. S., 788. By the rule of the common law rents under a lease executed by the owner of the fee, so accruing after death, cannot be said to be the goods, chattels, rights, or credits of the deceased, since they are incident to the reversion, and vest in the heir or devisee. In this state, as well as in many other states, this rule is in force; it being said in *Smith* v. *Thomas,* 14 Lea (82 Tenn.) 324, that there is nothing in our statutes changing the rights of the heir or devisee. *Combs* v. *Young,* 4 Yerg. (12 Tenn.) 218, 231, 26 Am. Dec. 225; *Rowan* v. *Riley,* 6 Baxt. (65 Tenn.) 67; note to *Walsh* v. *Packard,* 40 L. R. A. 321. . . . It is pointed out by the counsel of the widow that all of the above cases involved rents to accrue under, and represented only by, the rental contract, or by way of account; and it is argued that in the pending case notes were taken for such rental sums, that the rents were thus placed in negotiable form, and that from this fact we should imply a severance of the rents

from the reversion. By the common law rent was capable of being separated or severed from the reversion by the owner of the land granting or devising the land and reserving the rent, or by his granting or transferring the rent and retaining the reversion. But the act which severs must be that of such owner, indicating a purpose to sever."

In Scribner on Dower (Second Edition), vol. 2, p. 776, it is said: "The widow, when endowed of lands upon which there is an existing lease for years, becomes the reversioner, and is entitled to the rent, or, as the case may be, to a proportion of it."

The lower court's decree awarding the appellant dower in the interest of her husband in the leases and in the reversions as in real estate is correct; and it is accordingly affirmed.

HILDRETH *v.* HILDRETH.

4-7919 196 S. W. 2d 353

Opinion delivered July 1, 1946.

W. A. Singfield, for appellant.

McMillan & McMillan, for appellee.

McHaney, Justice. Appellants are the collateral heirs of Louisa Hildreth and of S. D. Hildreth who died testate and without issue on July 21, 1944. Appellee is the widow and chief beneficiary under the will of said S. D. Hildreth, which also makes provision for monthly payments of $14 each out of his estate to his sister, Lena Trigg, for her lifetime.

Appellants brought this action against appellee to determine the ownership of the southwest quarter of lot 46 of Trigg's Addition to the City of Arkadelphia. The title to this tract was conveyed by T. A. Sloan to Louisa Hildreth some years prior to her death in 1921, and she was residing thereon at the time of her death. The deed to her was lost or destroyed and was never recorded. She was the mother of said S. D. Hildreth, R. A. Hildreth who died in 1927, leaving a widow and no children, and Lena Trigg, and another son and daughter who both predeceased their mother, but each left children or a grandchild, who are parties appellants.

Appellants claim title by reason of a deed to said lot from said Sloan to S. D. Hildreth, R. A. Hildreth and Lena Trigg. This deed recites a consideration of $1 "paid in order to renew or replace a lost deed which (was) executed many years ago by T. A. Sloan to Louisa Hildreth, the grantees herein being the heirs at law of said Louisa Hildreth," and was dated August 1, 1922, and recorded on September 15, 1922.

The complaint alleged that appellants are the owners of said land in certain proportions therein set out and prayed partition and sale thereof. The answer denied the ownership of appellants and alleged exclusive adverse possession of said land for more than 20 years during which time valuable improvements were made by appellee and her husband, payment of all taxes during said time, all to the knowledge of appellants who lived in the vicinity of said property and who observed the acts of S. D. Hildreth in regard to said property through-

out said 20 years, and who have never claimed, demanded or received any rents or protested the making of said improvements, but have sat by and waited until the death of said Hildreth to claim any interest in said land. An intervention was filed in behalf of a great-grandson of Louisa Hildreth and for the widows of a son and a grandson claiming an interest in said land.

Trial resulted in a decree for appellee. The complaint and intervention were dismissed for want of equity and quieted the title to said property in appellee "as heir and residuary legatee under the will of S. D. Hildreth, deceased." The court made these findings: "The court finds that S. D. Hildreth and Maude I. Hildreth were married on September 17, 1924, and shortly thereafter took possession of said land upon which at that time was located a three-room shack and that said S. D. Hildreth and Maude I. Hildreth tore down said three-room shack and immediately began construction of a six-room house and that said S. D. Hildreth and Maude I. Hildreth have been in open, notorious, peaceable and exclusive possession of said lands at all times thereafter and for more than 20 years, and have expended upon improvements on said property during said 20 years $5,739.67 and that the said S. D. Hildreth has paid taxes upon said land beginning with the taxes for the year 1923 and continuing through the year 1943, and has expended the sum of $133.35 for taxes.

"The court further finds that all during the time that S. D. Hildreth and Maude I. Hildreth were living upon said land and making improvements thereon that they were claiming said land adversely to the interest of the plaintiffs and to the exclusion of all other parties and that the claim was a matter of common and general knowledge in that community and was known to the plaintiffs, especially to Richard Albert Hildreth and to Lena Trigg, both of whom lived within 100 feet of the property in question and who were intimately acquainted with all of the activities of S. D. Hildreth and Maude I. Hildreth.

"The court further finds that the defendant, Maude I. Hildreth, actually contributed $1,500 of the original construction cost of the house from her own personal money under the belief that the lands belonged to her husband, S. D. Hildreth, now deceased, and that from time to time said Maude I. Hildreth has contributed from her earnings at least 50 per cent of all of the funds expended for improvements and taxes under the belief that said lands belonged to her husband, S. D. Hildreth.

"The court further finds that the defendant has sustained both (1) the defense that said S. D. Hildreth and Maude I. Hildreth have held said land adversely for more than the statutory time, and (2) that the said S. D. Hildreth and Maude I. Hildreth have expended the sum of $5,739.67 for improvements, which improvements have enhanced the property's present value in the sum of $4,500 and have expended the sum of $133.35 for taxes for all of which the defendant would be entitled to compensation, even if she had not acquired title by adverse possession.

"But the court further finds that the defendant's defense of adverse possession is an absolute and complete bar to all of the claims of any and all of the plaintiffs and that, therefore, this cause should be dismissed with prejudice at the cost of the plaintiffs."

To reverse this decree this appeal is prosecuted, and substantially the only argument is that the decree is contrary to the evidence. With this we cannot agree. The deed to this property is made by Sloan to S. D. Hildreth, his brother, R. A., and sister, Lena Trigg. R. A. Hildreth died in 1927, but he and Lena lived very close to this property and must have known that S. D. and appellee had taken possession thereof shortly after their marriage in 1924, had torn down the 3-room shack standing thereon, filled in the ground which was low and swampy, erected thereon valuable improvements, paid the taxes and openly and notoriously exercised all the acts of ownership without objection by R. A. during his lifetime or by Lena Trigg, or by any of the other appellants, until after the death of S. D.

The general rule is that the possession of a tenant in common is the possession of his co-tenants, and that in order for the possession of a tenant in common to be adverse to his co-tenants, knowledge of such claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed. *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958. In *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96, it was held, to quote a headnote, that: "Where for more than thirty years co-tenants and those claiming under them permitted land to be held by one of their number who treated the possession in all respects as his own—paying taxes, selling timber, making improvements, executing leases, etc.—and these facts and other facts and circumstances are testified to by numerous reputable witnesses, the chancellor was justified in finding that the tenant in possession held adversely." See, also, *Stewart* v. *Pelt,* 198 Ark. 776, 131 S. W. 2d 644.

Here, as in *Jones* v. *Morgan, supra,* S. D. Hildreth did not go to his brother, R. A., nor to his sister, Lena Trigg, nor to any of the other appellants and say, "I am claiming this land as my own; I deny your interest in it; take notice of my attitude!" Yet, for more than 20 years, "his conduct, his situation, and his actions in dealings affecting the property were tantamount to a declaration of hostility to the claims of all persons," including appellants.

For more than 20 years appellants sat by, knew that S. D. Hildreth and appellee were making permanent and costly improvements; that they were living thereon, paying all the taxes and otherwise exercising all the acts of ownership. It was their duty to speak then, and, not having done so, equity will deny them the right to speak now.

The decree is correct and is accordingly affirmed.

McFaddin, J., concurs.

PYE *v.* HIGGASON.

4-7946 195 S. W. 2d 632

Opinion delivered July 8, 1946.

C. T. Sims and *DuVall L. Purkins,* for appellant.

Williamson & Williamson, for appellee.

McHANEY, Justice. Appellants and appellee are the collateral heirs at law of Reece Preston Pye who died intestate and without living issue in Drew county on September 8, 1941. Appellee, a niece, was appointed and qualified as administratrix of his estate on November 5, 1941. The inventory filed listed personal property of the value of $812.48 and real property of $1,000. Her first account current was filed November 27, 1942, and showed cash collected $261.64 and a small amount of expenditures for costs of administration and for a monument. She filed her final report and settlement on July 6, 1945, showing total collections of $877.34 and expenses of $283.70 and the balance to be distributed to appellants and appellee in proportion to their respective interests. On July 10, 1945, the probate court made an order "For the distribution of the residue of the assets belonging to the estate of Reece P. Pye, now in the hands of said

administratrix," according to their interests as set out therein, "and her acts in doing so are hereby approved." This order was based on her account for final settlement. Final settlement was accordingly made pursuant to said order. Prior thereto, on June 15, 1943, appellants had filed in the probate court a "Motion for Discovery," alleging that appellee held in her possession certain bank deposits in two banks, the property of said estate, which she had failed to inventory or account for, and again on September 1, 1943, they filed in the probate court their exceptions to the account current of appellee, as administratrix, filed November 27, 1942, again claiming that the intestate left certain deposits in two banks, the property of said estate, and the proceeds of certain insurance policies of intestate's life not here involved, which deposits were alleged to have been wrongfully withheld by appellee. If either the discovery motion or the exceptions to the account current was presented to the probate court for decision, the record fails to disclose it, unless by inference they were overruled by the order of distribution of July 10, 1945.

The action from which this appeal comes was filed in the circuit court July 30, 1943. Its final purpose was to obtain judgment against appellee as for money had and received because of two bank deposits, above referred to, one in the Commercial Loan & Trust Company of $3,121.80, and the other in the Union Bank & Trust Company of $1,447.08. The complaint alleges that each account was held by the banks in the joint names of intestate and of Lillie Higgason, appellee, as a joint account with the right of survivorship in either. For instance, the account in the Commercial was held by it under a signature card as follows: "Below please find duly authorized signatures which you will recognize in payment of funds or the transaction of other business on my account. We, R. P. Pye and Miss Lill Higgason, have opened up a checking and saving account with the Com. L. & T. Co. These accounts are opened in this manner, R. P. Pye, and Miss Lill Higgason payable to either of them and in event of death payable to the sur-

vivor. It is our purpose to create an estate of entirety and we authorize this said bank to consider these two accounts as same." It was alleged that intestate had intrusted appellee with these funds to handle as his agent with instructions to distribute to appellants their share, after the payment of debts, and that instead of doing so, she had fraudulently converted same to her own use. They prayed judgment against her for their share with interest. An amended and substituted complaint was filed July 7, 1945, to which appellee filed on September 17, 1945, a motion to dismiss the action or transfer to the probate court, alleging that only the probate court has jurisdiction of the matters presented, and that the subject matter had already been presented to said court, adjudicated by it and is *res judicata.*

On January 8, 1946, the circuit court dismissed the amended and substituted complaint of appellants without prejudice to their right to pursue their remedy, if any, in the probate or any other court with jurisdiction of the subject matter. This appeal followed.

In *Ferrell, Admr.,* v. *Holland,* 205 Ark. 523, 169 S. W. 2d 643, it was held that a certificate issued by a Federal Savings & Loan Association to "S. I. Ferrell and Dr. D. T. Holland as joint tenants with right of survivorship and not as tenants in common," subscribed and paid for by Ferrell, became the property of Holland on Ferrell's death under Act 343 of 1939. In *Jensen* v. *Housley, Admr.,* 207 Ark. 742, 182 S. W. 2d 758, it was held that stock in a corporation, purchased by decedent in the names of himself and appellant jointly, with right of survivorship, vested in appellant on the death of decedent.

Our statute, § 727a of Pope's Digest, is copied in full in *Black* v. *Black,* 199 Ark. 609, 135 S. W. 2d 837. It was there held that a deposit in a bank in the joint names of husband and wife becomes the property of the widow "as surviving tenant by the entirety, and her title thereto was not ascribed to said statute." It was there said: "It will be observed that the application of this

statute is not limited to deposits of husband and wife, but applies to joint deposits of any two persons, and was, we think, passed for the protection of the bank in which the deposit was made." While it was passed, no doubt, for the protection of the bank, it was also passed for the purpose of declaring a definite and conclusive relation of the parties to such deposit on the death of either and prior to receipt by the bank of written notice signed by any one of such joint tenants not to pay such deposit in accordance with its terms. The Act declares that "such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, . . ." It was held in *Ferrell* v. *Holland, supra,* that survivorship is one of the results of joint tenancy.

Therefore, if we assume that the circuit court was in error in dismissing appellants' complaint because it had no jurisdiction, the same result would necessarily follow, if we held it did have jurisdiction for the reason that the deposits in the two named banks did not become the property of Pye's estate on his death, but passed by operation of law to appellee as the survivor of a joint tenancy. The same result is bound to be reached, no matter what court had jurisdiction of the subject matter. The nature of the deposits is established, not only by the complaint, but by the answers of the banks to certain writs of garnishments caused to be served on them by appellants.

The judgment is accordingly affirmed.

GRIFFIN SMITH, C. J., not participating.

MCFADDIN, J., disqualified and not participating.

4-7926 195 S. W. 2d 542

Opinion delivered July 8, 1946.

John D. Eldridge, Jr., for appellant.

Ross Mathis, for appellee.

HOLT, J. The present action was begun in the Woodruff chancery court January 19, 1946, by R. M. Comer, Sr., against Walter E. Woods, for an injunction to restrain Woods from interfering with Comer's possession of an eighty acre farm. R. M. Comer, Sr., rented the land under a written lease from Mrs. Nannie T. Woods, mother of appellee, Walter Woods, for a term of five

years from August 6, 1942, to December 31, 1947. Mrs. Woods died September 25, 1943, and her son, appellee, succeeded to her rights. R. M. Comer, Sr., died January 25, 1946, and the cause was revived in the name of appellant, Rufus M. Comer, Jr., individually, and as administrator of Mr. Comer, Sr.'s, estate.

The substance of appellant's complaint was that following Mrs. Woods' death, her son, Walter, succeeded to her rights under the lease and collected the rentals from the land for 1943, 1944 and 1945; and (quoting from appellant's abstract) "that R. M. Comer, during 1945, subrented said lands, on a share-crop basis to Joe Bishop who was to move sometime during the month of January, 1946, and Comer intended to move another sharecropper, Dave K. Humphrey, on the land to replace Bishop. Bishop moved from the rented land on January 19, 1946, and Humphrey moved his furniture to the main house on the rented land the same day, but found that defendant, Walter E. Woods (appellee), had moved into the house immediately after Bishop had left. Defendant (appellee) and his wife refused to permit Humphrey, the agent and sharecropper of Comer, to enter the premises.

"Plaintiff, at the time of this interference, had his workstock on the rented land at the main house and all farm equipment necessary to work the land in 1946. He had a crib full of feed for feeding the stock during 1946. Humphrey, his agent and sharecropper, had moved a load of firewood to the house on January 12, 1946, preparatory to moving in. The complaint further states that plaintiff had made a binding trade with Dave K. Humphrey to move into the main house on the rented land and Humphrey had given up possession of the house where he had formerly lived; that the defendant (Woods) has taken the law into his own hands and by force deprived him of the rented premises without ever having complained or expressed any dissatisfaction and without giving any notice.

"That Humphrey has no place to live; that plaintiff does not have an adequate and sufficient remedy at law

and is about to suffer irreparable injury; and that defendant is insolvent; that the court grant plaintiff a permanent, mandatory injunction restraining the defendant from interfering with his possession of the rented premises and requiring defendant to remove his family and belongings from said premises; that the court grant an immediate hearing and give him a temporary order to be made permanent as provided by law."

Appellees answered with a general denial and, in addition, alleged that appellee, Woods, and his tenant were in possession of and living on the farm here involved at the time the present suit was filed; that appellant had breached the lease contract; that a court of equity was without jurisdiction to give to appellant the injunctive relief prayed; that appellant's remedy at law was adequate and complete, and prayed that "the complaint be dismissed or transferred to circuit court and that defendant (appellee) have judgment against the estate of R. M. Comer in the amount of $500."

Upon a trial, the substance of the trial court's findings and decree is stated by appellant as follows: "The court finds that this is an action to enjoin and restrain defendants from interfering with the property and possession of the plaintiffs to 80 acres, more or less (describing it). The court finds that the suit was brought by R. M. Comer, Sr., who died during its pendency, and it was properly revived by Rufus M. Comer, Jr. The court finds that the facts before it do not warrant injunctive relief. The court accordingly dismissed the plaintiff's suit for an injunction, without prejudice to his right to bring suit in the circuit court of Woodruff county, Arkansas, for possession and for damages for detention, and without prejudice to his bringing suit for an accounting. The court further orders that the testimony of the witnesses be transcribed and filed in this cause as depositions and as a part of the record herein."

This appeal followed.

Appellant says the primary question presented is: "Do the facts in this case warrant the jurisdiction of

chancery court or must the plaintiff for relief seek the slow and cumbersome processes of a possessory action in law court?"

The title to the eighty acre tract of land in question is not in dispute. Appellee, Walter Woods, was the owner and landlord, and in actual possession when the present suit was filed. Appellant, as tenant, under a written lease agreement, which had approximately two years to run at the time appellee, Woods, took possession, seeks to be restored to the possession of the leased property and for relief in a court of equity. The trial court, as indicated, found that his remedy was full and complete at law, and we think this finding was correct.

The rule is well settled in this State and elsewhere that "a court of equity will not interfere by injunction to restrain a mere trespass, in the absence of the elements of irreparable injury, unless the trespasser is insolvent, and cannot be made to respond in damages, or unless the remedy at law is inadequate." *Boswell* v. *Jordan,* 112 Ark. 159, 165 S. W. 295 (headnote 3).

While in the instant case, appellant alleged the insolvency of the appellee, we think the preponderance of the testimony shows no insolvency. We find no evidence of an involved, or complicated accounting.

In 28 American Jurisprudence, p. 199, § 5, the text writer says: "Injunction is primarily a preventive remedy. Its province is to afford relief against future acts which are against equity and good conscience, and to keep or preserve a thing *in statu quo,* rather than to remedy what is past or to punish for wrongful acts already committed. Generally speaking, rights already lost and wrongs already perpetrated cannot be corrected by injunction." In support of the text is cited the case of *White* v. *Sparkill Realty Corp.,* 280 U. S. 500, 74 L. Ed. 578, 50 S. Ct. 186. In that case, the Supreme Court of the United States quoted with approval from *Lacassagne* v. *Chapuis,* 144 U. S. 119, 124, 36 L. Ed. 368, 370, 12 Sup. Ct. Rep. 659: "The plaintiff was out of posses-

sion when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. 1 High, Inj., 2d Ed., § 355."

We conclude, therefore, as has been indicated, that appellant has a complete and adequate remedy in an action at law.

The decree is affirmed.

KELLEY *v.* NORTHERN OHIO COMPANY.

4-7933 196 S. W. 2d 235

Opinion delivered July 8, 1946.

Rehearing denied September 30, 1946.

Wils Davis, Giles Dearing and *W. H. Fisher,* for appellant.

James Robertson, J. H. Lookadoo and *J. L. Shaver,* for appellee.

Ed. F. McFaddin, Justice. Appellants (plaintiffs below) sought to establish and enforce a trust in certain lands. From a decree refusing the prayed relief, there is this appeal.

The background facts are lengthy. In 1929, Mr. H. Coldren organized a corporation known as the Northern Ohio Company (hereinafter called the "new company") with 1,000 shares of stock issued and outstanding. Mr. H. Coldren owned 998 shares and his two sons, H. L. Coldren and J. J. Coldren, each owned one share. The new company entered into a contract with the Northern Ohio Cooperage & Lumber Company (hereinafter called the "old company") whereby the new company took over all the assets of the old company on consideration that the new company pay all debts of the old company and also pay a certain stated amount to each stockholder of the old company. Shortly after the organization of the new company and the signing of the contract with the old company, Mr. H. Coldren entered into a contract

with his said two sons wherein the father and two sons agreed that after the new company had fulfilled the contract with the old company, then the new company would pay Mr. H. Coldren $72,000 "either in cash or other assets that may be agreed upon"; and the 1,000 shares of stock in the new company would then be owned one-third by Mr. H. Coldren and one-third by each of his said two sons. The $72,000 represented the face value of Mr. H. Coldren's stock in the old company. We refer to this contract as "the April, 1929, contract." It further stated:

"It is further agreed by all parties that each shall put forth his best efforts toward the fulfillment of above named contract, and in the interests of the Northern Ohio Company, and not let side issues interfere with his best efforts."

The new company prospered, and by 1937 had completely satisfied the old company and all of the stockholders thereof except Mr. H. Coldren. One of the disputed questions in this case is whether the new company ever paid Mr. H. Coldren the $72,000 either in cash or "other assets." It is the appellants' contention that certain farms were agreed to be deeded to Mr. H. Coldren in lieu of the cash. We will consider this question presently.

In December, 1937, Mr. H. Coldren transferred 200 shares of his stock in the new company to his son J. J. Coldren and a like amount to his son H. L. Coldren; so that, at all times thereafter during the life of Mr. H. Coldren, the stock in the Northern Ohio Company stood on the books as follows:

Mr. H. Coldren	598 shares
J. J. Coldren	201 shares
H. L. Coldren	201 shares
Total	1,000 shares

We mention here that if Mr. H. Coldren had transferred the stock to his sons as provided by the contract

of April, 1929, the stock would have stood 333 1/3 shares to each of the three shareholders; but this was never accomplished during the lifetime of Mr. H. Coldren.

On September 1, 1943, Mr. H. Coldren died testate, survived by his three daughters and two sons, being Mrs. Bertha Kelley, Mrs. Chloie Moffei, Mrs. Nora Box, J. J. Coldren and H. L. Coldren. The will of Mr. H. Coldren, dated March 11, 1942, omitting the opening paragraph and signatures and attestation, provided:

"2. I give, devise and bequest unto my son H. L. Coldren 198 shares, and unto my son J. J. Coldren 199 shares of my stock in the Northern Ohio Company. Conditional, however, upon each son paying within one year from the date of my death the sum of $14,400 in equal shares to my daughters Bertha Kelley, Chloie Moffie and Nora Box.

"I give and bequeath unto Bertha Kelley, Chloie Moffie and Nora Box the remainder of my shares of stock in the Northern Ohio Company, they to take equal shares of said stock.

"3. All the rest, residue and remainder of my estate whether real, personal or mixed and wherever situated, I give, devise and bequeath to my daughters, Bertha Kelley, Chloie Moffie and Nora Box and unto my sons H. L. Coldren and J. J. Coldren, they to take equal shares.

"4. Should any bequeathee, or devisee under this will die before me, then any child or children surviving shall take the devised parent's part, otherwise the legacy or bequest shall lapse and become of my residuary estate.

"5. My daughters Bertha Kelley, Chloie Moffie and Nora Box are indebted to me for some money I have advanced to them from time to time, and I anticipate I will make additional advances of money to them. All sums that they now owe, or may hereafter owe me, shall be deducted by my executor from their respective interests herein devised and bequeathed to them.

"6. I direct that all legacy, transfer, inheritance and succession taxes which may be payable in respect to

legacies and bequeaths whether in my residuary estate or otherwise provided for in this will, shall be paid out of the principal of my residuary estate, and I hereby charge the principal of my residuary estate with the payment thereof.

"7. I hereby waive, constitute and appoint my son H. L. Coldren executor of this my last will and testament, to be exempt from giving bond as such.

"8. It is my will that should any beneficiary undertake to contest this my last will and testament in any court that the bequest or devise made in his or her behalf shall at once become void and the property bequeathed part of my residuary estate to pass to the beneficiaries therein provided for."

The will was duly probated and was not contested. H. L. Coldren and J. J. Coldren each paid the $14,400 and received the stock provided in paragraph 2 of the will. The $28,800 was divided equally and received by the three daughters, Mrs. Kelley, Mrs. Moffei, and Mrs. Box, as provided in paragraph 2 of the will. J. J. Coldren died intestate on November 2, 1943, survived by his widow and two minor children.

On July 24, 1944, the present suit was filed by Mrs. Bertha Kelley and Mrs. Chloie Moffei as plaintiffs. The defendants were Northern Ohio Company, a corporation; H. L. Coldren, executor of the estate of Mr. H. Coldren; H. L. Coldren individually; Mrs. Nora Box; Mrs. Sarah G. Coldren, administratrix of the estate of J. J. Coldren; Mrs. Sarah G. Coldren individually; Jerre Jayne Coldren and Jimmy Francis Coldren, minor children of J. J. Coldren, deceased. The complaint alleged that H. L. Coldren, executor of the estate of Mr. H. Coldren, had refused to be a plaintiff so he was made a defendant. In addition to most of the facts hereinbefore stated, the complaint also alleged that in December, 1937 (when Mr. H. Coldren transferred the 200 shares of stock to each of his sons as above stated), it was then and there agreed that the new company would transfer to Mr. H. Coldren

certain lands and personal property in lieu of the $72,000 cash due him under the contract of April, 1929. The lands were described in detail in the complaint and are referred to as the "Chatfield and Long Lake Farms." The personal property referred to consisted of the farming equipment, etc., used on and going with these two farms. The complaint prayed (1) that the new company be held a trustee for the estate of Mr. H. Coldren for said farms and personal property, and (2) in the alternative, that the stock certificates of December, 1937, to H. L. Coldren and J. J. Coldren be canceled and the stock returned to the estate of Mr. H. Coldren.

There were also allegations in the complaint concerning undue influence exerted on Mr. H. Coldren by his two sons, the senility of Mr. H. Coldren in his later years, and also that large sums of money were secreted by some of the defendants; but these allegations (concerning undue influence, senility, and secreting of funds) are unsupported by the evidence: so we pretermit any discussion of them. The main effort of the plaintiffs was the attempt to obtain the Chatfield and Long Lake Farms for the estate of Mr. H. Coldren.

Issue was joined, by all of the defendants denying the allegations of the complaint; and the plaintiffs' evidence consists of the depositions of eleven witnesses and also numerous exhibits. The taking of plaintiffs' depositions was commenced on November 27, 1944, and concluded on January 21, 1946; and at the conclusion of the plaintiffs' evidence the chancery court, on motion of defendants, dismissed the complaint on the ground of the insufficiency of the evidence. This appeal challenges that decree.

I. *Did the Appellants Prove That the New Company Held Title to the Chatfield and Long Lake Farms in Trust for the Estate of Mr. H. Coldren?* The party seeking to prove such a trust must offer evidence more than a mere preponderance. In *Oliver* v. *Oliver,* 182 Ark. 1025, 34 S. W. 2d 226, and in *Fenter* v. *First National Bank,* 182 Ark. 89, 30 S. W. 2d 820, we said that such

evidence must be "clear and convincing." In *Nevils* v. *Union Trust Company,* 111 Ark. 45, 163 S. W. 162, we said that the evidence "must be of so positive a character as to leave no doubt of the fact." In *Aycock* v. *Bottoms,* 201 Ark. 104, 144 S. W. 2d 43, we said "nothing short of clear, convincing and satisfactory evidence will show a trust." Weighing the evidence of the appellants in the scales established by the cited cases, we reach the conclusion that the plaintiffs failed to establish the trust alleged. To review all the evidence in the 400 pages of testimony would unduly prolong this opinion and serve no useful purpose; but here are some of the factors that lead to our determination:

1. On March 7, 1942, Mr. H. Coldren made a financial statement in which he listed as his personal assets "stock in old company, $72,000." This item shows that on March 7, 1942, Mr. H. Coldren still considered that the value of his "stock in old company" to be what he was to receive and not the Chatfield and Long Lake Farms. It must be remembered that the face value of Mr. H. Coldren's stock in the old company was $72,000, and he was to receive that amount before he transferred to his sons their one-third contract interest in the stock in the new company. So on March 7, 1942 (four days before he signed his will) Mr. H. Coldren was not claiming the Chatfield and Long Lake Farms, but was claiming $72,000.

2. Then on February 18, 1943, in another financial statement, Mr. H. Coldren listed as his personal assets "stock in old company (Chat. & L. Lake Farms) $72,000." This quoted line is urged by the appellants as strong proof that Mr. H. Coldren was to get the farms. But we think the quoted line indicates that Mr. H. Coldren recognized that he had only the claim to $72,000. The information in the parenthesis, "Chat. & L. Lake Farms," could hardly mean that the transaction had been finally agreed upon by him and his sons, else the item would have read "Chat. & L. Lake Farms (for stock in old company), $72,000." The very way in which the

entry was worded indicates rather clearly that Mr. H. Coldren recognized on February 18, 1943 (less than seven months before his death), that he did not then have anything but the stock in the old company which he hoped to turn into farm lands by later consummation. That Mr. H. Coldren had tried to get his sons to let him have the farms for the $72,000 seems reasonably clear; but the fact that they had refused is equally as clear. High income taxes, as well as other matters, seemingly delayed the consummation.

3. The will of Mr. H. Coldren (signed on March 11, 1943) shows that he provided how his estate would keep the agreement of April, 1929, with his sons and at the same time give to the three daughters a part of the $72,000; and this will is a most cogent fact against the appellants. At the time he made his will and at the time of his death, Mr. H. Coldren had in his name on the books of the new company 598 shares of stock. By section 2 of his will he provided that H. L. Coldren could have 198 shares by paying $14,400 therefor, and that J. J. Coldren could have 199 shares by paying $14,400 therefor; and that the $28,800 would be divided equally to the three daughters. When these 397 shares of stock (the total of the 198 to H. L. Coldren and the 199 to J. J. Coldren) were deducted from the 598 shares, there were left only 201 shares still in Mr. H. Coldren's estate, and these shares were to go equally to the three daughters. If Mr. H. Coldren had thought at the time he made his will that he had the Chatfield and Long Lake Farms in lieu of the $72,000, then he would have known that he only had 333 1/3 shares of stock in the new company and therefore he could not leave 397 shares to the sons, conditioned on payment, and still have stock left to go to his daughters. The very provision in the will, providing for the disposition of 397 shares to the sons and the remaining shares to the daughters, shows that Mr. H. Coldren considered himself the owner of more stock than he could have owned if he had previously received the Chatfield and Long Lake Farms in lieu of the $72,000 under the contract of April, 1929. This provision in the will shows

that Mr. H. Coldren provided that his sons could get the stock only by paying the amount that Mr. Coldren named. The will is at variance with the contention of the appellants. Thus, the financial statements and the will—documentary evidence—prevent the evidence of the plaintiffs from being sufficient to meet the test required to have a trust declared.

II. *Impossibility of Performance.* There is another reason why appellants cannot recover in this case; and that is because they have by their own conduct rendered it impossible for the contract of April, 1929, to be performed. Before the corporation could be held to be a trustee of the Chatfield and Long Lake Farms, the appellants had the burden of proving: (a) that Mr. H. Coldren and his estate had done all that was required under the April, 1929, contract to be entitled to the $72,000, and also (b) that there had been a definite agreement that the Chatfield and Long Lake Farms would go to Mr. H. Coldren "as other assets" in lieu of the $72,000. (It is not claimed by the appellants that Mr. H. Coldren was entitled to both the lands and the $72,000.)

We revert to (a) above: Even before Mr. H. Coldren was entitled to the $72,000, the appellants had to prove that Mr. H. Coldren was (and his estate now is) ready, able and willing to perform all that was required of him in the contract of April, 1929, with H. L. and J. J. Coldren. By that contract Mr. H. Coldren agreed to transfer to each son 332 1/3 shares of stock in the new company, which with the one share held by each such son in April, 1929, would give each son 333 1/3 shares. There is proof that Mr. H. Coldren transferred 200 shares to each son in December, 1937; but before Mr. H. Coldren or his estate could get the $72,000, he was to transfer to each son 132 1/3 additional shares. This was never done. This performance (transferring 132 1/3 additional shares to each son under the contract) has been rendered impossible because under the will J. J. Coldren had an option to purchase 197 shares and H. L. Coldren had an option to purchase 198 shares, making a total of

397 shares. (For discussion of such option to purchase, see 69 C. J. 1156.) The appellants received from H. L. Coldren and J. J. Coldren two-thirds of the purchase price of $28,800 for said 397 shares of stock. This was all accomplished under the terms of paragraph 2 of the will.

Mr. H. Coldren had at his death 598 shares. When these appellants elected to take their part of the proceeds of 397 shares, the result was that the estate of Mr. H. Coldren was left with only 201 shares, and his estate did not have sufficient shares remaining to complete the performance of the contract of April, 1929. So the appellants, by accepting two-thirds of the $28,800, rendered it impossible for the estate of Mr. H. Coldren to perform the contract of April, 1929. It is well settled that a party who renders performance of the contract impossible cannot be heard to ask for performance by the other party. In *Mo. Pac. Ry. Co.* v. *Yarnell,* 65 Ark. 320, 46 S. W. 943, we said: "The failure of one party to a contract to comply with its terms releases the other party from complying with it." In 13 C. J. 647, the rule is stated:

"*Prevention by Adverse Party—In General.* A party to a contract cannot take advantage of his own act or omission to escape liability thereon, hence where he causes or sanctions a breach, he cannot recover damages for nonperformance or interpose the breach as a defense to an action on the contract. Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him." See, also, 12 Am. Juris., "Contracts," § 381.

When the sons purchased the 397 shares of stock under the will, they lost all right to insist on the contract of April, 1929; and in accepting the proceeds of the sales, the appellants likewise lost all right to ask for a performance of the contract by the sons or the new corporation.

III. *Act 257 of 1945.* What we have heretofore said disposes of the issues in this case; but there is one

procedural question which we now discuss so that this opinion will not be considered as an acceptance of the procedure claimed by appellees. Here is the situation. At the close of the plaintiffs' testimony, the defendants filed a "demurrer to the evidence," saying: ". . . they file said demurrer pursuant to Act 257 of the Acts of the General Assembly for the State of Arkansas for the year 1945; and state that the evidence introduced by the plaintiffs is not sufficient to constitute a cause of action against either of these defendants."

In the briefs and in the oral argument appellees insisted that they did not finally rest their case; and they say that in the event we should reverse the decree, then they would have the right to introduce their evidence on a remand to the chancery court. They cite Act 257 of 1945 as authority for such contention. In affirming the decree we have acted on the assumption that the appellees, by asking for and obtaining a decree dismissing the complaint for insufficiency of proof, waived the right to introduce evidence. We reach this conclusion because we do not give to Act 257 of 1945 the interpretation that the appellees give to it. The said act says in part: "that upon the closing of plaintiffs' . . . proof in any cause . . . in any court of chancery in this State, . . . the opposing party may file a written demurrer *setting forth any of the defenses now permitted by law* to be raised by said pleading . . ."

We think the italicized words above refer to the five grounds of demurrer found in § 1411 of Pope's Digest and not to a "demurrer to the evidence," which is unknown to our practice. The said act means that if, after the plaintiffs had closed their case, the defendants wanted to offer any of the five grounds set forth in § 1411 of Pope's Digest, then the right to file such demurrer had not been lost. The grounds of demurrer set forth in § 1411 of Pope's Digest go to the issue of jurisdiction, capacity, other pending actions, defect of parties, and "that the *complaint* does not state facts sufficient to constitute a cause of action." The position of

the appellees in the present case is that the *evidence* of the plaintiffs did not make a case. It is a *demurrer to the evidence.* In the case of *Grooms* v. *Neff Harness Company,* 79 Ark. 401, 96 S. W. 135, we said "A demurrer to the evidence, as a means of challenging its sufficiency, is unknown to our code of practice." Since a demurrer to the evidence as a means of challenging its sufficiency was not permitted by our practice prior to the adoption of Act 257 of 1945, and since the said act only purports to allow defenses then known to our practice, it follows that the said act does not establish a demurrer to the evidence in equity cases. In law cases, we have a motion for instructed verdict at the close of plaintiff's case; but in equity cases, there is no such equivalent. For a general discussion of a demurrer to the evidence and its particular inapplicability to equity cases, see 53 Am. Juris., p. 338 *et seq.,* "Trials," § 427 *et seq.* 19 Am. Juris., p. 217, "Equity," § 299. 64 C. J., p. 371 *et seq.* And see *Re Peters,* 73 Colo. 271, 215 Pac. 128, 33 A. L. R. 24. *Troll* v. *Spencer,* 238 Mo. 81, 141 S. W. 855, Ann. Cas. 1913A, 276, contains a discussion of the impropriety of a demurrer to the evidence in chancery cases; and in 1913 Ann. Cas. 283 following the reported case there is an annotation on the impropriety of a demurrer to the evidence in an equity case. In 21 C. J. 637, in discussing equity practice, this is stated:

"*After Close of Plaintiff's Case.* Dismissing a bill at the close of plaintiff's case, before defendant presents or rests his case, is not correct practice in equity, in the absence of express provisions to the contrary. The case being set down for hearing upon the bill, answer and proof, if defendant is willing to risk his case upon plaintiff's proof or rather the failure of plaintiff to prove his case, he should submit the case to the court for final hearing, and if he is not so satisfied, he should present what proof he desires or may be able to present."

Therefore, in affirming this case because of the insufficiency of the plaintiff's evidence, we do so on the theory that the appellees waived the right to introduce

proof by moving for a decree, and we do not rest our opinion on any part of Act 257 of 1945; nor do we express any opinion as to the validity of the Act.

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

[redacted]

CHITWOOD *v.* STATE.

4411 196 S. W. 2d 241.

Opinion delivered July 8, 1946.

Rehearing denied September 30, 1946.

[redacted]

Walter Billingsly, Earl Goad and *Batchelor & Batchelor,* for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

ROBINS, J. A trial jury found appellant guilty of murder in the first degree, and from the judgment of the lower court, entered in accordance with the verdict, sentencing him to death in the electric chair, appellant prosecutes this appeal.

When arraigned to answer the information filed against him appellant entered a plea of "not guilty by reason of insanity"; and thereupon, in accordance with the provisions of § 3913, Pope's Digest, the lower court ordered that appellant be sent to the State Hospital for observation.

Appellant makes no question here of the sufficiency of the testimony to establish his guilt, nor does he challenge the correctness of any ruling as to the admission or rejection of evidence or as to the giving or refusing of instructions. However, we have carefully reviewed the record and we find that no error was committed by the lower court in respect of any of these matters, and that the evidence abundantly established his guilt.

The sole grounds relied on by appellant for reversal are: First. That the provisions of § 3913, Pope's Digest, as to committing appellant to the State Hospital for observation were not observed in that, during the time appellant was being observed by the superintendent and staff of the State Hospital, appellant, instead of being kept in one of the hospital buildings, was actually confined in the Pulaski county jail; and, second, that the lower court erred in denying his petition for change of venue.

I.

The statute (§ 3913, Pope's Digest) directs that when the defense of insanity has been raised on behalf of a defendant in a prosecution for crime "the judge shall

postpone all other proceedings in the cause and shall forthwith commit the defendant to the Arkansas State Hospital for Nervous Diseases, where the defendant shall remain under observation for such time as the court shall direct, not exceeding one month." Subsequent portions of the statute provide for the making of observations and investigations by physicians employed at the hospital and for making of report of their findings. The law also authorizes the subpoenaing of such physicians as witnesses at the trial at the order of the trial judge, or at the request of the State or the accused.

The testimony shows that when Dr. A. C. Kolb, superintendent of the State Hospital, learned that appellant was to be sent to his institution he called the circuit judge who had made the order for appellant's committal and advised the judge that the hospital had no escape-proof building wherein appellant could be confined while he was being observed and asked permission to have appellant kept in the Pulaski county jail instead of at the hospital. This permission was granted by the judge. During the period of observation appellant was taken by the officers from the jail to the hospital, at any time during the day Dr. Kolb called for appellant, where he was examined by Dr. Kolb and other members of his staff. Dr. Kolb testified that, if appellant had been confined in one of the wards at the hospital, it would have been necessary to have brought appellant, each time an examination was made, from such ward to the room used by the physicians at the hospital for conducting the investigations. There is nothing in the record to indicate that a proper investigation of the mental condition of appellant was not made. On the contrary, Dr. Kolb's testimony showed that a thorough and careful examination of the mental and physical condition of appellant was made. That no prejudice resulted to appellant from the manner in which he was examined by the hospital authorities is conclusively shown by the testimony of Dr. Rowland, a psychiatrist who examined appellant and who was introduced as a witness by appellant. Dr. Rowland corroborated Dr. Kolb's testimony

to the effect that appellant was sane and legally responsible for his acts. We conclude that it was not only Dr. Kolb's right, but it was his duty, in view of the fact that in his judgment the facilities at the hospital were not sufficient to insure the safekeeping of appellant, to have him comfined in some other convenient and available place from which an escape could not be effected.

The obvious purpose of this statute (§ 3913, Pope's Digest) is to provide for a prompt and impartial investigation, by competent psychiatrists, of the mental condition of any person accused of crime, about whose sanity a question is raised. The evidence shows that this purpose was fully accomplished in the case at bar; and no prejudice to appellant could possibly have arisen from the failure to confine him in some building of the State Hospital while the investigation required by the statute was being made.

II.

Nor do we find any merit in appellant's contention that his petition for change of venue was improperly overruled. In the first place, this petition did not meet the requirements of the statute (§ 3918, Pope's Digest) in that it was not supported by the affidavits of two qualified electors of the county. No person (other than appellant) made affidavit to appellant's petition. Despite this fact, before overruling the petition, the lower court permitted appellant to introduce in support of the petition such testimony as he desired to offer. We have reviewed this testimony and do not find that it established that the minds of the inhabitants of the county were so prejudiced against appellant that he could not have a fair trial therein.

In the case of *Bailey* v. *State,* 204 Ark. 376, 163 S. W. 2d 141, we held (headnote 4): "Unless the trial court has abused its discretion in overruling a motion for change of venue the order is conclusive on appeal."

We do not find that the lower court abused its discretion in overruling this petition, even if it could be said that the petition itself was sufficient.

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

DeSoto Life Insurance Company *v.* Jeffett.

4-7948 196 S. W. 2d 243

Opinion delivered July 8, 1946.

Rehearing denied September 30, 1946.

John C. Sheffield, for appellant.

Dinning & Dinning, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Dr. W. F. Jeffett, instituted this action on October 8, 1945, for recovery of monthly payments for total disability alleged to be due under a sick and accident policy issued to him by appellant, DeSoto Life Insurance Company, on November 1, 1943. The policy provided for payments of $200 per month so long as insured was totally disabled from accidental injury, or $100 per month for a maximum of three months in case of partial disability.

Appellee practiced dentistry in Helena, Arkansas, for more than 30 years prior to November, 1944. On November 12, 1944, appellee, while on a hunting expedition, suffered an injury to the right side of his face from a severe recoil of a shotgun which he was firing. The injury resulted in a paralysis of the 7th nerve of the right side of the face, a condition which is called Bell's Palsy. This nerve controls the lachrymal gland of the right eye and paralysis of the nerve prevented appellee from closing his eyelid, and caused the right side of the face to be drawn. Any concentration of close vision causes the eye to be flooded with tears and the vision is blurred. A recovery from Bell's Palsy may usually be expected within three or four months, but if recovery is not had within six months, the injury becomes permanent.

Appellee made due proof of total disability and payments of $200 per month were made for a period extend-

ing from November 15, 1944, to February 15, 1945. The payments for March, April and May, 1945, became delinquent. A claim adjuster for appellant called on appellee in May, 1945, and, according to the testimony of appellee, explained that the delay in payments was due to shortage of help, and the adjuster assured appellee that he would get the matter adjusted on his return to Little Rock and send appellee a check. Appellee's right to recover the delinquent payments was not questioned. Appellee told the adjuster that many of his patients were anxious for him to resume his practice and that he would like to go on partial disability temporarily to ascertain whether he could recover his health sufficiently to enable him to discharge his duties.

On May 14, 1945, Logan, the claim adjuster, wrote a letter to appellee, enclosing a check for $200 for disability for one month. Logan stated in the letter that he had advised the company of appellee's intention to try to resume his practice. Appellee replied to this letter on May 21, 1945, stating that he was at a loss to know why the company sent only $200 when they owed him $600, and that he would call at the Little Rock office within a few days for a more correct adjustment of the claim.

On May 24, 1945, appellee called at the Little Rock office of appellant where he signed the following instrument: "In consideration of the sum of $400 paid to me this 24th day of May, 1945, I do hereby release the De-Soto Life Insurance Company from the total disability clause in Policy No. 4899-HA and agree to go on partial disability according to the terms of Policy No. 4899-HA from May 15, 1945, from disability due to Bell's Palsy or eye trouble caused from the aforesaid disability. Signed, W. F. Jeffett."

Appellee testified that, in the conversations leading to the signing of the above instrument, there was never any suggestion or intimation by Logan, or the officers of the company, that the company's liability for total disability payments in the future would be terminated. Appellee voluntarily suggested that the total disability

provision of the policy be temporarily suspended and that he go on partial disability in order to determine whether he could regain his health sufficiently to enable him to perform his duties. Appellee further testified that this suggestion was agreed to by Logan, and he trusted the latter to draw the agreement as it had been made. Logan retired to another office to dictate the agreement, and upon his return undertook to read it to appellee. Appellee signed the instrument without reading it, believing it was in accord with the agreement they had reached. He did not hear the word "release" used by Logan when the latter undertook to read it and was not furnished a copy of the instrument. According to appellee, Logan freely admitted that the company owed him $400 when he agreed to go on partial disability, and the company's liability for the delinquent payments for total disability was never questioned.

Appellee drew partial disability payments from May 15, 1945, to August 15, 1945, but was only able to work an hour or two on the days he attempted to perform his duties during the three-month period. On August 18, 1945, appellee collapsed while attempting to perform his duties, and, upon the advice of his physician, closed his office.

On August 20, 1945, appellant issued its check to appellee in the sum of $100 for the last payment for partial disability. Appellee accepted and cashed this check which contained a notation on its face that it was "in full settlement of claim for partial disability." This suit was instituted when appellant refused to make further payments for total disability.

Appellant's first contention for reversal is that the evidence is insufficient to establish total disability of the appellee. In addition to the facts already stated, two physicians testified that appellee, in their opinion, was completely disabled to practice dentistry because of his injury. Appellee was at all times following the injury unable to do dental surgery, which constituted a substantial portion of his usual practice. He attempted to re-

sume his practice against the advice of his physicians. Appellant offered no testimony to contradict the evidence of appellee on the issue of total disability.

In the recent case of the *Mutual Life Insurance Company of New York* v. *Bowman,* 209 Ark. 1001, 193 S. W. 2d 480, the rule frequently approved by this court as it is set out in 29 Am. Jur. 872 is restated 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 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."

Appellant has not favored us with an abstract of instructions given and refused by the trial court. In the absence of such abstract, it must be presumed that the issue of appellee's total disability was properly presented to the jury under instructions that correctly declared the law. The testimony was, in our opinion, sufficient to support the jury's finding that appellee was totally disabled within the meaning of the policy.

It is next insisted that the signing of the purported release by appellee on May 24, 1945, and the acceptance of the check for final payment of partial disability on August 20, 1945, constitute a complete accord and satisfaction of all claims for disability under the policy. In answer to this contention, appellee insists that there was no meeting of the minds sufficient to create a binding contract between the parties in the execution of the release. It is further insisted that there was no consideration to support the release as an accord and satisfaction.

It may first be noted that the check accepted by appellee "in full settlement of claim for partial disability" made no reference to the claim for total disability so that, if there was an accord and satisfaction of the

appellant's liability for future payments for total disability, it must arise from the execution of the purported release. The release was prepared by an agent of the appellant in the course of a conference for its benefit, and under these circumstances, the instrument is to be construed most strongly against the party preparing it. *Lee Wilson & Company* v. *Fleming,* 203 Ark. 417, 156 S. W. 2d 893. If, however, there was no consideration for the execution of the release, it becomes unnecessary for us to determine whether the instrument was otherwise valid.

It is an elementary principle of law that a contract to be valid and enforceable must be supported by a valuable consideration. An accord and satisfaction, being a contract, must be founded on a proper consideration consisting of some benefit to the creditor or detriment to the debtor in order to be effectual and valid. 1 C. J. S., p. 473; 1 Am. Jur., p. 235. In the case of *Feldman* v. *Fox,* 112 Ark. 223, 164 S. W. 766, this court said: "If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to the contract parts with nothing except what he was already bound for, there is no consideration for the additional contract concerning the subject-matter of the original one."

The case of *McGehee* v. *Cunningham,* 181 Ark. 148, 25 S. W. 2d 449, was an action for breach of a contract of employment, in which the employer contended that the acceptance of his check, after his cancellation of the contract, for the amount of salary due to the time of such cancellation, constituted an accord and satisfaction. There, this court said: "Appellee denied that he had received the check in satisfaction of his demand under the contract. On the contrary, he contends that there was no controversy about the sum paid him. This was a liquidated demand payable in any event, and there was no controversy about the indebtedness which the last check paid. This check paid the salary up to January 1, 1928, and there was no controversy about it. The

controversy was over the salary accruing thereafter, and nothing was paid on that account. The payment was upon an undisputed item, which was payable in any and at all events, and we think the court was correct in refusing to hold, as a matter of law, that there had been an accord and satisfaction . . ."

It is held generally that the payment of a liquidated, undisputed, matured obligation does not furnish a consideration for the release of any additional obligation. In 1 C. J. S., Accord and Satisfaction, § 29, it is said: "The payment of a sum admittedly due and payable furnishes no consideration for the discharge of an additional and distinct amount or item of liability, and does not effect an accord and satisfaction thereof." In the case of *Buel* v. *Kansas City L. Ins. Co.*, 32 N. M. 34, 250 Pac. 635, 52 A. L. R. 367, a $2,000 life insurance policy provided double indemnity for accidental death. Disclaiming liability for accidental death, but not for the $2,000 face of the policy, the insurer tendered and the beneficiary accepted that sum in full settlement of all claims under the policy. The New Mexico court held that such acceptance did not constitute an accord and satisfaction which barred recovery for the balance, and there said: "There never was dispute as to liability for $2,000 because of the death of the insured. There was dispute as to any liability for accidental death, but none as to the amount to be paid if the death were accidental. By the payment made, appellee obtained nothing to which she was not entitled, and appellant gave up nothing it could rightfully retain. If the claims were to be considered separately, the death claim was liquidated and undisputed; the accident claim liquidated and disputed. If it be treated as a whole, the larger amount was liquidated, and the smaller amount paid was conceded. However viewed, we find it impossible to locate the consideration for the release of the amount here sued for."

In support of its holding the New Mexico court cited and discussed, among others, the following cases which support the rule there announced: *Knights Templars &*

M. L. Ins. Co. v. *Crayton,* 209 Ill. 550, 70 N. E. 1066; *Prudential Insurance Co.* v. *Cottingham,* 103 Md. 319, 63 Atl. 359; *Woodall* v. *Pacific Mut. L. Ins. Co.* (Tex. Civ. App.), 79 S. W. 1090. In the last case cited, the Texas court held that payment by the insurer of an amount conceded to be due, under an accident insurance policy, for total disability for part of the time of such disability, is no consideration for the release by the insured of his claim for the balance of the period of total disability which the insurer denied. The court said: "Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not by itself a sufficient consideration to sustain a release by the creditor of other unliquidated claims against the debtor . . . There being no consideration for the release, it is immaterial whether it was fraudulently obtained by the defendant, or whether the plaintiff knew of its contents, or failed to exercise reasonable diligence in ascertaining its import . . ." See, also, *Moore* v. *Maryland Casualty Co.,* 150 N. C. 153, 24 L. R. A., N. S., 211, 63 S. E. 675; and Couch, Cyclopedia of Insurance Law, vol. 7, § 1867.

In *United States Casualty Co.* v. *Vinson,* 83 Ind. App. 474, 149 N. E. 90, it was held that the payment of an amount admittedly due the beneficiary under an accident insurance policy for disability indemnity will not constitute a sufficient consideration for the release of an unliquidated amount claimed under the policy.

According to the testimony on behalf of appellee, the consideration of $400 named in the release was a matured obligation of the company for a claim of total disability for two months, the validity of which was neither disputed nor questioned by appellant. While Logan testified that he advised appellee that the company questioned his right to the delinquent total disability payments, this is stoutly denied by appellee. Appellee furnished proofs of disability monthly which were never questioned, and no request for re-examination was ever

made. Under the testimony adduced on that point, the question whether the consideration mentioned in the release was in fact a liquidated and undisputed obligation of the company was for the jury to determine. In the absence of an abstract of the instructions, it must be presumed that this question was also properly presented to, and determined by, the jury. There being no consideration for the release, it becomes immaterial to decide whether there was a meeting of the minds of the parties in the execution of the instrument.

Appellant relies on the case of *American Insurance Union* v. *Wilson,* 172 Ark. 841, 291 S. W. 417, where it was held that an accord and satisfaction was effected where the beneficiary accepted a check which stated that it was in full payment of the amount due under the benefit certificate. The undisputed evidence in that case, however, showed that there was a *bona fide* dispute as to the amount due under the benefit certificate, and it was held that the payment of the smaller sum in satisfaction of the entire claim was a sufficient consideration for the release of the balance of the amount claimed. In the instant case there was substantial evidence to warrant a finding by the jury that no dispute existed as to appellant's liability for the delinquent payments.

It is finally insisted that appellee was not entitled to a judgment for penalty and attorney's fee because he brought suit for a larger amount than he recovered. During the course of appellee's examination as a witness, and again at the conclusion of the testimony of Logan, appellee reduced the amount of his claim to $200, and offered to pay all costs that had accrued since the bringing of the suit. The reduction and offer were made with the permission of the court and without objection by appellant, and was tantamount to an amendment to the complaint to conform to the proof. If appellant had desired to avoid the penalty and attorney's fee, it should have offered to confess judgment for the amount sued for, after the reduction was made. This court so held in the case of *Life & Casualty Co.* v. *Sanders,* 173 Ark.

362, 292 S. W. 657, where it was said: "Generally it is within the discretion of the court to permit the complaint to be amended during the trial or at the close of the testimony to conform to the proof. *Duff* v. *Ayers,* 156 Ark. 17, 246 S. W. 508. But it is urged that, having brought suit and gone to trial on a demand for more than justly due, appellee could not amend his complaint by reducing the demand to the correct amount, and recover the statutory penalty and attorney's fees in addition thereto. We do not agree with appellant in this contention. If, instead of proceeding with the trial of the case and denying any liability whatever on the grounds here urged, it had either offered to pay the reduced amount, or had asked to be given the time in which to pay same as provided in the policies, appellee could not have recovered the penalty and attorney's fees, and, in addition, would have been required to pay all costs, for the reason that he demanded a sum greater than he was entitled to under the policies." See, also, *Queen of Ark. Ins. Co.* v. *Milham,* 102 Ark. 675, 145 S. W. 540; *Great Southern F. Ins. Co.* v. *Burns & Billington,* 118 Ark. 30, 175 S. W. 1161, L. R. A. 1916B, 1252, Ann. Cas. 1917B, 497.

The jury returned a verdict for $200, the sum demanded, and the trial court correctly assessed the statutory penalty and attorney's fee. We find no error, and the judgment is affirmed.

FISHER *v.* TAYLOR.

4-8009 196 S. W. 2d 217

Opinion delivered July 8, 1946.

Rehearing denied September 30, 1946.

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

W. Leon Smith, for appellee.

ROBINS, J. Appellant is a citizen of Mississippi county, Arkansas, and for more than two years before the beginning of the suit below has been serving in the United States Navy. Desiring to become a candidate for the office of representative in the General Assembly from his county he instructed his mother to take the necessary steps to have his name placed on the ballot in the 1946 Democratic primary election. His mother, on May 1, 1946 (the last day on which candidates could qualify), went to the secretary of the Democratic Central Committee of Mississippi county and procured from him the blank party loyalty pledge, signed appellant's

name thereto, left the pledge with the secretary and paid the required fee of $50, for which the secretary issued to her proper receipt. The chairman of the County Central Committee, on May 3, 1946, wrote appellant's mother a letter enclosing a check for $50 and advising her that the party loyalty pledge, not having been personally signed by her son, did not comply with the party rules and could not be accepted.

Thereafter appellant instituted in the lower court this suit praying for writ of mandamus against the chairman and secretary of the committee to compel the printing of appellant's name on the official ballot as a candidate for representative. To reverse judgment of the lower court denying the writ this appeal is prosecuted.

Only two witnesses testified in the trial below—the mother of appellant, who testified in his behalf, and the chairman of the County Central Committee, who appeared as a witness for appellees.

The substance of the testimony of appellant's mother was that her son, having previously expressed a desire to run for office, sent her a letter, written on board ship in New York harbor, enclosing a power of attorney and directing her to file his pledge, pay his fee and otherwise qualify him as a candidate for representative. This letter and power of attorney were both dated April 27, 1946, and the power of attorney was acknowledged before a commissioner of deeds of New York, whose official certificate, dated April 27, 1946, was attached thereto. Appellant's mother further testified that in compliance with her son's directions she went to the secretary of the County Central Committee, obtained from him the blank loyalty pledge, signed her son's name thereto, left the pledge with the secretary, paid him the required fee, and then, on advice of the secretary, went to the office of the County Clerk where, on behalf of her son, she executed and filed the "corrupt practice" pledge required by § 4893, Pope's Digest.

The chairman of the County Central Committee testified that under his interpretation of the party rule the loyalty pledge must be signed personally by the candidate and that for this reason he returned the fee which had been paid to the secretary and advised appellant's mother that appellant's name could not be placed on the ticket.

The pertinent rules of the Democratic party of Arkansas are as follows:

"Section 54. Candidates—Eligibility.—Any eligible Democrat, as defined by these rules, who shall pay all assessments and the fees levied against him by the proper committee, or committees, as a candidate or office holder, and who files the pledge required hereinafter, will be entitled to enter the race for any office or for delegate or committeeman, and to have his name printed on the ballots.

. . . . . .

"Section 57. Candidates—Pledge of Loyalty.—Each candidate shall file a written pledge to abide by the result of the primaries to support the nominees of the party. The pledge shall be as follows:

"FORM OF PLEDGE

"As a candidate for the Democratic nomination for the office of.....held in the Democratic Primary Elections to be on....., 194....., and on the.....day of....., 194....., I hereby pledge myself to abide by the results of said primary election and to support all the nominees thereof. I declare that I am not now and will not become the candidate of any faction, independent or otherwise, either privately or publicly suggested in opposition to a regular Democratic nominee.

"This.....day of....., 194.....

"(Signed) .....

"Section 68. All candidates for United States Senators, Representatives, in Congress and all state and district offices shall file the prescribed pledge with the secretary of the State Committee and all candidates for county and township offices shall file the prescribed pledge with the secretary of the County Committee, not later than 12 o'clock noon on the 90th day before the preferential primary election, and all candidates for municipal offices (including candidates for County and City Committeeman) shall file their pledges with the secretary of the County Committee and the City Committee not later than 12 o'clock noon on the 30th day before the preferential primary election.

"The name of any candidate, who shall fail to sign and file said pledge within the time fixed shall not appear on the official ballot in said primary election."

It will be noted that the candidate is not required to swear to the loyalty pledge—only his signature thereto is required.

It is argued by appellees that the interpretation of the party rules is a duty solely to be performed by the officials of the party and that appellant had no redress in court for a mistaken interpretation of the rules by the representatives of the party.

In the case of *Williamson* v. *Montgomery,* 185 Ark. 1129, 51 S. W. 2d 987, which was a suit to compel acceptance of a loyalty pledge from a candidate allegedly not filed by the required date, we said: "We have already said that, if there was any charge of fraud or arbitrary action, the court would have jurisdiction, and mandamus would lie to compel a compliance with the rules of the party."

There is nothing in the record to indicate, and it is not urged, that there was any fraudulent conduct about the refusal to place appellant's name on the ballot or that the chairman of the committee was actuated by any improper motive in adopting the attitude which he took in the controversy; but it is insisted by appellant that

his action, under the circumstances, was arbitrary. Therefore the lower court properly refused to hold that it had no jurisdiction of appellant's petition.

While earlier decisions of this court have tended to establish the rule that a primary election is peculiarly a party affair, in which the courts should be reluctant to interfere, the effect of recent decisions of the United States Supreme Court is to hold that party primaries are an integral part of the election machinery—as much so as the general elections. We recognized this "new order of things" in our recent decision in the case of *Adams* v. *Whittaker, ante,* p. 298, 195 S. W. 2d 634, in which we held that, since the legalized primary election had been declared by our nation's highest court to be a part of the regular electoral system of a state, the legislature might properly require the expense of such primary election to be paid with county funds.

In the case of *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74, we considered the requirement, under § 4893, Pope's Digest, that each candidate file a pledge that he is familiar with the Corrupt Practice Act and that he will in good faith comply with it. In that case the candidate had filed a pledge within apt time stating that the candidate was familiar with the Corrupt Practice Act; but the pledge entirely omitted the part of the pledge (required by the statute) by which the candidate should have promised to abide by the provisions of this law. We held in that case that, while the pledge was defective, it was a substantial compliance with the statute.

In the case of *Spence* v. *Whittaker,* 178 Ark. 51, 9 S. W. 2d 769, we had to decide whether Spence was entitled to have his name on the ballot in the face of the objection that he had by mistake filed his "corrupt practice pledge" with the secretary of the Democratic Central Committee instead of with the Secretary of State as required by § 3898, Crawford & Moses' Digest (§ 4893, Pope's Digest). In that case the contention of Spence that he was not ineligible by reason of this mistake was upheld.

The rationale of these cases is that where there has been a substantial compliance with the requirements of the law as to candidacy for office a citizen should not be deprived of the high privilege of offering for public office because of a failure to observe literally all requirements. If this principle is to be applied as to requirements of the statute, *a fortiori* it should control where the requirement is based merely on a party rule.

Was there then a substantial compliance by appellant with the party rule as to the loyalty pledge to be filed with the secretary of the committee? His pledge contained the proper language and it was filed with the proper official of the party, who received it and retained it, along with the fee, without making any objection that appellant's name was signed thereto by his mother. While there is some question in the testimony as to when the power of attorney was mailed, there is no doubt from the testimony that three days before the pledge was filed appellant had executed and acknowledged a power of attorney specifically authorizing his mother to execute and file the pledge in his behalf, and that after learning that she had done so appellant ratified her action. The County Central Committee did not take any action as to this pledge. The secretary apparently treated the pledge as valid, and the decision to refuse to put appellant's name on the ticket was that of the chairman alone. The committee did not pass on the matter. So we do not have here an interpretation of a party rule by the party committee such as was involved in *Williamson* v. *Montgomery, supra.*

In determining whether there was a substantial compliance with this rule we think all of the circumstances revealed by the proof should be taken into consideration. Here appellant was a member of the armed forces of the United States and his duties prevented him from being personally present in his home county, and apparently, at the time he executed the power of attorney and wrote his mother directing her as to his candidacy, his ship was about to sail for a foreign port.

From time immemorial soldiers and sailors absent from home in defense of their country have been the objects of special consideration at the hands of lawmakers and courts. During the great war just ended many statutes, the purpose of which was to protect the civil and property rights of men in the armed forces, were enacted by Congress and by our own legislature.

And courts have, in the absence of legislation, been alert to recognize the extraordinary circumstances of the soldier away from his homeland in time of war, and to extend to him, as far as is reasonably possible, the same rights and privileges enjoyed by those other citizens who, through the service and sacrifice of the soldier, are permitted to remain in safety at home. An example of this is the holding of the courts that many of the technical requirements as to execution of a will should be waived as to the will of a soldier. See *Cartwright* v. *Cartwright,* 158 Ark. 278, 250 S. W. 11; *Johnson* v. *White,* 39 F. 2d 793. "Throughout the history of the civilized world, since the decrees of Julius Caesar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbard of his sword or his shield . . ." *Claffy* v. *Forbes, Director,* 280 Fed. 233.

The right to become a candidate for public office is, under our form of government, a fundamental right, which should not be in any manner curtailed without good cause; and any law or party rule, by which this inherent right of the citizen is diminished or impaired ought always to receive a liberal construction in favor of the citizen desiring to exercise the right.

While a pledge not signed by the candidate in person should not, under ordinary and normal conditions, be accepted by the party officials, we conclude, under the special circumstances shown in this case, that what appellant, situated as he was, as a member of the armed forces, and subject as he was at all times to the control,

as to his movements, of his superior officers, did as to qualifying for candidacy was a substantial compliance with the rules of the party. Therefore the denial of his right to have his name placed on the ballot as a candidate was arbitrary and he was entitled to the writ of mandamus prayed for by him.

The judgment of the lower court is accordingly reversed and the cause remanded with directions that the writ of mandamus issue; and immediate mandate in this case is ordered.

GRIFFIN SMITH, Chief Justice, and MCHANEY, J., dissent.

GRIFFIN *v.* STATE.

4417 196 S. W. 2d 484

Opinion delivered September 30, 1946.

Ben M. McCray, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

ROBINS, J. Appellant, Beulah Griffin, charged by information with the offense of murder in the first degree alleged to have been committed by shooting to death Helen Mason, another negro woman, was by a jury convicted of voluntary manslaughter and her punishment fixed at two and one-half years confinement in the penitentiary. She has appealed.

For reversal it is first urged by appellant that the verdict was not supported by any substantial testimony.

Appellant admitted doing the shooting, but claimed that she fired in self-defense and that she intended not to kill Helen, but only to stop her in her hostile advance upon appellant. At the time of the difficulty, appellant was operating a restaurant in the negro section of Benton, Arkansas. Helen had been patronizing appellant's place of business and a dispute arose as to an alleged overcharge in Helen's bill.

Sonny Green, a witness for the state, testified that he was asleep in a little back room of appellant's cafe when the trouble between appellant and deceased began and that appellant requested him to call the officers; that appellant said to Helen twice: "Don't follow me"; and Helen said to appellant: "Please give me my dollar and a half"; that the gun was then fired; that he saw nothing in Helen's hand; that when he went to phone the officers Helen put her hands on him, but he pushed her back.

The coroner testified that he found Helen's body lying on the floor and that she died from a bullet wound either in the heart or "the big artery of the heart"; that Helen had nothing in her hands except a paper sack which was clutched in her left hand and which contained an old, thin rayon dress rolled up and a skirt rolled up in another paper sack. There was no proof that Helen had any weapon at the time of the killing.

Appellant testified in substance: That Helen, after having previously asserted that she had been overcharged by appellant, came back to appellant's cafe. "She said 'Do you intend to pay me my dollar and a half or not'?, and I said 'I haven't got it'. She was cursing and said 'Do you not intend to pay me'?, she kept on from word to word and she said, 'You don't intend to pay it' and at that time she picked up a pepper sauce bottle, it was a fruit jar, and she drew it back. I said 'I have been awful nice to you, you have worn my things and I have given you show fare', and explained the nice things I had done as nice as a person could. She said 'I don't give a damn, I don't care', she cursed and said 'I don't give a so-and-so, I am going to have my so-and-so money'. While she was talking she set the pepper sauce bottle down and that is when I went and called Sonny Green. She meant business and she meant to do something to me and I went to call Sonny to call the police. I thought probably she would hit me with the jar while talking to the police and after I got Sonny up he went in and tried to call the police and I taken advantage of it and when she went to the telephone where he was that is when I started around to get to the kitchen and she said 'you needn't get that gun'. She said 'I am not afraid of you, and you are going to give me the . . . dollar and a half or I intend to get it' and she was coming down the counter to me. I had gone into the kitchen and was standing against the table and she said 'I mean you are going to give me the . . . money'. I said 'I don't want to hurt you and I don't want you to hurt me'. She said she was going to get the . . . money and I got the gun and pulled the trigger back and I said 'if you keep coming', and she said 'You yellow . . ., you ain't got the nerve to shoot me'. I said 'I don't want to shoot you, but one thing I don't want you to hurt me'. She continued on and after she got to the ice cream she kept on coming as short as from me to that man. I said 'I am not trying to scare you, you had better not make another step', and I shot her, I meant to stop her I didn't mean to kill her."

Several witnesses testified that Helen was quarrelsome and bore a bad reputation, and it was shown that

appellant had the reputation of being a peaceful and industrious woman.

When the correctness of a verdict of guilty is being considered by us on appeal the testimony must be given its strongest probative force in favor of the state. *Higgins* v. *State,* 204 Ark. 233, 161 S. W. 2d 400. Applying this rule in appraising the testimony, we conclude that there was substantial evidence in this case upon which the jury might base a finding that appellant slew the deceased, not because of an honest belief that appellant was in danger of being killed or receiving serious bodily injury, but because of sudden and irresistible anger aroused in appellant because of Helen's boisterous and offensive conduct. The jury evidently took this view of the testimony and it therefore properly found appellant guilty of voluntary manslaughter; and the reputation of the appellant was doubtless given due consideration by the jury in assessing the punishment.

It is next urged by appellant that the lower court erred in refusing to give appellant's requested instruction No. 4, which dealt with the matters of burden of proof and presumption of innocence. The court correctly gave the law as to this phase of the case in several instructions, particularly appellant's requested instructions Nos. 2, 3, 6-B, 8 and 11. We have often said that it is not necessary for the trial court to multiply instructions by repeating in substance the same declaration of law. *Sweeney* v. *State,* 35 Ark. 585; *Carroll* v. *State,* 45 Ark. 539; *McCoy* v. *State,* 46 Ark. 141; *Lee* v. *State,* 56 Ark. 4, 19 S. W. 16; *Maxey* v. *State,* 66 Ark. 523, 52 S. W. 2; *Richardson* v. *State,* 80 Ark. 201, 96 S. W. 752; *Jones* v. *State,* 105 Ark. 698, 152 S. W. 161; *Moore* v. *State,* 109 Ark. 475, 160 S. W. 206; *McCown* v. *State,* 125 Ark. 597, 188 S. W. 547; *Burns* v. *State,* 155 Ark. 1, 243 S. W. 963; *Sutton* v. *State,* 162 Ark. 438, 258 S. W. 632; *Hicks* v. *State,* 193 Ark. 46, 97 S. W. 2d 900; *Lee* v. *State,* 200 Ark. 964, 141 S. W. 2d 842; *Herron* v. *State,* 202 Ark. 927, 154 S. W. 2d 351; *Bradshaw* v. *State,* 206 Ark. 635, 176 S. W. 2d 912; *Trotter* v. *State,* 206 Ark. 690, 177 S. W. 2d 173.

It is finally argued by appellant there was error in the refusal of the lower court to give appellant's requested instruction No. 12, defining appellant's right of self-defense; but we find that in instructions Nos. 9, 10, 10-A, and 13, given at the request of appellant, the court fully and properly charged the jury as to the law of self-defense.

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

SEARS *v.* SCOTT.

4-7903 197 S. W. 2d 33

Opinion delivered September 30, 1946.

Rehearing denied November 25, 1946.

John L. Sullivan, and *Jno. A. Hibbler,* for appellant.

J. R. Booker and *Philip McNemer,* for appellee.

ED. F. MCFADDIN, Justice. This is a dispute between the rival factions of the Arch Street Baptist Church (Colored) in Little Rock, Arkansas, which church is congregational in its method of church government. See *Elston* v. *Wilborn,* 208 Ark. 377, 186 S. W. 2d 662, 158 A. L. R. 179. The appellant, Sears, claims to be the pastor of the church. The appellees claim to be the trustees and the representatives of the majority faction of the congregation.

On December 10, 1945, appellees filed their complaint in the Pulaski Chancery Court, alleging that at a regular meeting of the congregation on December 4th a majority had voted to immediately discharge Sears as pastor, but that he had refused to vacate the pulpit and church property. The prayer of the complaint was for an injunction. On December 17th, appellees filed their first amendment to the complaint, in which they amplified the allegations, and prayed for the same relief as in the original complaint. On December 18th, appellees filed their second amendment to the complaint, adding an additional defendant and alleging a conspiracy between the defendants to eject appellees from church membership, in order that Sears and his faction might have complete control. The prayer of this amendment was for a restraining order. On January 26, 1946, appellees filed their third amendment to the complaint, which amendment contained eight detailed charges against Sears' conduct, but contained no additional prayer for relief.

During the interims between the filing of these amendments, there were various applications for temporary restraining orders, hearings on the applications, the granting and modifying of such orders, motions to dismiss, and hearings on the same; but we find it unnec-

essary to detail these. On February 12, 1946, the defendants filed their answer which contained, *inter alia,* a general denial of all allegations.

On the same day that the defendants' answer was filed, an order was entered causing an election to be held by the church membership on the sole question of the retention of Sears as pastor. It is not claimed by anyone that any evidence was introduced at this hearing. Appellees insist that the order was by consent; but appellants claim otherwise. An examination of the order shows that in one place it recites "all of the parties having consented hereto in open court for this method of procedure for determining said issue"; but the order also shows at its conclusion that the plaintiffs agreed and consented in open court, "but the defendants (appellants here) except to said findings and pray and are granted an appeal to the Supreme Court." (parentheses our own). The quoted words show that the appellants did not agree or consent to the order, and protected themselves as best they could by preserving exceptions. The language at the end of the order, that the defendants objected to the findings, shows that there was no consent. The very purpose of an exception is to preserve the rights of the one excepting. The language here used was sufficient under §§ 1544 and 1545, Pope's Digest.

Thus, the status of the record is: (1) no testimony is claimed to have been introduced to support the facts recited in the order; (2) any recital as to "consent" is negatived by the exception to the findings; and (3) the court called an election to settle a pending controversy.

In the said order calling the election, the court directed the time and place of the election, and appointed a moderator to hold the election, and two deputy sheriffs to attend and preserve order. The order recites:

"The only question for decision by the congregation at said time in this said election to be held as hereinbefore set out . . . is and shall be . . . the retention or non-retention of the said P. J. Sears as its pastor. That the ballots to be cast shall be printed in form as follows:

"1. For Rev. P. J. Sears ——————.

"2. Against Rev. P. J. Sears ——————."

The election was held in pursuance with said order, and the result was reported by the moderator and two deputy sheriffs as being 127 against Sears and 105 for Sears. Solely on the result of that election, as based on the report of the moderator and the deputy sheriffs, the Chancery Court entered a final decree on February 16, 1946, permanently restraining the appellants, who have duly appealed.

I. *An Election to Determine the Litigation.* We reach the conclusion that the order of the chancery court calling the election, and the decree based on the election, come squarely within the procedure interdicted in *Elston* v. *Wilborn, supra.* There, as here, a dispute arose between factions of the congregation, and the Chancery Court called an election and decided the cause solely on the result of the election. We there quoted from the Pennsylvania case of *Mazaika* v. *Krauczunas,* 229 Pa. 47, 77 At. 1102, 31 L. R. A., N. S. 686, as follows:

" 'Instead of meeting the issues raised by the pleadings, pursuant to an agreement entered into between the parties, the chancellor proceeded to hold a new election, to determine whom the majority preferred to have act as trustee of the title. . . . . Here was a clear abdication of judicial function and authority. . . . It is the proper function of a chancellor to resolve such doubtful questions in the light of the evidence, not to avoid them by reaching a solution of the controversy through methods for which there is no legal warrant. . . . The decree entered in the case rests exclusively upon the result derived by the chancellor from the election held before him. Not only had the election no relation to the congregational meeting, but it was not ordered by the congregation, . . . The case must go back, to be proceeded with sec. reg., the contending parties to be allowed to introduce such testimony as they can touching the issues raised under the pleadings. From that testimony let the facts be found,

and then, should an appeal to this court follow, we will be in a position to make final ruling, but not until then.' ''

Appellees claim that the procedure in the case at bar falls within the purview of the following language found in *Elston* v. *Wilborn*:

''We do not mean that an election can never be called. If—for instance—a complaint should be filed stating that by force, threats, etc., the desire of the majority could not be ascertained, then a court could properly decree a clear election—not to decide the result of a pending case, but as granting the relief prayed, *i. e.*, a clear election.''

We cannot agree with appellees' contention. In all of their pleadings, appellees never prayed for a clear election, but, on the contrary, insisted all the time that there had been an election and that Sears refused to abide by the election. In their first amendment, appellees recited how Sears' faction had left the congregational meeting of December 4th; but appellees alleged that the meeting had proceeded and there had been a complete election. There was never any claim that judicial intervention was needed to obtain a fair election. Furthermore, the order of February 12th calling the election did not recite that it was for the purpose of securing a clear election theretofore denied. On the contrary the order recites that it was for the purpose of having an election to settle the entire controversy. The decree of February 16th specifically recited that it was based on the result of the court election. In short, the whole record in this case at bar indicates that the rule of *Elston* v. *Wilborn* was overlooked.

We try chancery cases *de novo;* and if there had been any evidence introduced in this case on which we could base a decree, we might finally dispose of this controversy. For instance: appellees alleged in their original complaint, and also in their first amendment, that the congregation on December 4th had duly and legally voted to discharge Sears. If that allegation had been substantiated by evidence, then we would be in a

position to decide this case. But, in the absence of any evidence, we must remand the controversy.

II. *Rule Nine.* The appellants' abstract was defective; and we would sustain the appellees' motion to dismiss the appeal for failure to comply with Rule Nine (of this court), except for the fact that the appellees have supplied us with an abstract and thereby waived their own motion to dismiss. In *Thomson* v. *Dierks Lumber & Coal Co.,* 208 Ark. 407, 186 S. W. 2d 425, we pointed out that the appellees in their brief on the merits might supply any deficiency in the appellants' abstract, and thereby lose the benefit of the appellees' motion to dismiss for failure to comply with Rule Nine. That eventuality has occurred in the case at bar, and so the motion to dismiss for non-compliance with Rule Nine has been waived by appellees having cured the defective abstract made by appellants.

It follows that the decree of the chancery court of February 16, 1946, is reversed, and the cause is remanded with directions to set aside the order of February 12, 1946, calling the election, and to hear such evidence as may be offered by the parties, on the merits of the controversy, and proceed in a manner not inconsistent with this opinion.

There was an order made by the chancery court in this case which restrained and enjoined P. J. Sears from officiating or acting in any capacity whatever as pastor of the Arch Street Baptist Church at 11th and Arch Streets, Little Rock, Arkansas, and which restrained and enjoined P. J. Sears from interfering with or using the said church house or properties in any way whatever. In order to maintain the *status quo* in this case, we decree the said restraining order in full force and effect until the Pulaski Chancery Court determines the cause.

The costs of the appeal in this court will be borne equally by the parties.

Opinion delivered September 30, 1946.

[redacted]

Reinberger & Eilbott, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

HOLT, J. Appellant, Andrew Thomas, a Negro, was tried on an information charging him with murder in the first degree, alleged to have been committed November 22, 1945, by striking his wife's mother with an iron poker and stabbing her with an ice pick, causing her death. He was convicted and the death penalty imposed.

The record discloses that appellant, by timely objections, has preserved twenty-five alleged errors during

the trial of this cause, only one of which is argued here. This being a capital case, the rules of this court require that we consider all alleged errors where objections have been made in the lower court, regardless of whether such alleged errors are argued here on appeal. *Phillips* v. *State,* 190 Ark. 1004, 82 S. W. 2d 836.

As indicated, appellant argues but one alleged error here and in this connection says: "Appellant here urges reversal of the lower court on the ground that the lower court erroneously permitted the introduction of a statement made by the accused in the nature of a confession while he was in custody and while counsel of his choosing was not present. The testimony here shows that previous to the time that the confession was made by the accused he had employed attorneys of his own choosing to defend him and the prosecuting attorney or sheriff's office knew this fact or could easily have ascertained same. Yet notwithstanding this fact this statement was taken from the accused in the absence of that counsel and without any attempt to have that counsel present."

It appears from the record that the appellant November 23, 1945, made a full, complete, and detailed confession of the crime charged against him, freely and voluntarily, without coercion or threats or of any promise of leniency or reward of any kind. This confession was made and signed by appellant in the presence of the prosecuting attorney, other officers, and a young lady stenographer who took down his confession, in the nature of questions propounded by the prosecuting attorney, and appellant's answers, in the Jefferson County jail at Pine Bluff. Appellant was 23 years of age. This confession was made without the knowledge and in the absence of his counsel. Appellant made no request that his counsel be summoned nor that he be present during the confession.

Was the action of the lower court, in these circumstances, in permitting this confession to be introduced in evidence, error? We do not think any error was committed by its introduction. While this court appears not to have passed directly upon this point, the general

rule appears to be well established that when it appears, as here, that a confession has been freely and voluntarily made by the accused in the absence of counsel, and without any request for the presence of counsel, the confession is admissible in evidence.

In *Underhill's Criminal Evidence,* Fourth Edition, § 267, p. 525, the writer says: "A confession is not inadmissible merely because made in the absence of counsel for accused or because accused was not informed that he was entitled to consult counsel."

In *C. J. S.,* Vol. 22, p. 1431, § 817, we find this language: "Matters which do not affect the voluntary character of a confession do not render it inadmissible as involuntarily made. A confession is not rendered inadmissible . . . by the fact that when it was made persons in authority were present, . . . or that he was not represented by counsel, or, if represented, his counsel was not present; or because of other similar factors. A voluntary confession is admissible regardless of where it was made. If the confession was free and voluntary, the motive which prompted it is, as a general rule, immaterial as affecting its admissibility." See, also, 23 *A. L. R.,* p. 1387, section (b), and cases there cited.

We adopt this general rule as sound and as, we think, based on reason and justice. Certainly it would seem that an accused, in circumstances such as are presented here, needed no advice from counsel to aid him in telling the simple truth.

Appellant also objected to all the evidence as being insufficient to sustain the verdict of the jury. As we view the testimony in this case it presents a most savage, vicious and cold-blooded murder. We briefly state it.

On the morning of November 22, 1945, appellant and deceased were alone in the home of the deceased. Appellant and his wife, deceased's daughter, had been married but a short time, but had accumulated approximately $600, which they had deposited in a joint account in a local bank. Appellant's wife was away that morning for the purpose, so appellant seemed to think, to with-

draw a part or all of this money. Appellant and the deceased began quarreling over appellant's bank book and this bank deposit, and at intervals during this quarrel, which lasted for the greater part of the morning and continued to become more heated and violent, the deceased would go outside the house and return. On deceased's last return to the house, appellant had concealed himself behind the kitchen door with an iron bar or poker, about three feet in length, in his hand, and as deceased entered the kitchen door, he struck her on the head, knocked her to the floor, and then proceeded to administer several additional blows on her head, crushing her skull and knocking one of her eyes almost from its socket. He then dragged her into another room, procured an ice pick with which he stabbed her in the region of the heart, approximately a dozen times, each penetration of the ice pick being to a depth sufficient to pierce the heart. The deceased was unarmed at the time, and died very shortly after appellant's attack upon her. We think this evidence abundantly sufficient to support the jury's verdict.

Appellant also objected to the following question asked by the prosecuting attorney on the cross examination of appellant, and appellant's answer, which the court permitted to go to the jury: "Q. You also hit your wife, when she came home you struck her with that poker, didn't you? A. That's right." We think no error appears here. The question and answer were properly admitted as affecting the credibility of the witness and as tending to show the state of defendant's mind. See the recent case of *Gaines* v. *State*, 208 Ark. 293, 186 S. W. 2d 154.

Finally, the appellant questions the action of the court in giving on its own motion and over appellant's objections, seventeen instructions, and the action of the court in refusing to give two instructions requested by the appellant.

We think it could serve no useful purpose to set out these separate instructions. It suffices to say that we have carefully examined each and all of them and are

unable to find any error. It appears that the instructions given by the trial court clearly declared the law applicable to the facts in this case and were similar in effect to instructions usually given in cases of this character. We are also of the opinion that the two instructions requested by defendant were properly refused by the court for the reason that they were fully covered by other instructions which the court gave. An examination of the record discloses no errors and convinces us that, on the whole case, appellant has had a fair and impartial trial, and accordingly, the judgment must be, and is affirmed.

WILLIAMS *v.* STATE.

4415 196 S. W. 2d 751

Opinion delivered September 30, 1946.

Kenneth C. Coffelt, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Willams,* Assistant Attorney General, for appellee.

McHANEY, Justice. By information filed November 2, 1942, appellant, a Negro woman, was charged with murder in the first degree for the shooting and killing of another Negro woman, Lucille Williams. She was tried

and convicted, at the March, 1946, term of Court, of involuntary manslaughter, and sentenced to one year in the State penitentiary.

When the case was called for trial appellant filed a motion to be discharged under the provisions of § 3969 of Pope's Digest, she having been admitted to bail on or shortly after her arrest, on the ground that she had not been "brought to trail before the end of the third term of the Court" after admission to bail. That section so provides with the condition that the delay must not happen on her application. The Court overruled the motion for discharge and a trial followed with the result above stated.

On this appeal the only alleged error urged for a reversal is the overruling of said motion to be discharged.

It is undisputed that at the first term of court after the charge was filed, in March, 1943, a continuance was granted on appellant's motion. It is also undisputed, and the Court so found in the order denying the motion, that the case was set for trial at the September, 1944, term, but was not tried, and that no other setting of the case was asked by either the State or appellant until it was set for trial for March 11, 1946. In other words, appellant did not, on the record, or otherwise, demand a trial or resist postponements.

In the early case of *Stewart* v. *State,* 13 Ark. 720, it was held that, in order to justify a discharge of the accused on such a motion, "he must have placed himself on the record in the attitude of demanding a trial, or at least of resisting postponements." In *Dillard* v. *State,* 65 Ark. 404, 46 S. W. 533, the Stewart case, *supra,* was erroneously cited as being in the 23 Ark., and the language above quoted is there quoted with approval with other language of Chief Justice Watkins giving the reasons for the rule. It was there said, under similar facts to those here, "So it appears that appellant was consenting to or acquiescing in the delay, and made no demand for a trial or disposition of the case against him." In *Ware* v. *State,* 159 Ark. 540, 252 S. W. 934, the Stewart and

Dillard cases were cited as also the later case of *Fox* v. *State,* 102 Ark. 393, 144 S. W. 516, and the construction of the statute as given in the Stewart case was again approved. See, also, *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777.

Under the rule announced in these cases, the trial Court correctly overruled the motion to discharge appellant, since she never at any time demanded a trial or resisted postponement. By her silence she must be held to have consented to the postponements.

Affirmed.

RITHOLZ *v.* DODGE, CHANCELLOR.

4-7993 196 S. W. 2d 479

Opinion delivered September 30, 1946.

Petition for Prohibition to Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; writ denied.

E. Chas. Eichenbaum, Glenn F. Walther and *Charles Mehaffy,* for petitioners.

Carl Langston, for respondent.

Guy E. Williams, Attorney General, for intervenor.

ARKANSAS STATE BOARD OF OPTOMETRY *v.* DODGE, CHANCELLOR.

4-7994

Opinion delivered September 30, 1946.

Carl Langston, for petitioner.

Charles Mehaffy, for respondent.

Guy E. Williams, Attorney General, for intervenor.

[redacted]

MINOR W. MILLWEE, Justice. The petitioners, Ritholz, make application here for a writ of prohibition directed to the judge of the Pulaski Chancery Court to restrain said court from proceeding against them in a cause instituted by the Arkansas State Board of Optometry wherein petitioners are charged with contempt of the Chancery Court by repeated violations of its injunctive orders. In a separate petition the Board of Optometry seeks the issuance of a writ of mandamus directing the Chancellor to assume and exercise jurisdiction in said contempt proceeding over certain residents of Jefferson and Sebastian counties, who are alleged to be the agents and employees of petitioners. The two causes are consolidated for hearing in this court, and for convenience the petitioners, Ritholz, will hereinafter be referred to as "petitioners" and the Arkansas State Board of Optometry will be designated "Board".

Petitioners are six non-resident members of a copartnership operating a chain of optical stores in this and other states under the trade name of National Optical Stores Company. On September 30, 1943, a decree was entered in the Pulaski Chancery Court permanently enjoining petitioners and their local agents in Pulaski county from the practice of optometry and engaging in "bait" advertising in violation of Act 94 of 1941. The decree of the Chancery Court was affirmed by this court in the case of *Ritholz* v. *Arkansas State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410. Subsequent to the issuance of the original injunction, petitioners continued to operate in violation thereof by substituting their manager and salaried physician in the city of Little Rock. The Board instituted further proceedings resulting in punishment of the local manager and physician for contempt, the court declining to punish petitioners because they were not "physically present". The latter case was appealed to this court and affirmed on April 23, 1945, in the case of *Hudkins* v. *Arkansas State Board of Optometry,* 208 Ark. 577, 187 S. W. 2d 538.

On April 17, 1946, the Board filed a petition in the same cause praying for the issuance of an order to show cause why the petitioners and their local agents in the cities of Little Rock, Pine Bluff and Fort Smith, Arkansas, should not be punished for contempt for alleged violation of the restraining orders previously issued by the chancellor. It was alleged that petitioners had moved their place of business in Little Rock and changed their trade name to King Optical Company; that petitioners had again replaced their Little Rock manager and salaried physician and continued to practice optometry and engage in "bait" advertising in violation of Act 94 of 1941 and the injunctions of the court. The Board also charged petitioners and their local managers and physicians in Pine Bluff, Arkansas, and Ft. Smith, Arkansas, with similar violations and asked that the latter be made parties defendant to the contempt proceedings. The court entered an order for the appearance of all the defendants on May 14, 1946, to show cause why they should not be held in contempt for violation of the injunctive decrees previously issued, and a receiver was appointed to take charge of petitioners' property.

Petitioners then filed their special demurrer to the jurisdiction of the court. In the order overruling the special demurrer, the court dissolved the receivership and petitioners were directed to file a corporate bond for $2,000 to be held by the Court in lieu of the property of petitioners held by the receivers. Petitioners then filed their motion to strike certain paragraphs of the petition filed by the board, alleging that the court had no jurisdiction of the alleged agents and employees of petitioners at Pine Bluff, Arkansas, and Fort Smith, Arkansas.

On May 21, 1946, the Chancery Court entered an order holding: (1) that petitioners entered their general appearance in the cause by appealing from the decree of September 30, 1943; (2) that petitioners were served originally in the suit in accordance with the provisions of § 14 of Act 94 of 1941 which the court held to be good substituted personal service; (3) that petitioners were duly served with copies of the order to show cause why they should not be punished for contempt, in accordance

with § 1385 of Pope's Digest which the court held to be good substituted personal service; (4) that the court had jurisdiction to restrain and punish petitioners from illegally practicing optometry in Pine Bluff, Arkansas, and Fort Smith, Arkansas; (5) that the court had jurisdiction to appoint a receiver to seize the assets of petitioners to aid it in the collection of fines that might be assessed against them; (6) that the court had no jurisdiction over the resident agents and employees of petitioners in Jefferson county and Sebastian county, Arkansas, for the reason that the latter must be sued in their respective counties in accordance with § 1397 of Pope's Digest.

The Petition for Prohibition

In their application for a writ of prohibition, petitioners allege and now earnestly insist: (1) that the proceedings against them are for criminal contempt and the trial court has no jurisdiction of the persons of petitioners and can acquire none; (2) that the record shows on its face that no service has been had on petitioners, and (3) that the trial court has no jurisdiction to appoint a receiver to take charge of the assets of petitioners.

It must be remembered that petitioners were parties defendant in the two cases formerly appealed to this court, and most of the questions now sought to be raised seem to have been previously adjudicated. The contentions of petitioners that the proceeding in the trial court is one for criminal contempt which may only be brought by the state, and in the county where petitioners reside, were made in *Hudkins* v. *Arkansas State Board of Optometry, supra,* where we said: "As to the subject matter from which the case at bar proceeds, there is, upon the one hand, clear distinction between criminal conduct and punishment, while upon the other hand there is the public's right of protection against continuing practices of unlicensed individuals who persist in an activity legislatively found to be inimical to the common welfare.

"Although the statute says, in effect, that where the prohibited practice continues it *may* be enjoined at the Board's instance, necessarily an implication arises that in appropriate cases it is the Board's prerogative as an implement of the law to fairly present to a court of equity the facts it believes justify action. Then, if in the Court's discretion injunction follows, the right to find that there has been contemptuous disregard for the court's order is a necessary incident to the tribunal's jurisdiction to act in the first instance."

The question of the validity of the service of process upon petitioners was likewise an issue in the first appeal in *Ritholz* v. *Arkansas State Board of Optometry, supra.* This question was argued in the briefs in that case, and we there affirmed the decree entered by the trial court on September 30, 1943, which contains a finding as follows: "The Court finds that said non-resident partners, the Defendants, Ritholz, by their acts of the illegal practice of Optometry have submitted themselves to the jurisdiction of the Court in accordance with the provisions of the Act 94 of 1941, the requirements of which have been fully met by notice and service of summons, having the same legal force and validity as if served personally." The court also retained jurisdiction for any further proceedings.

Section 14 of Act 94 of 1941 provides that any non-resident person, firm or corporation that performs acts in this state which constitute the practice of optometry, except when done by those having a designated agent for service within the state, shall be deemed equivalent to the appointment of the Secretary of State as agent for service of process. After providing for service on the Secretary of State, it is then required that a notice of such service and a copy of the process be sent the non-residents by registered mail, and the defendant's return receipt or the affidavit of the plaintiff, or his attorney, of compliance with the requirement, are placed in the record. It is further provided that such service shall be given "the same legal force and validity as if served on such person, firm or corporation personally."

The Legislature has, therefore, by Act 94 of 1941, provided that the practice of optometry within the state by non-residents shall operate as an implied consent to the form of service of process provided in § 14 of the act. The record in this case reflects that there has been a rigid compliance with the terms of this section.

The record shows that a summons to answer the order to show cause issued by the chancellor in the instant proceeding was served upon the manager of petitioners' Little Rock store with copies of the order to show cause and prior injunctive decrees of the court attached to the summons. The trial court held this to be good substituted personal service under § 1385, Pope's Digest, which is Act 74 of the Legislature of 1935. This section authorizes service on any individual, partnership, or unincorporated association doing business at two or more places in this state, on actions arising out of the business done, by service on the agent in charge of the local business. The venue of the action is by the act fixed in any county where such business is done.

The forms of service authorized by both § 14 of Act 94 of 1941 and Pope's Digest § 1385 were prompted by and patterned after the so-called non-resident motorist statutes. Dr. Leflar, in his excellent treatise on *Conflict of Laws,* points out the development in recent years of a new theory underlying the creation of jurisdiction over the person in many cases where actual personal service cannot be obtained. This principle is that the causing of acts which are subject to regulation under the police power to occur in a state should be the basis of jurisdiction in the courts of that state over the person causing the acts, as to causes of action arising out of the acts done.

In § 34, p. 106, of his work, Dr. Leflar says: "Considerable state regulation of the doing of local business is permissible under the police power. It has long been known that, with corporations, this permissible regulation includes subjection of the foreign principal to substituted service of process in suits on causes of action arising out of the business done. It is now realized that

this is true also when the foreign principal is a private person, or several private persons associated together as a partnership or other association. The basis of jurisdiction is the fact of doing acts or causing them to be done in the state, the acts being of a type so affecting the public interest, in that they are apt to give rise to causes of action in local citizens, that such police regulation as is represented by these statutes is allowable. The operation of motor vehicles, and the carrying on of a business, fall within this type of acts clearly, and it is not difficult to imagine that similar statutes may in time be enacted in reference to other local activities out of which causes of action frequently arise. After all, the effect of such a statute is merely to make it as easy to sue a nonresident as it already is to sue a resident who does the same local acts."

The Iowa court had occasion to construe a statute of that state with substantially the same provisions as § 1385, Pope's Digest, in the case of *Davidson* v. *Henry J. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700, 91 A. L. R. 1308. The court said: "The statute in question does not in any manner abridge the privileges or immunities of citizens of the several states. It treats residents of Iowa exactly as it treats residents of all other states. The citizens of each state of the United States are, under this statute, entitled to all the privileges and immunities accorded citizens of this state.

"The justice of such a statute is obvious. It places no greater or different burden upon the nonresident than upon the resident of this state. . . . A nonresident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state. . . .

"It (the statute) provides that a nonresident, as well as a resident, doing business in this state through an office or agency, is subject to actions *in personam* in this state as to such transactions *only* as grow out of

said office or agency, and then only where substituted service is made on such agent. When a nonresident defendant establishes an office or agency for the transaction of business in any county in this state under this statute, he thereby voluntarily appoints his own agent, in charge of said office or agency, as one upon whom substituted service in actions *in personam,* growing out of that office or agency, may be made. Service of summons upon such duly appointed agent as to transactions growing out of such agency meets every essential requirement of due process of law." The holding of the Iowa court was affirmed by the Supreme Court of the United States in *H. L. Doherty & Co.* v. *Goodman,* 294 U. S. 623, 55 S. Ct. 533, 79 L. Ed. 1097.

In *Wilentz* v. *Edwards,* 133 N. J. Eq. 488, 33 A. 2d 297, affirmed 134 N. J. Eq. 522, 36 A 2d 423, where the attorney general of New Jersey sought to restrain the sale of securities within the state by a nonresident, the court held a statute providing for service of process by registered mail directed to defendant's address outside the state to be valid. In discussing the validity of the service the court said: "The argument advanced in the instance case is the same as that advanced in *Stevens* v. *Television, Inc.,* 111 N. J. Eq. 306, 162 A. 248, namely, that this suit is one *in personam,* and that therefore there can be no personal judgment entered without personal service within the State, defendant's counsel citing *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565. This, however, as pointed out by Vice Chancellor Backes in *Stevens* v. *Television, Inc., supra,* 'is not a case seeking a personal recovery against the defendants; it is to foreclose them. The state is not asking anything of them; it wants nothing from them.' The State has the power to ordain against imposition in the sale of fraudulent securities. *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; *Merrick* v. *N. W. Halsey & Co.,* 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498. Since the State has such power to ordain against imposition upon the guillible, it may prescribe the means of protection and the procedure for

enforcement of its laws including substituted service, such as the defendant admits he received."

Under these authorities, we think the trial court correctly held that it had jurisdiction of the persons of petitioners by service of process in the manner reflected by the record. We are not unmindful of our approval of the action of the chancellor in declining to punish petitioners in the case of *Hudkins* v. *Arkansas State Board of Optometry, supra,* because they were not "physically present". It is true that the trial court is powerless to compel the physical presence of petitioners for punishment, but we do not mean to say that property owned and repeatedly used by them in violation of Act 94 of 1941 could not be seized in satisfaction of a fine imposed against them where the court has jurisdiction of the contempt proceeding. After appointing a receiver who took charge of the properties of petitioners, the trial court dissolved the receivership and required petitioners to post bond in lieu of the property that had been seized. The writ of prohibiton does not issue to prohibit a trial court from erroneously exercising its jurisdiction, but issues only when that tribunal is wholly without jurisdiction, or is proposing to act in excess of its jurisdiction. *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13. The erroneous exercise of jurisdiction may be corrected by appeal, and, since we hold that the trial court had jurisdiction of the persons of petitioners and the subject matter, we will not determine here whether the trial court has erroneously exercised its jurisdiction in the particular manner in which it proceeded in the receivership.

Receivership is generally regarded as a remedy of last resort. 45 Am. Jur., Receivers, § 26. However, there is authority for the resort to such provisional remedy to be found in the case of *Blackmer* v. *United States,* 284 U. S. 421, 52 S. Ct. 252, 76 L. Ed. 375. In that case, Blackmer, a citizen of the United States residing in Paris, France, was found guilty of contempt of the Supreme Court of the District of Columbia for failure to respond to subpoenas requiring him to appear as a witness in the

trial of a criminal case. The subpoenas were served on Blackmer in Paris, France, and by publication of the process in a District of Columbia newspaper. Upon his failure to appear at the trial to which he had been subpoenaed as a witness, Blackmer's property was seized by the court and sold to satisfy a fine for contempt. Disposing of contentions similar to those made by petitioners in the instant case, the court, speaking through Chief Justice Hughes, said: "The further contention is made that, as the offense is a criminal one, it is a violation of due process to hold the hearing, and to proceed to judgment, in the absence of the defendant. The argument misconstrues the nature of the proceeding. 'While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not "criminal prosecutions" within the Sixth Amendment or common understanding.' *Myers* v. *United States,* 264 U. S. 95, 104, 105, 44 S. Ct. 272, 273, 68 L. Ed. 577. See, also, *Bessette* v. *Conkey,* 194 U. S. 324, 336, 337, 24 S. Ct. 665, 48 L. Ed. 997; *Michaelson* v. *United States,* 266 U. S. 42, 65, 66, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451; *Ex parte Grossman,* 267 U. S. 87, 117, 118, 45 S. Ct. 332, 69 L. Ed. 527, 38 A. L. R. 131. The requirement of due process in such a case is satisfied by suitable notice and adequate opportunity to appear and to be heard. *Cf. Cooke* v. *United States,* 267 U. S. 517, 537, 45 S. Ct. 390, 69 L. Ed. 767.

"The authorization of the seizure of the property belonging to the defaulting witness and within the United States, upon the issue of the order to show cause why he should not be punished for contempt (§ 5 of the Act [28 USCA § 715]), affords a provisional remedy, the propriety of which rests upon the validity of the contempt proceeding. As the witness is liable to punishment by fine if, upon the hearing, he is found guilty of contempt, no reason appears why his property may not be seized to provide security for the payment of the penalty. The proceeding conforms to familiar practice

where absence or other circumstance makes a provisional remedy appropriate."

The remedy of sequestration has been held to be available in equity against a person or corporation for contempt. 47 Am. Jur. 697; 17 C. J. S. 136. We can see no valid reason why property that is continuously used in violation of the repeated injunctions of the court and the laws of this state, may not be seized to provide security for the payment of fines which are imposed on the owners of such property over whom the trial court has jurisdiction.

It follows that the petition for writ of prohibition will be denied. It is so ordered.

The Petition for Mandamus

The Board seeks by mandamus to compel the Pulaski Chancery Court to assume and exercise jurisdiction over four residents of Jefferson and Sebastian counties who are alleged to be the agents of petitioners and violating the injunctions of the trial court in the counties of their residence.

Section 1397 of Pope's Digest provides: "All actions for debts due the State of Arkansas, and all actions in favor of any State officer, State board or commissioner, in their official capacity, and all actions which are authorized by law to be brought in the name of the State, and all actions against such board or commissioner or 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."

Since the proceedings in the chancery court were instituted by the State Board of Optometry, we think venue is clearly fixed by the terms of the statute in the counties of Jefferson and Sebastian insofar as the defendants residing in those counties are affected. The Board relies on the case of *Beeson* v. *Chambers,* 192 Ark. 265, 90 S. W. 2d 770. In that case all the parties to a foreclosure suit were residents of Logan county and Beeson, a resident of Pulaski county, removed a part of the mortgaged chattels, which were in possession of

a receiver appointed by the court, from Logan county. Service of an order to show cause why he should not be punished for contempt of the Logan Chancery Court was had on Beeson in Pulaski county. This court held the service valid. The situation is entirely different from that presented in the instant case. The resident defendants of Jefferson and Sebastian counties are not charged with the commission of acts in Pulaski county in contempt of the Pulaski court. They are charged with contempt of the Pulaski Chancery Court by acts committed in the counties of their residence, and the statute clearly fixes the venue of any action against them in the counties where they reside. The trial court correctly so held, and the petition for mandamus will, therefore, be denied.

STATON *v.* MOORE.

4-7940 196 S. W. 2d 573

Opinion delivered October 7, 1946.

E. W. Brockman, for appellant.

Max M. Smith, for appellee.

SMITH, J. Appellant brought this suit to quiet her title to lots 2 and 3 of the S. E. quarter, of the S. W. quarter, section 1, township 9 south, range 11 west, Cleveland county, Arkansas. The 40-acre tract of land, of which the described lots are a part, has been divided into 15 lots, the plat of the survey being duly of record. These lots vary in area from one to twelve acres, and are of various shapes. One of these lots, numbered 2, lies directly north of another lot, numbered 3. An answer denied appellant's ownership of these lots, and alleged the acquisition of the title by adverse possession. Upon the submission of the case defendants, appellees, abandoned any claim of title to lot 3. After much conflicting testimony had been introduced, the court found that defendants had acquired title to lot 2 by adverse possession, and dismissed appellant's suit as being without equity as to that lot, but quieted and confirmed appellant's title to lot 3.

Appellant's claim of title to these lots is based upon the following conveyances: A chain of conveyances from the United States to one McMurtrey. By deed from Polly McLendon, dated March 29, 1904, to T. W. Rogers. Under the will of Rogers to his wife Cynthia. By deed from Cynthia to Detie Staton, and by deed from Detie Staton to appellant, Girlie Staton.

Lot number 3 was enclosed by a fence, while lot number 2 was unenclosed, except on the side thereof which joined lot 3. Both lots were described in the deed from Polly McLendon to T. W. Rogers, and possession of lot 3 was taken after the execution of that deed, and lot 3 has been in the possession of Detie or Girlie Staton since their purchase in 1925.

Inasmuch as appellant had actual possession of lot 3, she claims to have had constructive possession of the adjacent lot 2, as both lots were described in the deed

from Polly McLendon, and the deeds under which they claim. Appellant invokes the rule stated in *Thornton* v. *McDonald,* 167 Ark. 114, 266 S. W. 946, that, "Where, under a deed conveying four adjacent lots, the grantee took actual possession of two of the lots and held same adversely for more than seven years, the other two lots being unoccupied, his constructive adverse possession includes the two unoccupied lots."

A complete answer to this contention is that when Detie and Girlie took possession of lot 3, lot 2 was not then unoccupied. On the contrary, lot 2 was in the actual possession of a claimant of the title thereto, which occupancy continued for many years.

Appellant also claims title to lot 2 by virtue of the payment of the taxes thereon for a period of more than seven years. Two answers may be made to this contention: the first being, that lot 2 was not vacant and unoccupied property; the second answer being, that appellant did not pay the taxes on lot 2 for seven consecutive years.

The parties in the payment of the taxes due on these two lots were evidently confused by the descriptions of the lots appearing on the tax books, and Girlie Staton paid taxes for certain years on the south half, lots 2 and 3. Inasmuch as lot 3 is directly south of lot 2, it is apparent that she did not pay taxes on adjoining parcels of land, as the south half of lot 2 is not adjacent to the south half of lot 3. In other years she paid taxes on the east half of lots 2 and 3, and the east half of these lots is adjacent to the other half. The significance of this fact, as will presently appear, is that Girlie never in any one year paid taxes on more than one full lot, and never in any year paid taxes on two lots.

As has been stated, the paper title of Girlie to these lots is derived from the deed of Polly McLendon to T. W. Rogers. Now Polly testified that her first husband, Charles Edward Barnett, owned lot 3 and made his home there for many years, and for more than seven years, but that he never owned or claimed any interest in lot 2. When questioned about her deed describing lots 2 and 3,

she stated that she had no intention of conveying lot 2, as neither she nor her husband ever had any interest in it.

Polly further testified as follows. Her first husband Charles Edward Barnett, was a son of J. M. (Jackie) Barnett, and that she and her husband bought the lot on which Girlie's house now stands, which is lot 3, and that they bought from a Dr. McMurtrey, evidently one of the heirs of the McMurtrey who owned the original record title derived from the United States.

Polly further testified that the other lot, or lot number 2, was owned by Josh Barnett, who was her brother, who died in 1936. She and Edward, her husband, bought their lot, which was lot number 3, and they told Josh about a vacant adjoining lot, which is lot 2, and Josh bought this vacant lot, and built a house thereon, in which he lived until 1924, when Josh left and went to St. Louis. It is not clear when he built his home, but it was more than seven years prior to 1924, and by his occupancy of this lot he acquired title thereto by possession, if he did not have a deed to himself, about which Polly testified. Polly's husband got his deed about 1899, and Josh took possession of lot 3 soon thereafter, but Polly and her husband never lived on lot 2, and never claimed any interest in, or title to lot 2. When Josh moved from lot 2, he left Polly in charge of the house thereon, and she collected the rents for the account of Josh's wife for a number of years, and paid the taxes for the years 1925, 1926, 1927 and 1928, in the name of Emma Barnett, who was Josh's wife. These taxes were paid on the description, north half, lots 2 and 3, and receipts were taken in Emma's name because Emma had directed that this be done. Emma died in 1929. She and Josh were the parents of seven children, and it is not clear how many of these children survived them. Polly rented the property for Emma until Ray, one of Josh's children, took possession of the house.

We think it is very clearly shown that Polly and her husband claim to own and had possession of lot 3, while Josh claimed and had possession of lot 2, and that

Polly and her husband never owned or claimed any interest in lot 2. The fact that never in any one year did appellant Girlie pay taxes on more than one lot strongly corroborates the testimony of Polly that she never owned or intended to sell lot 2, but even if she may not contradict her deed, the deed was not effective to convey the title to lot 2, for the simple reason that Polly had no interest in lot 2 which she could convey.

On February 8, 1930, Pearl Barnett, Ella Roberts, and Nolia Barnett, three of Josh Barnett's children, applied to and obtained from I. E. Moore a loan, and as security therefor executed to Moore a mortgage on the north half of lots 2 and 3. This mortgage granted Moore the right to purchase at the foreclosure sale under the power of sale incorporated in the mortgage, and when the lot was sold under this power, Moore became the purchaser. The holding in the case of *Ellenbogen* v. *Griffey,* 55 Ark. 268, 18 S. W. 126, is to the effect that Moore had the right to purchase at this sale, inasmuch as the mortgage had given him that right.

Moore built a house on lot 2, and his right to do so appears not to have been questioned by Girlie, and upon Moore's death partition of his estate was effected among his heirs and in the partition his son, Victor, acquired in severalty his father's title to lot 2. On March 20, 1941, Victor Moore conveyed the north half, north half of lot 2 to B. W. Thomasson, who for four years was clerk of the circuit court of Cleveland county, and for ten years was postmaster of the town of Rison, the county seat of Cleveland county, of which town the property here in litigation is a part. Thomasson testified that he had known for many years the property which he bought from Victor Moore as the homestead of Josh Barnett.

Thomasson testified that before buying the property he was advised by an abstractor of land title that there was some complication about the title, and he asked Girlie if she claimed any interest in the lot he contemplated buying, and she told him that she did not and he bought the property, and proceeded to build a house costing about $500 thereon, and he did this without

objection on Girlie's part. He further testified that after he sold this property, which he did on October 14, 1943, to one Clara Mae Scott, Girlie asked him why he did not tell her that he would like to sell, as she would have bought had she known it was for sale.

Girlie denied this testimony and stated that when Thomasson began to build she told him the property belonged to her. We credit the testimony of Thomasson, and not that of Girlie, not only for the reasons already stated, but for the additional reason that on December 18, 1941, Girlie obtained a quit claim deed from J. M. (Jackie) Barnett, the father of Charles Edward Barnett, for lot 3, and for that lot only.

We are led to the conclusion and find the fact to be that Girlie never acquired title to lot 2, and never claimed to have done so until about the time this suit was filed to quiet her title as against Moore and Thomasson, who were named as defendants. This suit was filed April 21, 1942, and by an amendment to the complaint Clara Mae Scott was made a party defendant.

Appellant offered in evidence the deed of the state land commissioner to her, dated November 24, 1941, conveying north half of lots 2 and 3. This deed is based upon a sale for the non-payment of the 1929 taxes. The tax sale on which the deed was based was void for many reasons, but appellant insists upon the authority of the case of *Hopper* v. *Chandler,* 183 Ark. 469, 36 S. W. 2d 398, that appellees may not raise that question, because neither they nor the persons through whom they claim title had any interest in the land at the time of the forfeiture to the state.

Neither of these contentions is sound. It will suffice to say that the Hopper case, *supra,* following the case of *Osceola Land Company* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 1, 103 S. W. 609, construed § 7105, Kirby's Digest, now appearing as § 13874, Pope's Digest, which section provides among other things that " . . . 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 . . . ." with certain named exceptions.

It was held in the case of *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton,* 74 Ark. 383, 86 S. W. 852, that this section is limited to deeds made by the county clerk, and does not apply to deeds made by the commissioner of state lands.

The court found that Moore had acquired title by adverse possession to lot 2, but whether this is true or not, the court properly refused to cancel the deeds in the Moore chain of title and to confirm appellant's title to lot 2, for the reason that appellant did not own that lot. The decree is therefore, affirmed.

NUNN *v.* MITCHELL.

4-7943 196 S. W. 2d 576

Opinion delivered October 7, 1946.

S. L. Richardson, for appellant.

Judson N. Hout, for appellee.

McHaney, Justice. This action involves the title to lots 1 and 2 in block 3, J. H. Simpson's Addition to the town of Tuckerman, Jackson county, Arkansas. Appellant claims title by inheritance from her father, Foster Johnson, who died intestate in 1934, and by conveyance from the other heirs of said Foster Johnson. Appellee claims title by purchase from the State on February 3, 1936, the State's title being based on a tax forfeiture and sale to it in 1931 for the 1930 taxes due and unpaid thereon, and upon actual possession of said property by him since his purchase.

It was stipulated by the parties that appellant and her predecessors in title were the original owners of said lots prior to its forfeiture for the 1930 taxes, and that appellee procured a deed from the State, as above stated, paying a consideration of $26.84 therefor, and that appellee has occupied this property since 1936.

Upon this stipulation and other evidence upon behalf of each of the parties the court entered a decree for appellee and dismissed appellant's complaint, seeking to recover the possession of said property, at her cost. This appeal followed.

Appellant makes four contentions for a reversal of this decree. The first is that the tax forfeiture in 1930 and the sale based thereon, upon which appellee's title is founded, are void because of the clerk's failure to publish the notice of sale for two weeks and to certify at the foot of the delinquent list, stating in what newspaper the delinquent list was published, etc., as required by §§ 13846 and 13848 of Pope's Digest. Assuming that the sale was irregular or void, the fact remains that appellee has been in actual possession under the deed from the State for more than seven years and has acquired title by adverse possession under either the seven or the two year statute of limitations, §§ 8918 and 8925 respectively of Pope's Digest. In *Sims* v. *Petree,* 206 Ark. 1023, 178 S. W. 2d 1016, to cite one of the late cases on the subject, we held that such adverse possession bars an action for recovery whether the sale be merely irregular, or void on account of jurisdictional defects. See, also, cases there cited. So the present action is barred.

It is next argued that appellee was a tenant of Foster Johnson in his lifetime, paying the rent to him, and continued to pay the rent to her after her father's death, and could not acquire and assert an adverse title against his landlord while remaining in possession as such tenant. Appellant and her sister testified that appellee was a tenant, but appellee and his witnesses disputed this fact. The court found against appellant and we cannot say the finding is against the preponderance of the evidence.

Appellant also claims title under a clerk's deed dated March 2, 1942, and based on a tax forfeiture and sale by the Collector in 1939 for the 1938 taxes. This deed recites that these lots were sold to the State on November 6, 1939, at the delinquent tax sale. It then recites that "Edwin McCall, Collector, did on the 16th day of Nov., 1939, duly assign certificate of the sale of the said property aforesaid and all his right, title and interest therein to Savannah Nunn of the County of Jackson, State of Arkansas." Based on said certificate of sale which Collector McCall says he assigned to her, and

which was surrendered to the Clerk on March 2, 1942, after the period of redemption of two years had expired, the Clerk issued to appellant a deed. We think this deed is void on its face. Section 13849 of Pope's Digest provides that if no person shall bid the amount of the tax, penalty and costs due on said lands, then he shall bid the same off in the name of the State for said amount. The Collector or his deputy, or the Clerk are prohibited from being concerned in the purchase of any tract of land by § 13854. By what right the Collector assigned the certificate of sale to appellant when the State was the purchaser, we have been unable to determine. Having been sold to the State, it was subject to redemption for two years after the sale, and we think the procedure taken amounted only to a redemption of the property from the sale and that the Clerk's deed conveyed to appellant no more title than she then had.

Finally it is argued that appellee should be given no relief in equity because he has not offered to do equity by tendering to her the amount of taxes paid by her on said property since 1936. Appellant brought this action. She did not pray any alternative relief, such as taxes paid by her, in event title to the lots should be denied her. She claimed to be the absolute owner, and prayed to be so declared and for possession and $200 damages. Appellee paid the taxes when he could get to the Collector's office before appellant did and he prayed no affirmative relief. Not having asked for a recovery of taxes, the court properly dismissed her complaint.

The decree is accordingly affirmed.

INTERNATIONAL PAPER COMPANY *v.* AUD.

4-7934 196 S. W. 2d 578

Opinion delivered October 7, 1946.

Gaughan, McClellan & Gaughan, for appellant.

G. W. Lookadoo, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Earl A. Aud, recovered judgment against appellant, International Paper Company, in the Clark Circuit Court. The action was predicated upon an alleged breach of an oral contract between the parties in which appellee was employed to cut timber for appellant, and, in order to perform his part of the contract, appellee was required to purchase a sawmill and other equipment. It was alleged in the complaint that appellant agreed to reimburse appellee for the construction of a road to the mill, and to furnish appellee sufficient timber for operation of the mill throughout the year 1944. It was also alleged that appellant breached its agreement by ordering appellee to cease operation of the mill on or about September 1, 1944, and refusing to furnish timber for cutting after that date. Damages were prayed for loss of $2,800 on the mill and equipment, which appellee was required to furnish under the alleged contract, and $300 as a reimbursement for construction of the road.

Summons was issued and the return shows that it was served on "W. W. Southall, agent for International Paper Co., in Clark Co., Ark." Appellant, appearing specially for that purpose, first moved to quash the service, alleging that it was a foreign corporation organized under the laws of New York, with its legal domicile at Camden in Ouachita county, Arkansas, and authorized to do business in this state; that it is not subject to a personal action for a breach of contract in Clark county because it maintains no branch office or place of business there, and has no agent in said county upon whom legal process can be served; that W. W. Southall is not an agent upon whom legal service may be had in Clark county.

Appellee filed a response to the motion to quash alleging the sufficiency of the service on W. W. Southall as appellant's agent for service in Clark county. The trial court heard the motion to quash the service upon the testimony of Southall. The motion was overruled and appellant duly excepted to the ruling of the court and reserved the issue as to the service in its answer. The answer denied all the allegations of the complaint, except the allegation that appellant is a foreign corporation organized under the laws of New York and authorized to do business in Arkansas, which was admitted. The cause was submitted to a jury which resulted in a verdict and judgment in favor of appellee for $3,000. This appeal follows.

The first contention made by appellant for a reversal of the judgment is the alleged insufficiency of the service. If this contention is sustained, it becomes unnecessary to consider the other assignments of error urged in the motion for new trial.

The testimony of W. W. Southall on the motion to quash service was substantially as follows: Witness resides at Amity in Clark county, and is employed by appellant to check timber lands in five counties, including Clark county, for trespass, fire control, and marking timber for cutting and removal. He pays the rent on his home in which he has a telephone and neither he nor

appellant maintains an office there or any other place in the five counties in which he works. He usually leaves home about 7:30 a. m. and returns about 7 p. m. Reports are sent to the company once a month showing the timber areas that are marked for cutting and the location and extent of any fire damage. There are no signs or other indications around his home that appellant has any office there or anything to do with the home. He works on a salary and sometimes hires men to mark timber who keep their own time which he reports to the company. Township plats, which are kept at his home, are used in making his reports. These reports are mailed from Amity and towns in the other four counties where he is employed. There are four or five other employees of the company working in Clark county, but none of these have any authority over him. The company owns 67,000 acres in Clark county, but witness looks after only a part of this acreage.

Service on appellant was attempted under § 1369, Pope's Digest, which provides that suits may be brought against any foreign or domestic corporation in any county in the state in which such corporation maintains a branch office or other place of business by service of a summons upon the agent, servant or employee in charge of said office or place of business. This statute was enacted in 1909 and has been analyzed and construed in many cases in determining whether a branch office or other place of business was maintained by a corporation within the meaning of the statute. *Fort Smith Lumber Co.* v. *Shackleford,* 115 Ark. 272, 171 S. W. 99, was one of the first of these cases, and it was there said that the statute contemplates that there must be maintained a place where a well defined line of business is carried on with an agent in charge of that business. Service was had in that case upon the manager of a commissary which was maintained by the lumber company in connection with a logging camp, and the service was held to be valid.

To sustain the action of the trial court in overruling the motion to quash, appellee cites a number of cases in

which this court has held that service upon an agent of a corporation is sufficient service upon the corporation under the statute, but in all the cases cited the evidence disclosed that the service was upon an agent or employee in charge of a place of business kept or maintained by the corporation in the county where the action was brought. Appellee particularly relies upon the case of *Arkansas Power & Light Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. 2d 464. In that case service was had upon the manager of a drug store who was the company's agent for collection of bills owed by customers of the company. The evidence showed that an established place of business was maintained where monthly bills were regularly paid to a salaried agent at the place of business. Mr. Justice MEHAFFY, speaking for the court in that case, said: "The important thing in determining this question is that the corporation itself established a place of business where its bills could be paid and receipted for, and when a corporation establishes such a place and receives and receipts for money paid for its services through an agent, it has for all reasonable and practical purposes established such a place of business as mentioned in § 1152 of C. & M. Digest."

It is contended by appellee that the home of Southall in the instant case should be determined as "a branch office or other place of business" of the paper company, within the meaning of the statute. There is no evidence that the company had anything to do with the maintenance of Southall's home. He paid the rent on his home and his work for the company was not confined to a place where he could be located, as was true in the case of the agent in the Hoover case, *supra,* but his daily duties were performed over a large timber area in five counties. There is testimony showing that Southall made reports to the company from township plats kept in his home, and reported the time of other employees which the latter kept, but these duties do not, in our opinion, constitute sufficient transactions to convert the home of Southall into "a branch office or other place of business" of the paper company. We think it would be an unwarranted

extension of the rule followed in the Hoover case to hold the home of Southall to be the branch office or place of business of the company under the testimony presented on that issue.

We conclude, therefore, that Southall was not an agent in charge of a branch office or other place of business of appellant within the meaning of the statute, and that service upon him was insufficient to confer jurisdiction upon the courts of Clark county. It follows that the motion to quash the service should have been sustained, and as that question has been properly reserved throughout the trial, the judgment of the trial court will be reversed and the cause remanded with directions to quash the service upon appellant.

PAGE *v.* PAGE.

4-7944 196 S. W. 2d 580

Opinion delivered October 7, 1946.

Hays, Wait & Williams, for appellant.

Bob Bailey and *Bob Bailey, Jr.,* for appellee.

ROBINS, J. This appeal presents a controversy between appellant, Elmer Page, and his divorced wife, appellee Sinda Page, as to the custody of three of their children, to-wit: Harvey Eugene Page, a son twelve years of age, Juanita Page, a daughter ten years of age, and Joyce Page, a daughter seven years of age.

Appellant brought suit against appellee for divorce, alleging separation for more than three years, and asking custody of said children. In her answer appellee denied the grounds of divorce alleged by appellant and also prayed for custody of the children.

The lower court granted appellant a divorce, but permitted appellee to retain the children, and ordered appellant to pay to her for their support the sum of $25 per month.

Appellee has not appealed from the provisions of the decree by which appellant was granted a divorce, but appellant has appealed from that portion thereof by which custody of the children was awarded to appellee.

The parties to this litigation were married in 1920, and at the time of the trial had seven living children, four of whom were older than the children whose custody is involved herein. Appellant and appellee separated in 1940. Appellant kept the children from the time of the separation until July 24, 1944, on which date his dwelling house was destroyed by fire and appellant sustained severe burns while rescuing his youngest child. By reason of these burns he was confined to a hospital for almost five months. When appellant was taken to the hospital the children were for a time cared for in the homes of other relatives, and then appellee carried them to her home, where they have since remained. After appellant had recovered from his injury and had established a new home he sought to obtain his children, but appellee refused to give them up. Thereupon this suit was instituted.

The rule to be followed by courts in awarding custody of minor children is thus stated in headnote 6, *Oliphant* v. *Oliphant*, 177 Ark. 613, 7 S. W. 2d 783: "The custody of a child is not awarded for the purpose of gratifying the feelings of either parent, or with the idea of punishing or rewarding either, but, under the statute as well as from considerations of equity, for the best interests of the child." To the same effect see *Miller* v. *Miller*, 189 S. W. 2d 371. By § 6205 of Pope's Digest it is provided: "Where the husband and wife are living apart, there may be an adjudication of the court as to their power, rights and duties with respect to the persons and property or their unmarried minor children. In such cases there shall be no preference between the husband and wife, but the welfare of the child must be considered first in determining the custody of such child, or the control of its property."

In the trial below each party offered testimony tending seriously to impugn the character of the other. No useful purpose would be served by a rehearsal of the recriminations made against the other by each of these parties. The chancellor had the parties, the children whose custody was involved, and the witnesses on both sides before him and had the benefit of observing the appearance and demeanor of all of them. His decision was doubtless influenced by these factors in the situations which were shown by undisputed evidence:

First. These children, at the time of the trial, had for eighteen months been in the home of appellee, and the chancellor probably recognized the harmful effect to young children, as was pointed out by us in the case of *French* v. *Graves*, 205 Ark. 409, 168 S. W. 2d 1108, of frequent changes in their surroundings and environment. Of course this one factor should never be permitted to control a decision in a case of this kind where the evidence clearly shows that a change in custody of the children is required, but it is always to be considered and may be entitled to controlling weight, where from the evidence there is doubt as to what order should be made.

Second. The evidence indicated that the children preferred to remain with their mother. This preference, too, while not controlling, should always be taken into account. *Vilas* v. *Vilas,* 184 Ark. 352, 42 S. W. 2d 379.

Third. The appellee had not only been taking care of these children, but had also opened her home to three orphan children—one of them affected with infantile paralysis—of the deceased daughter of appellant and appellee. The father of these children had apparently deserted them and was contributing nothing to their support. The evidence showed that it was only by a valiant struggle, involving the doing of the hardest kind of manual labor, that appellee had been enabled to support all these little children. The fact that this woman, already beset by dire poverty, had voluntarily taken upon herself the heavy burden of providing food, shelter and clothing for her orphaned grandchildren may have led the lower court to conclude that the custody of the children involved herein might safely be entrusted to appellee.

After a careful review of the record we cannot say that the decree of the lower court is against the weight of the testimony. Therefore, under our long established rule, it must be affirmed. *Hinkle* v. *Broadwater,* 73 Ark. 489, 84 S. W. 510; *Whitehead* v *Henderson,* 67 Ark. 200, 56 S. W. 1065; *Norman* v. *Pugh,* 75 Ark. 52, 86 S. W. 833; *Cunningham* v. *Toye,* 97 Ark. 537, 134 S. W. 962; *Cotton* v. *Citizens Bank,* 97 Ark. 568, 135 S. W. 340; *England* v. *Scott,* 205 Ark. 47, 166 S. W. 2d 1014.

COLE, JONES AND BEAN *v.* STATE.

4414 196 S. W. 2d 582

Opinion delivered October 7, 1946.

Lindsey P. Walden, Elmer Schoggen, and *Ross Robley,* for appellants.

Guy E. Williams, Attorney General, and *Earl N. Williams, Assistant Attorney General,* for appellee.

GRIFFIN SMITH, Chief Justice. Disregarding other matters complained of by appellants, we agree that the judgments must be reversed because incompetent evidence was admitted.

Of 117 union laborers under contract with Southern Cotton Oil Company in Little Rock, 112 went out on strike December 17, 1945.[1] The disgruntled former workers established picket lines and had a tent erected and maintained near the Company's property, but not on Company lands.

[1] The record is not entirely accurate as to numbers, but this is unimportant. For example, on page 17 of appellants' brief it is stated that "Otha Williams, Willie Brown, Elvy Washington Williams, and Willie Jackson did not join the strikers." Following this it is said: "For the three shifts approximately 117 men were employed. Of these, six Negroes and some white [men] did not go out on strike. One or two of the 'whites' could have been classed as laborers, 'one in particular.' Of the 117 laboring employes, 112 [struck]."

It is clearly inferable—in fact, there is direct proof—that relatonship between the strikers and those who remained at work was far from amicable. December 26th Walter Campbell and Otha Williams clashed. In consequence Williams spent seventeen days in a hospital recuperating from injuries inflicted by Campbell before Williams succeeded in drawing a pocket knife and opening a blade with his teeth. The defensive measures employed by Williams resulted in Campbell's death, although Williams says that when he left the scene after cutting Campbell, his assailant was still standing. A grand jury, upon investigation, determined that the facts reflected justifiable homicide, and declined to indict Williams.

Acting upon the theory that acts of violence intended to prevent non-strikers from working had been engaged in, and that Roy Cole, Louis Jones, and Jesse Bean (colored) had been participants, indictments were returned against them, essence of which is that *"by the use of force and violence"*, they prevented Williams from working for the Cotton Oil Company. The disorder complained of occurred December 26th.

The indictment is predicated upon Act 193, which became a law without the Governor's signature March 11, 1943. See *Smith and Brown* v. *State,* 207 Ark. 106, 179 S. W. 2d 185; *Gurein* [and others] v. *State,* 209 Ark. 1082, 193 S. W. 2d 997.

In the Gurein case one Justice dissented in respect of affirmance as to any of the defendants, while two members of the Court thought the evidence sufficient to convict Gurein and Tapps, but insufficient as to three other defendants. In that case the information asserted violation of Act 193, and alleged that the defendants unlawfully and with malice, force and threats "prevented and/or attempted to prevent" A. L. Cobb from engaging in the vocation of driving a bus.

Affirmance of the Gurein and Tapps judgments and approval of judgments against the other defendants, appear to have rested upon construction given Initiated

Act No. 3, adopted in 1936. The Gurein opinion says that if the defendants believed charges in the information were uncertain, "they had the right to request a bill of particulars to advise them whether they were charged with *preventing,* or only with *attempting to prevent,*[2] a person from doing a lawful act." It was held that if objection had been made to the so-called "indefiniteness" prior to trial, the deficiency could have been met "by the simple expedient of striking out the word 'or' appearing in the phrase 'and/or' ".

In the case at bar we are dealing with an indictment, not an information. Here charges were made by a grand jury, and it confined accusation to acts of the three defendants who "by the use of force and violence" are alleged to have prevented Williams, (and he is the only one mentioned) from engaging in work as a laborer.

One of the first motions by defendants was to quash the indictment "because it is so vague and indefinite that they are not advised of the charges against them".

Treating the Act as constitutional—and it has been so held in two cases—the motion to quash was properly overruled because the indictment alleged that the accused, by use of force and violence, prevented Williams from working.

Defendants argue the Act is void because provisions of Sec. 4 are made cumulative of other existing articles of the penal code upon the same subject. Perhaps the answer is that no other article of the code deals with the identical subject and undertakes to cover labor strife (accompanied by violence and threats) as a matter distinct from prior classifications.

Denial of the motion to quash, however, though legally proper—did not authorize introduction of evidence that a crime denounced by the Act (the commission of which was a transaction separate from the use of force or volence) had been committed—for example, that the three defendants, or either of them, had by threats, unaccompanied by force or violence, prevented

[2] Italics supplied.

Williams from working. At trial it was sought by those who are now appealing to have such testimony excluded. This motion was denied because the Court thought (as it said in refusing to give defendants' requested Instructon No. 11), "a threat is an element of violence".

So, it will be seen, the trial was conducted upon the assumption that, although the indictment did not allege threats were made, evidence of threats was admissible to prove the use of force and violence—because, as the Judge stated, "a threat is an element of violence". Certainly a threat of bodily harm or material damage or serious inconvenence may, in certain circumstances, become an element of violence; but the nature of the attempted coercion, the situation of the parties and the subject-matter causing disputation—these and other factors would ordinarily enter into the transaction and affect the event.

Section 2 of Act 193 undertakes to define an unlawful assemblage. It is made unlawful for any person, "acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, [and it shall be unlawful] for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage, or aid in any such unlawful assemblage".

Trial of the defendants preceeded as though there had been an admission that the men who composed the picketing group constituted an unlawful assemblage. There is no such admission. Proof is not satisfactory that the strikers bore a direct grievance against any but Williams. Williams was attacked by Campbell and Campbell paid the penalty of life for his rashness. No one testified that others struck or attempted to strike Williams. On this point the version given by Willie Brown [3] is informative. He was among the number who

[3] This witness (Willie Brown) was sentenced to the penitentiary for killing a white man. He was "furloughed" in 1940.

did not join the strike, but saw Cole, Jones, and Bean "walking the picket line". The day Williams killed Campbell, Cole came up after the fight. Brown heard Jones call to Williams. Brown testified that "Louis [Jones] gave a signal and said, 'all right, boys'. Then they flocked around like blackbirds from all directions and Campbell struck Williams with a stick. Roy Cole [one of the defendants] told me to go ahead, as they were not after me".

Charlie Owens testified that Bean told him the morning of December 26th not to cross the picket line, adding, "If anything happens, it will just happen". Owens was a Company employe who did not strike.

Brown testified that after the fight started, Cole came up "with a club". Willie Johnson saw Cole and Bean where the fight occurred, after Campbell had been cut; but neither participated in the engagement. He didn't see Jones there. A man named Robert Brooks, however, "grabbed" Johnson.

Elvy Williams testified that Otha Williams and Willie Brown "started out" with others, went back and unloaded a truck, then joined a group. Looking across the street he saw Bean, Bishop, Jackson, Brooks and Campbell. An unknown person threatened Otha Williams. He did not see any of the defendants strike Otha Williams, or use violence. His attention was first attracted when Willie Johnson yelled that some one had hit him. "This man" (he didn't know who) came with a club.

Otha Williams, after he and Willie Brown had unloaded the seed, crossed the railroad They were going west. Across the street Williams saw some of the men who were on strike, including Jones, Jackson, Bean, and Cole. Jones called, saying he wanted to talk. Williams replied that he was in a hurry. Jones insisted on seeing him at that time, but Williams walked across the track and was near a store when Campbell struck him in the back of the head, using a stick. It was then that Williams drew his knife, opened it with his teeth, and began cutting. On cross-examination he was asked:

"So far as you know, neither of the three defendants struck you? A. If they did I didn't know it. If they hit me I didn't know it."

Bishop Jackson (under another indictment on a charge of using violence, but not yet tried) testified that the morning of December 26th he went to the headquarters tent used by the strikers and saw Bean, Jones, and others there. He heard "someone" say "they" were going to talk to a boy who was working and if he didn't talk right they would give him a whipping. In the evening he went with Campbell to the foot of Ninth street and together they approached "the boys" who were doing picket duty. He saw Jones. Bean had been there, but had left. Cole came up. He had a stick. "The boys from the mill started to cross the street to go to the street car. Just then one of the strikers told them they wanted to talk to them. One said he didn't have time and the boys from the mill kept on walking". This witness did not know what the strikers did because, when Williams and Campbell began fighting, he caught a street car to go home. On cross-examination he asserted that neither of the defendants assaulted anyone or used violence. All of the witnesses were introduced by the State.

The State argues that "this threat which Owens testified to was a part of the whole picture and was a part of the conspiracy, and under the holding in *Gurein* v. *State* . . . this type of testimony was competent."

Quoting from the Gurein case, the State emphasizes that part of the opinion that says " . . . 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 person shown to be parties to the conspiracy". It is then said in the State's brief: "The facts in that case appear to us to be identical to those in the case at bar".

If it be assumed that, in practical effect, facts here and in the Gurein case were similar, still we have not disposed of differences between the information and the indictment. In the Gurein case it was alleged that

Act 193 had been violated, and that charge included all provisions—embracing, of course, Sec. 2. Here there was no such allegation. A part of Sec. 1 alone is involved; and yet, in order to prove that the three men whom the State's witnesses assert took no part in the affray between Campbell and Williams (transactions said to have occurred during the morning, effect of which could have pointed only to a plan of action in concert, or indicated conspiracy) was admitted over the defendants' objections. Timely exceptions were made and brought forward in the motion for a new trial.

The nearest approach to actual participation by either Cole, Jones, or Bean, occurred when Cole, who was said to be carrying a stick, came upon the scene as Campbell assailed Williams and lost his life. At least one of the witnesses referred to Cole's club as a walking stick. But whatever it was, no use was made of its potential as a weapon; nor can it be said that the mere presence of a man in such a gathering, whether laborer or employer, brands him as a felon on that ground alone.

It must be borne in mind that the workers engaged on both sides—those who struck and those who refused to do so—included men whose manners in expressing their likes and dislikes, whose ordinary conversations, and whose so-called "threats" are not necessarily on a parity with workers whose opportunity for higher standards has been exercised. It has often been said that the raw, rough, and ready language of an uncouth pick wielder, in conversation with an associate, might mean one thing to the man at a desk and quite a different thing to a menial of equal classification and having similar habits. What would insult or frighten a particular individual might not cause a ripple of apprehension in the man who understood the mental attitude of a person inured to physical adversity.

The thought is expressed by Lord Halifax as a member of the British government prior to 1933.[4] In welcoming labor into politics and national affairs he said: "Many of the newcomers are disorderly, many seem essentially violent minded. Yet our debates are richer for their presence. Not all of us are as near to the sufferings of the working classes as they are. They bring (however misguided some may be in their opinions, and however violent they may be in publicly expressing them) home to the House of Commons the gravity of our social problems and the importance of getting fundamental things right".

It is the duty of the General Assembly to declare the State's public policy and define its police powers. Courts interpret and construe. In the instant case we are dealing with a statute that invokes punishment as for a felony where the same conduct, if committed in a non-labor dispute, would be a misdemeanor—an offense as to which the guilty party might be discharged upon payment of a small fine, as compared with a possible two-year prison term.

In making this radical change the Legislature must have intended to cover the entire subject insofar as the Act went, and to have expressed its whole purpose; hence nothing would be left to intendment.

Under any reasonable construction Section 1 creates separate offenses, as does Sec. 2, and an indictment that alleges crimes covered by a part of Section 1 does not impose upon the defendant a duty to defend under Section 2 or against "threat" provisions of Sec-

[4] Lord Halifax, British Ambassador to the United States, made a *quasi* official visit to Little Rock in 1944, accompanied by Lady Halifax and attaches of the embassy; also Mr. Wood, a son, who in spite of the loss of both legs in the North African campaign, had mastered artificial limbs and paid a visit to inmates of the Veterans Hospital at Hot Springs. Included in the group were Mr. Paterson, in charge of the consulate at St. Louis, and Mrs. Paterson. Born April 16, 1881, Edward Frederick Lindley Wood has the following titles: Third Viscount Halifax of Monk Bretton, First Baron Irwin of Kirby Underdale, night of the Garter, Privy Councillor, Knight Grand Commander of the Star of India and Knight Grand Commander of the Indian Empire, and finally, His Royal Majesty's Ambassador to the United States. See "The Men Around Churchill," by Rene' Kraus, pp. 16 and 44.

tion 1. In holding that "a threat is an element of violence" the trial Court allowed too much latitude for the introduction of testimony going solely to other transactions. It follows that the judgments must be reversed and the causes remanded for a new trial or new trials.

SMITH, J. (dissenting). Why should the judgments of conviction in this case be reversed?

The constitutionality of the act under which they were convicted is not questioned, but is reaffirmed. The right of a person to refuse to work is not questioned. One who does not wish to work and refuses to do so, has the right also to solicit others to join with him in this refusal. But this right of one not to work, and to solicit others to join him in his refusal, is no more sacred than is the right of another who does wish to work to do so. As the purpose of Act 193 of the Acts of 1943 is to protect the right to work, it does not appear to me to be violative of any provision of either our own or the Federal Constitution.

Having the power to protect this right to work, it was the province of the General Assembly to determine how that power should be exercised, and to enact such legislation as was thought reasonably necessary to accomplish this lawful purpose, and it does not appear to me to be in excess of this power, or an abuse thereof, to enact that no one shall by force or violence or threats of violence prevent another from engaging in a lawful occupation.

Section 1 of this Act defines two offenses. The first is by the use of force or violence preventing any person from engaging in any lawful vocation within this state. The second offense is to prevent any person from engaging in any lawful vocation within this state by the threat of the use of force or violence for that purpose. In other words, it is unlawful to prevent one from engaging in any lawful occupation either by using force or violence or by the mere threat to use force or violence.

Proof of threats of violence was admissible for several different reasons. First, they were of themselves a

form of violence. Webster's New International Dictionary defines violence as follows: "Injury done to that which is entitled to respect, reverence, or observance; profanation; infringement; unjust force; outrage; assault. Broadly, exertion of any physical force considered with reference to its effect on another than the agent, as in effecting an entrance into a house in burglary. Sometimes, in law, the overcoming or prevention of resistance by threats of violence is held to be constructive violence."

Proof of threats was admissible to explain the purpose of the strikers and was admissible also to show the concert of action which proved the existence of a conspiracy among the strikers to prevent others not on a strike from working.

The defense was interposed that the strikers were attempting merely to persuade those employees not on a strike, to desist from working. But how could this lawful purpose be disproved except by showing what the strikers said they would do and what they did?

What means the testimony recited in the majority opinion that Campbell and others said the very afternoon when the strike terminated in riot, resulting in Campbell's death, that they were going to talk to a boy who was working, and if the boy did not talk right they were going to whip him? Why whip the boy if not to stop him from work?

Why was Williams assaulted by Campbell except to prevent Williams from working? Williams and Campbell had had no personal quarrel or altercation. If the striking men were not "after" anyone why should Willie Brown have been told by Roy Cole, one of the strikers, that they were not after him? Does not this remark explain itself, accompanied as it was by the fact that almost immediately after it was made Williams was attacked by another striker and forced to kill his assailant in his necessary self-defense, as the grand jury later found after investigating the facts? What meant the remark of

Jesse Bean, one of the strikers, and an appellant here, made to Charlie Owen, an employee who did not strike, on the morning of the day Campbell was killed, that he must not cross the picket line, as he would have been compelled to do if he went to work, and that if he did cross it and anything happened it would just happen?

What means the testimony that when Williams attempted to hurriedly leave the plant where he was working, and gave his reason for not stopping, when told to do so, that in response to a signal given by Louis Jones, one of the appellants here, the strikers came from all directions and flocked around like blackbirds? What were the strikers trying to do if not to prevent Williams and others from working, and how better could their purpose be shown than to prove what they said they were going to do before they did it.

If the undisputed testimony does not show the existence of a conspiracy to prevent Williams and others from working, is not the testimony sufficient to support the finding that a conspiracy existed to accomplish this unlawful purpose? If so, all the acts and declarations of any of the conspirators are admissible against all the other conspirators. *Gurein* v. *State,* 209 Ark. 1082, 193 S. W. 2d 997, and cases there cited.

It is not contended that the testimony is not legally sufficient to sustain the conviction. Indeed that contention could not well be made in view of the facts recited in the majority opinion.

The court gave an instruction reading as follows: "If you believe from the evidence in this case beyond a reasonable doubt that the defendants in Pulaski county and on about the 26th day of December, 1945, willfully, unlawfully and feloniously and by the use of force and violence prevented Otha Williams from engaging in a lawful vocation, you will convict them as charged in the indictment."

This instruction does not permit a conviction upon the mere proof that threats were made, although the Act

might have been violated in that manner, but requires the finding that appellants "by the use of force and violence prevented Otha Williams from engaging in a lawful vocation."

The undisputed evidence shows that appellants and their co-conspirators did actually prevent Williams from engaging in a lawful occupation. Williams was assaulted and all but killed and as a result of this beating he was confined in a hospital for a period of seventeen days, during all of which time he was prevented from working. He was unable to resume his work because of the injuries and wounds inflicted upon him. The evidence as to the threats was required to show why this was done, and was therefore admissible in evidence. This is true because the mere beating of Williams while a violation of the law, would not have been violation of the Act. It was essential to show why he was beaten, and proof of the threats was necessary to show that purpose.

There is no error in this record. Not only is the verdict supported by evidence legally sufficient to sustain the conviction, but it is supported by the undisputed evidence when the conduct of Campbell and his co-conspirators is interpreted in the light of the threats made before, and at the time of the assault upon Williams.

I think the judgment should be affirmed and therefore dissent from the reversal of the judgments pronounced upon the verdict.

I am authorized to say that Mr. Justice McHaney concurs in the views here expressed.

NOLEN *v.* WORTZ BISCUIT COMPANY.

4-7936 196 S. W. 2d 899

Opinion delivered October 7, 1946.

Rehearing denied November 11, 1946.

Chas. X. Williams and *Paul X. Williams,* for appellant.

Hardin, Barton & Shaw, for appellee.

ED. F. MCFADDIN, Justice. This appeal necessitates a decision as to the scope of the evidence to be considered

on the question of dependency under § 15(h) of the Arkansas Workmen's Compensation Law, which is Act 319 of 1939.

Dorothy Nolen, a single woman 18 years of age, was an employee of the Wortz Biscuit Company at Fort Smith, and she died on December 30, 1944, as a result of burns received in and arising out of her employment. Appellants, the father and mother of Dorothy Nolen, filed claim for partial dependency under the Workmen's Compensation Law. The claim was resisted by appellees, being Wortz Biscuit Company, and the company carrying its compensation insurance. The Workmen's Compensation Commission, after extensive hearings, held that the parents had failed to prove dependency; and thus disallowed the claim. The circuit court affirmed the Commission, and the cause is here on appeal.

The appellants claim that the finding of the Commission shows on its face that the Commission refused to consider certain evidence, which appellants claim to be admissible on the question of dependency.

The Nolen family consisted of W. D. Nolen, his wife and their three children: being Dorothy (the deceased); Arzell, a son, aged 16; and Mary Lee, a daughter, aged 13. The family lived in Logan county, near the community of Sugar Grove, some distance from Fort Smith. Mr. Nolen was, and for many years had been, a tenant farmer, owning one team and cultivating about 35 acres. Dorothy finished the 8th grade, and then—on account of the family finances, and also because of the poor health of her mother and father—became the main "field hand" of the family, and also did the family washing, ironing and cooking. She became 18 years of age on September 20, 1944; but continued to assist the family, just as she had always done. She helped gather the crop in the fall of 1944; and then, in November of that year, she went to Fort Smith to work for the Wortz Biscuit Company, with the avowed purpose of supplementing the family income. Her father also went to Fort Smith and worked for a short time for the same purpose; and—in

addition to her work—Dorothy cooked his meals for him while he was there.

On each week-end Dorothy went home to Sugar Grove; and on each trip took articles of clothing for her brother and sister, and also some food. The sister, Mary Lee, was in school; and each week Dorothy gave Mary Lee the money with which to buy her lunches at school. The brother, Arzell, was not in school due to lack of family finances, but Dorothy also gave him a dollar each week. It is true that the amounts of money were small, and the articles of clothing (scarf, sweaters, socks and hair ribbons) were inexpensive; yet, at the same time, they were substantial and essential to the family finances. On several occasions when Dorothy returned to Fort Smith on Sunday afternoon, she took eggs and other farm provisions from the home, and gave her mother the cash for these items. Dorothy had drawn $15 from the family funds with which to start herself in Fort Smith, and she repaid this amount. She worked for the Wortz Biscuit Company for the seven weeks immediately preceding her death.

A week after Dorothy's death, an adjuster for the insurance carrier obtained a signed statement from Dorothy's mother, in which Mrs. Nolen stated, concerning Dorothy, *inter alia*:

"She was making her way, that is, she was making enough to get on by herself while she worked up at the biscuit company, and she was only dependent upon me and my husband up until she went to work at the biscuit company. No one in my family was dependent upon her at all while she was working for this biscuit company, but she would have helped us if we would have asked her to help us."

In her testimony before the Commission, Mrs. Nolen stated that she did not understand the statement she had given the adjuster; and that the adjuster told her that if she signed the statement, she would get $7,000, and if she failed to sign the statement, she would get nothing. Other witnesses corroborated Mrs. Nolen to the effect that the adjuster obtained the statement by deceit.

On the other hand, the adjuster's testimony is that Mrs. Nolen made the statement of her own will, and without the adjuster making any promises or threats, or practicing any deceits.

There were many witnesses who testified as to Dorothy's aid to her family before she went to Fort Smith in November, but the effect of the Commission's ruling was to exclude all such evidence in determining the question of dependency; for the Commission said in its conclusions:

"The evidence before the Commission is that Dorothy Nolen was raised on a farm; that she assisted her father in his farm work and because of her mother's ill health, did the greater part of the household work. The record is replete with testimony that she was a good, dutiful girl, discharging in full her filial duties to her parents. There is no doubt that her assistance was of value to them and that it lightened their burden. With full sympathy, however, we must state that we are not dealing in the case of Dorothy Nolen the farm girl, but are concerned with her after she became an employee of the Wortz Biscuit Company. The Workmen's Compensation Act gives this Commission jurisdiction only where the status of employer and employee exists. . . .

"Had Dorothy Nolen given up her employment in Fort Smith and returned to her farm home, undoubtedly she would have taken up her old farm duties and been of the same assistance to her family as she had been prior to going to Fort Smith. But as heretofore stated, this Commission is concerned only with her status as an employee of the Wortz Biscuit Company and with any contributions for the support of her family that she may have made while such an employee and the reliance of the family upon her for support during such period. The Arkansas Workmen's Compensation Act provides that all questions of dependency must be determined as of the time of the injury."

It is clear from these excerpts that the Commission considered only as competent and admissible that part of the evidence which dealt with what Dorothy Nolen

contributed to the support of the family after she went to work for the Wortz Biscuit Company, and that the Commission ignored and refused to consider any evidence of what services and money she contributed to the family before she went to Fort Smith in November. We hold this exclusion to be an error which necessitates a reversal of the cause. The Commission, in failing to give consideration to such evidence, acted "without or in excess of its powers", which is one of the grounds on which this court may reverse the Commission under § 25(b) of the Workmen's Compensation Law. See *Long-Bell Lumber Co.* v. *Mitchell,* 206 Ark. 854, 177 S. W. 2d 920.

It is true that § 15(h) of the Workmen's Compensation Law says:

"All questions of dependency shall be determined as of the time of injury."

But that provision does not mean that the Commission should refuse to consider evidence of conditions *prior to the injury* to ascertain the true situation as to dependency. In *Crossett Lumber Co.* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, we said:

"The question of dependency is one of fact in the determination of which all the circumstances of the particular case are to be considered."

In considering *all the circumstances,* the Commission should give consideration to the evidence of dependency which existed from the time Dorothy became 18 until she went to Fort Smith, for it is not at all unusual for farm hands to obtain factory work after the crops are harvested in the fall season, and this for the purpose of supplementing the family budget. Prior to the time she became 18 years of age, Dorothy's parents were entitled to all of her earnings and services. If, after becoming 18, she continued in any way to contribute to her parents in earnings or services, and if such contributions went to relieve the parents' penury, then all such facts and circumstances should be considered in determining the question of partial dependency.

Merely to consider whether Dorothy made contributions from her Wortz Biscuit Company wages, and to disregard her aid to the family before she went to work for the Wortz Biscuit Company, is to give the Workmen's Compensation Law a narrow and technical construction. We have held repeatedly that the act is to be liberally construed. *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *Herron Lbr. Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252; *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380; *Elm Springs Canning Co.* v *Sullins,* 207 Ark. 257, 180 S. W. 2d 113. In this last cited case we quoted from an earlier case:

" 'Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these acts seek to serve leave no room for narrow technical constructions.' "

We reserve for consideration in a proper case the interplay or effect of § 7603, Pope's Digest, on the dependency provision of the Workmen's Compensation Law. We do not try fact questions *de novo* in an appeal from the Commission. So we reverse this case, not because of the alleged erroneous finding of fact by the Commission, but because the Commission did not consider all the facts, that is, Dorothy's aid to her family before she went to Fort Smith.

The following cases from other states point to the conclusion here reached: *Shaffer, el at.,* v. *Williams Brothers, Inc., et al.,* Kansas City, Missouri, Court of Appeals, 226 Mo. App. 635, 44 S. W. 2d 185; *State ex rel. Grzelak* v. *Industrial Commission of Ohio,* Court of Appeals of Ohio, 61 Ohio App. 51, 22 N. E. 2d 214; *Lumbermen's Reciprocal Assn.* v. *Warner,* Texas Commission of Appeals, 245 S. W. 664; *Fordson Coal Co.* v. *Burke, et al.,* Court of Appeals of Kentucky, 219 Ky. 770, 294 S. W. 497; *Ritzman* v. *Industrial Commission, et al.,* Supreme Court of Illinois, 253 Ill. 34, 186 N. E. 545; *Chambers* v. *State ex rel. Parsons,* Supreme Court of Idaho, 59 Idaho 200, 81 Pac. 2d 748; *Williams* v. *Kelly Co., Inc.,* Superior

Court of Pennsylvania, 128 Pa. Super. 228, 193 Atl. 97; *Texas Employers' Insurance Association* v. *Sheppeard*, U. S. Circuit Court of Appeals, 62 Fed. 2d 122. The rationale of these cases is succinctly stated in 71 C. J. 535:

" . . . . the relation of dependency existing at the time of the accident is to be determined in the light of prior events and not to be controlled by an unusual temporary situation . . . . "

Conclusion: The judgment of the circuit court is reversed, and the cause remanded to the circuit court with directions to remand the cause to the Workmen's Compensation Commission for a rehearing, and for further proceedings not inconsistent with this opinion.

SCHLUMPF *v.* SHOFNER.

4-7902 196 S. W. 2d 747

Opinion delivered October 7, 1946.

Rehearing denied November 4, 1946.

Brooks Bradley, for appellant.

Taylor Roberts and *June P. Wooten,* for appellee.

ROBINS, J. This suit was instituted in the lower court by appellee to require appellants to perform an agreement, as to redemption of appellee's home from foreclosure, which appellee alleged was made by appellee and Frank Schlumpf, Sr., holder of a mortgage on the property. From decree of the lower court awarding appellee the relief prayed by him appellant prosecutes this appeal.

In his complaint appellee alleged that he was the owner, subject to the rights of appellants, of a certain dwelling house, with appurtenant lots, in the city of Little Rock, Arkansas, wherein appellee had lived since 1902; that he had given a first mortgage on this property to J. T. J. Fizer and a second mortgage thereon to Frank Schlumpf, Sr., father of appellant, H. J. Schlumpf; that Fizer began a suit to foreclose his mortgage, which, owing to the depression then prevailing, would have resulted in Schlumpf's lien, as well as the equity of appellee, in the property being wiped out; that while the suit

was pending it was agreed between Frank Schlumpf, Sr., and appellee that if the Fizer mortgage could be bought for $500 less than due thereon Schlumpf would purchase it and allow appellee to redeem the property by making monthly payments until the entire amount of Schlumpf's outlay, and the debt owing to him, together with interest, and his advances for taxes, insurance and repairs, should be repaid to him; that in pursuance of this arrangement appellee assisted Schlumpf in purchasing the Fizer claim at a discount of approximately $500, and, acting as attorney for Schlumpf without fee, filed an intervention for Schlumpf in the foreclosure suit; that in accordance with the agreement Schlumpf became purchaser at the foreclosure sale for $3,575, which was almost exactly the amount he paid Fizer, and the balance due Schlumpf on his mortgage and the costs, and received deed from the commissioner; that appellee thereafter continued to occupy the premises, and, as had been agreed upon, made monthly payments to Schlumpf of $25 for the first six months, then $30 per month for twenty-four months, and thereafter, up to the death of Frank Schlumpf, Sr., for twenty-three months at the rate of $40 per month; that Schlumpf died on July 26, 1943, having willed the property to his son, the appellant, H. J. Schlumpf; that after the death of said appellant's father appellee continued to make to said appellant the monthly payments of $40 each for twenty-four months; that, relying on the agreement, he had made repairs on the property in December, 1944, at a cost of $250; that, though appellee was ready, able and willing to carry out his agreement and pay off the entire balance due by him, said appellant had refused to carry out the agreement; and the prayer of appellee was for a decree ordering specific performance of the said contract. Mrs. Julia Schlumpf, wife of H. J. Schlumpf, was afterwards made defendant.

Appellants' answer was a denial of all allegations of the complaint.

Appellee testified to substantially the facts set up in his complaint. The effect of the testimony of appellants

was a denial of any knowledge of the alleged agreement between appellee and the elder Schlumpf. There were shown by the evidence some circumstances tending to support the contention of appellants that appellee, after the foreclosure, remained on the property as tenant, first of the elder Schlumpf and later of the son, and, on the other hand, circumstances were proved which indicated that appellee's version of the matter was true. No witnesses, except the three parties to the suit, the mother of appellant, and the clerk of the probate court, who introduced certain records, testified at the trial.

Appellant, for reversal of the lower court's decree, urges these grounds:

I. That the oral contract relied on by appellee is void as contravening the statute of frauds.

II. That appellee should have been denied relief because he failed to pay or tender the entire mortgage indebtedness.

III. That appellee failed to make any substantial payment, or to pay the taxes and insurance, or to make any substantial improvement on the property.

IV. That the evidence adduced to establish the alleged oral contract did not meet the requirements of law as to oral testimony necessary to prove a trust or agreement as to land.

V. That appellee is barred by laches and estoppel.

I.

It is argued by appellants that since appellee had, in the mortgage to Schlumpf, waived his statutory right to redeem, the alleged oral agreement was in reality one to re-purchase, rather than to redeem, and that therefore was such a contract as under the statute of frauds was required to be in writing.

By § 9473, Pope's Digest, the mortgagor is given the right, where the mortgage is foreclosed by proceeding in chancery court, to redeem within one year from the sale;

and this is the privilege which appellee waived in the face of the mortgage. But, in addition to the right of redemption created by said statute, every mortgagor has the right to redeem his property by payment (or by agreement made with the mortgagee) at any time up until the date fixed in the foreclosure decree. In the foreclosure decree involved herein appellee was given thirty days from the date of the decree to pay off the amount adjudged to be due from him. According to the testimony of appellee, the agreement was made with Schlumpf long before the decree was rendered; so that at the time said agreement was made appellee had the unquestioned right to pay off the debt and redeem his property; and therefore the asserted agreement was one to redeem, not to repurchase the property.

In 49 Am. Jur., p. 530, this statement is made: "The question has frequently been presented as to the effect of an oral agreement to enlarge the time for redemption from a sale under a mortgage or other lien on real property, and it has been held in many cases that an oral agreement to permit redemption or to extend the period for redemption after the expiration of the statutory period is not within the statute of frauds, such agreement not being regarded as a contract for the sale of land or a transfer of title thereto, and is therefore binding upon the parties, particularly where such an agreement has been acted on so far that the parties cannot be placed *in statu quo.*"

Dealing with a similar question, the Kentucky Court of Appeals, in the case of *Webbs* v. *Hynes,* 9 B. Monroe, 388, 50 Am. Dec. 515, said: "The statute of frauds has no application to a contract of this character, which is not for the sale of land, or the transfer of title thereto, but merely to prolong the time, for the exercise of the right of redemption."

In the case of *Turpie* v. *Lowe,* 158 Ind. 314, 62 N. E. 484, the Supreme Court of Indiana said: "An agreement for an extension of the time of redemption, although not in writing, nor supported by any consideration excepting

the promise of the redemptioner to pay the amount to become due, with interest, when acted upon by the parties, is not within the statute of frauds."

The Supreme Court of Illinois, in the case of *Ogden* v. *Stevens,* 241 Ill. 556, 89 N. E. 741, 132 Am. St. Rep. 237, said: "A verbal agreement to extend the time for redemption from a judicial sale is valid and not affected by the statute of frauds."

We said in the recent case of *Wood, Admr.,* v. *Conner,* 205 Ark. 582, 170 S. W. 2d 997:

"In the case of *Coates* v. *Dortch,* 145 Ark. 82, 224 S. W. 721, Chief Justice McCulloch said: 'The fact that there was an oral agreement for the redemption on specified terms made within the time allowed for redemption and the payments made thereon, together with the fact that Dortch bound himself to pay the mortgage to the bank, was sufficient to take the case out of the operation of the statute. This is not a case of an oral contract for sale of property to one already in possession, but it is a case where the original owner is in possession with the right to redeem and there is an oral extension of the period of redemption on specified terms, and we hold that the acceptance of part of the redemption money pursuant to this agreement is sufficient to take the transaction out of the operation of the statute of frauds.'

"In the case of *Webb* v. *Vercoe,* 201 Cal. 754, 258 P. 1099, 54 A. L. R. 1207, there appears an extended annotation upon the question of: 'Effect of oral agreement to enlarge time for redemption from payment under mortgage or other lien on real property,' and a large number of cases are cited by the annotator to the effect that an oral agreement to permit redemption, or to extend the period for redemption after expiration of the statutory period for redemption, is not within the statute of frauds.

"Among other cases cited by the annotator are our cases of *McNeil* v. *Gates,* 41 Ark. 264, and *Littell* v. *Jones,* 56 Ark. 139, 19 S. W. 497, with the comment that 'the

following additional cases recognize that such an agreement may not be within the statute of frauds, although on their facts it did not become necessary to consider the question.'

"Other cases are cited by the annotator to support the statement that 'upon a somewhat different theory, the following cases hold a purchaser at an execution, tax, or foreclosure sale who has entered into an agreement to permit redemption or extend the time for redemption, and thereby cause the holder of the right of redemption to postpone the exercise of that right to a future period, cannot rely upon the statute of frauds to defeat the effect of his contract, since this would be permitting the statute, which was designed to prevent fraud, to be used as an instrument for its promotion.'

"These cases support the holding that the statute of frauds does not defeat Conner's right to the relief prayed. As the agreement made was that the lands would not be sold in consideration of the additional security and the agreement that Wood should collect and credit the rents on the mortgage debt, yet, notwithstanding this agreement, the mortgage was foreclosed, then and in that event a constructive trust arose. *Lewis* v. *Bush,* 171 Ark. 192, 283 S. W. 377; *Haskell* v. *Patterson,* 165 Ark. 65, 262 S. W. 1002; *Trevathan* v. *Taylor,* 177 Ark. 499, 6 S. W. 2d 835; Scott on Trusts, §§ 444-484. We conclude Conner was entitled to the relief granted and that the right of redemption should be accorded him."

In the case of *Littell* v. *Jones,* 56 Ark. 139, 19 S. W. 497, cited by appellants, it was held that an oral contract to permit redemption, made *after* the title of the lienholder has become perfect by a sale to him, was barred by the statute of frauds. But in the case at bar the alleged contract as to redemption was made long before the sale and at a time when appellee could have stopped the foreclosure proceeding by paying the debt. And in the Littell case, *supra,* we said: "So long as the right to defeat the purchase exists, agreements to extend the time or modify the conditions for redemption have been held not to come

within the statute, for the defendant is in many respects regarded as the owner of the land, and by such agreements purchases nothing, but merely holds what he already has."

We conclude that the contract relied on herein by appellee was not within the ban of the statute of frauds.

II.

According to the testimony of appellee his agreement with Schlumpf was to repay him the entire amount of Schlumpf's outlay, including the amount paid for the Fizer debt and the amount of appellee's debt to Schlumpf; and this the appellee offered to do. He was not required, under the terms of the agreement as testified to by him, to repay to Schlumpf the entire amount of both mortgage debts, but only the amount Schlumpf paid Fizer and the amount loaned by Schlumpf, with interest and taxes.

III.

The evidence shows that, after the alleged contract to redeem was entered into, appellee made payments to the elder Schlumpf, and to his son, appellant, H. J. Schlumpf, aggregating $2,750, and made improvements on the property at one time which he claimed cost $250. It cannot therefore be properly said that after the terms of redemption were agreed on, appellee failed to make any substantial payment.

IV.

The lower court, with all the witnesses before it, had the advantage of an opportunity to observe the demeanor of the witnesses and their manner of testifying. The lower court found that appellee's version of the matter was correct. After a careful review of the record, we are unable to say that the testimony fails to support the lower court's finding in favor of appellee or that the testimony was not of the clear, cogent and convincing character required by the law in cases of this kind.

V.

There was no testimony introduced in the trial below tending to show that appellee had been guilty of such laches as would defeat his rights in the premises. According to his testimony, he paid appellant and his father regularly and in accordance with the agreement, and, when he found that appellants were denying the agreement, appellee, without delay, brought suit to enforce the contract. Nor was any element of estoppel against appellee shown. The party invoking estoppel must ordinarily show that on account of the action or conduct of the party against whom it is asked he has been put in a more disadvantageous position than he would otherwise have occupied. Nothing in the testimony indicates that anything done by appellee caused appellants or their predecessor in title to assume a different position in the matter than either of them would otherwise have occupied. "To give rise to an estoppel, one must show that he, in good faith, relied upon the other's conduct or statements to his prejudice." *Norton* v. *Maryland Casualty Company*, 182 Ark. 609 (headnote 3), 32 S. W. 2d 172.

No error appearing, the decree of the lower court is affirmed.

MINOR W. MILLWEE, Justice, dissents.

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

4-7887 196 S. W. 2d 588

Opinion delivered October 7, 1946.

Henry Donham and *Pat Mehaffy,* for appellant.

George F. Edwardes, for appellee.

HOLT, J. By an act of Congress of the United States, July 28, 1866 (14, Stat. L, p. 338), certain grants of land in Arkansas were made to the St. Louis, Iron Mountain & Southern Railway Co. Later, all rights in this land under the grant were acquired by the Missouri Pacific Railroad Company. The act also contained the following provision: "That all mineral lands within the limits of this grant and the grant made in § 2 of this Act are hereby reserved to the United States," and further provided that the Secretary of the Interior issue patents from time to time "for all lands granted" upon proper showing of completion of parts of the railroad, etc.

On December 12, 1892, the Iron Mountain Railroad Company deeded one of the two tracts of land involved here to the Big Woods Lumber Company, and on March 31, 1894, the Company deeded the other tract to H. C. Lee. Both deeds contained the following reservation: "Also reserving all coal and mineral deposits in and upon said lands, with the right to said party of the first part, its successors and assigns, at any and all times to enter upon said lands, and to mine and remove any and all coal and mineral deposits found thereon, without any claim for damages on behalf of said second party, his heirs or assigns."

Appellees are the present owners of these two tracts of land subject to the above reservation and they brought separate, similar suits (consolidated by the court below for the purpose of trial) to quiet their title by cancelling the reservation, it being their contention that the reservation of "all coal and mineral deposits" did not include oil, gas and distillate, as contended by appellant.

In compliance with the provisions of § 13600 of Pope's Digest, enacted in 1929, the mineral rights in question have been separately assessed for taxation, and taxes thereon paid by the Missouri Pacific Railroad Com-

pany, or its present trustee, since and including the year 1932.

By stipulation of the parties in the trial below: "It is admitted that present title to the land in question is owned by plaintiffs, subject to defendant's reservation set forth in deeds of St. Louis, Iron Mountain & Southern Railway Company aforementioned described as follows: 'Reserving, however, the right of way to the said Railroad Company 100 ft. wide where the track of said Railroad or its branches has been or may be laid over said land, also reserving all coal and mineral deposits in and upon said lands with the right of said party of the first part, its successors and assigns at any time to enter upon said lands and to mine and remove any and all coal and mineral deposit found thereon without any claim for damage on behalf of said second party, his heirs or assigns.' The specific point here at issue is whether the aforesaid reservation includes oil and gas."

From a decree finding the issues in favor of appellees comes this appeal.

On the threshold of this cause, we are confronted with a former opinion of this court (made by six of its members,—one judge not participating) in *Missouri Pacific Rd. Co., Thompson, Trustee,* v. *Strohacker,* 202 Ark. 645, 152 S. W. 2d 557, delivered May 26, 1941, which involved the construction of reservations in two deeds made by the appellants here, predecessors in title, in 1892 and 1893, wherein the identical language "reserving all coal and mineral deposits in and upon said lands, etc.," was used as that used in the two deeds in question here.

Appellees earnestly argue that the opinion in that case controls here, and we agree.

While the record in the present case reflects some additional testimony, in effect, it is substantially the same as that in the Strohacker case, *supra,* to which reference is made for a somewhat detailed statement of the facts. Appellant insists with much earnestness, how-

ever, that we should overrule the Strohacker case as being unsound and not in accord with the weight of authority. We cannot agree.

The question decided in the Strohacker case was the identical question decided in the present case: "Does a reservation of coal and mineral deposits reserve oil, gas and other minerals?" The deeds in the Strohacker case bore approximately the same dates as the two deeds in question here and all these deeds conveyed tracts of land in Miller county, Arkansas. In that case, we held (headnote 5): "By excluding from deeds executed in 1892 and 1893 'all coal and mineral deposits' pertaining to lands in Miller county, Arkansas, accruing to railroad company through government grants, the company no doubt had in mind, as did its grantees, only substances then commonly recognized as minerals; and in view of such intent the language was not sufficient to reserve oil and gas."

Since we hold that the principles of law announced and set forth in the Strohacker case control here, it could serve no useful purpose to detail the evidence or restate the law as set forth in that opinion. Accordingly, the decree is affirmed.

McFaddin, Justice, dissents.

Cole *v.* Citizens Bank.

4-7954 196 S. W. 2d 589

Opinion delivered October 14, 1946.

J. A. Worsham and *John B. Gulley,* for appellant.

Hays, Wait & Williams, for appellee.

SMITH, J. This suit was filed by the Citizens Bank of Pottsville to reform and foreclose a mortgage alleged to have been executed to it on June 12, 1934, by Minnie Bowden to secure a debt of $2,000 due the bank by Mrs. Bowden, evidenced by ten promissory notes signed by Mrs. Bowden, each of them for the sum of $200, and payable one each year from November 15, 1935, to and including November 15, 1944.

It was the theory of the bank that the mortgage sought to be reformed and foreclosed was a renewal of a former mortgage to the bank by Mrs. Bowden, now Mrs. Cole, executed in 1930, which correctly described three tracts of land amounting in all to eighty acres. One of these tracts was described in the original mortgage as, "southwest quarter of southeast quarter of section 33, township 8 north, range 19 west, containing 40 acres." The descriptions in the second mortgage were the same as those of the first mortgage except that the second mortgage described the tract of land as "southwest quarter of southwest quarter of southeast quarter, section 33, township 8 north, range 19 west, containing 40 acres."

Mrs. Cole was unmarried when she executed the admitted mortgage in 1930, and she married James D. Cole, September 16, 1941, a date subsequent to the date of the alleged renewal. The court granted the relief prayed, reformed the second mortgage, and ordered its

foreclosure, and properly held that the deed to Mr. Cole from his wife, which she had given him, was subject to this mortgage. This appeal is from that decree.

The only testimony offered was that of G. C. Owens, the cashier of the plaintiff bank, and Mrs. Cole and her husband, together with numerous exhibits, and there is presented on this appeal only two questions, both questions of fact: first, did Mrs. Cole execute the renewal mortgage, and, second, was she allowed all the credits of payments to which she was entitled?

Owens testified as follows: Mrs. Cole is his wife's sister. He is now, and for the past sixteen years has been, cashier of the plaintiff bank. Mrs. Cole was indebted to the bank in the sum of $2,000, evidenced by five notes for $400 each, all bearing interest at the rate of 8 per cent., and to secure the payment of this indebtedness she executed the mortgage which was offered in evidence, and which described three tracts of land, one of these being described as southwest quarter, southeast quarter, section 33, township 8 south, range 19 west. Mrs. Cole was unable to pay this debt, and he agreed with her to renew and extend it, and to reduce the interest rate from 8 per cent. to 4 per cent., and pursuant to this agreement she executed ten notes to the bank, each for $200, one payable each year, and all dated June 12, 1934, bearing interest at the rate of 4 per cent. These notes were all offered in evidence, and were aparently signed by Minnie Bowden. In addition to this indebtedness, Mrs. Cole was indebted to the bank in the sum of $1,017, evidenced by a plain unsecured note which bore interest at 10 per cent. None of the $400 notes was paid, and the bank wanted paper which was not past due, and the original notes were surrendered to Mrs. Cole when new notes were taken. Mrs. Cole has not acquired or sold any land since the first mortgage was given. Witness prepared the new mortgage and intended to copy the same description, and it was the intention of the bank to take, and of Mrs. Cole to give, the same security in the second mortgage which had been given in the first, but a mistake was made in copying the description.

This second mortgage was made an exhibit to the complaint and was offered in evidence, but does not appear in the transcript. The ten notes which it secured were all offered in evidence, and the originals are in the transcript.

During the trial Mrs. Cole signed her name six times on a slip of paper, and these signatures are in the record. The chancellor had the opportunity we do not have of comparing the genuine signatures with the signature appearing on the mortgage, which is not in the record. We are unable to say that the chancellor's finding that Mrs. Cole signed the mortgage is contrary to a preponderance of the evidence.

With this finding, which we affirm, that Mrs. Cole did sign the mortgage, other questions are made easier. It is entirely reasonable to find that if Mrs. Cole was renewing the mortgage, she intended to describe the same land described in the first mortgage. It would not be a renewal if this were not true, and it would be unreasonable to hold that the bank was voluntarily releasing thirty acres of land from the mortgage which it already had, and which was in full force and effect when the second mortgage was given. But notwithstanding the first description, southwest quarter was repeated, the tract is further described as "containing 40 acres," which would not be true if the description southwest quarter is repeated.

We conclude the chancellor did not err in finding that the repetition of the description southwest quarter was an error of the scrivener in copying the descriptions appearing in the first mortgage, and that the descriptions employed in the second mortgage did not reflect the intention of either party.

No useful purpose would be served in reciting the conflicting testimony as to payments which were made. These resulted in discharging the note for $1,017.

It is urged that the court should have required the bank to produce its books in use during the many years the transactions between the parties covered, but we

think Mrs. Cole did not prove any payment for which she was not given credit.

Judgment was rendered for $2,267.40, which sum includes the face of the ten notes, and the interest thereon, less credits of certain payments, and in addition covered certain taxes and insurance paid by the bank. The inclusion of these items of taxes and insurance was proper. The mortgage required the mortgagor to keep the property insured, with a loss payable clause in favor of the mortgagee bank, with the provision that "in case of default of any premium, same can be paid by Citizens Bank (the plaintiff) and to become a part of the mortgage." Payment of taxes was necessary, of course, to protect the security, and the sum so paid was properly included in the amount for which judgment was rendered.

The contention of appellant that usury was charged is not sustained by the testimony. The statement that usury was charged is based upon the contention that the notes provided that they should bear interest at the rate of 4 per cent. per annum from date due until paid. But the mortgage itself provided that the notes should bear interest at the rate of 4 per cent. per annum, payable annually. However, these notes matured one each year beginning November 15, 1935, so that in no event could it be said that usury was charged. Certainly there was no contract the performance of which would have resulted in the exaction of usurious interest.

No error appearing, the decree must be affirmed, and it is so ordered.

DeSoto Life Insurance Company *v.* Barham.

4-7955 196 S. W. 2d 592

Opinion delivered October 14, 1946.

Adams & Willemin, for appellant.

Holland & Taylor, for appellee.

McHaney, Justice. Appellee brought this action in the common pleas court against appellant to recover $500 on a policy of disability insurance issued to him by it. By the terms of the policy appellant agreed to pay appellee $200 per month for total disability and $100 per month for partial disability. The complaint alleged that he had sustained an injury to his eye on or about October 21, 1944, from the effects of which he became totally disabled on or about November 7, 1944, and such total disability continued to January 20, 1945, a total of two and one-half months, and was partially disabled for more than three months thereafter; that appellant has paid him $300 on the amount due him under the policy; and that he is entitled to recover $500 for total disability and $300 for partial disability, or a total of $800, less the amount already paid of $300, or a balance of

$500, for which he prayed judgment, with costs, penalty and attorney's fee.

For answer appellant filed a general denial, after admitting the issuance of the policy sued on. It also plead said payment of $300 made on January 24, 1945, by draft of its adjuster on appellant, as being in full and complete satisfaction of all claims of appellee for his eye injury as evidenced by a written release on the back of said draft in these words: "In full and complete settlement for eye injury, received on or about November 6, 1944," which draft appellee indorsed under said release and deposited same to his credit in his bank. Other defenses were set up, reference to which will be hereinafter made.

Trial in the common pleas court resulted in a judgment against appellant for $500, and penalty and attorney's fee. On appeal to the circuit court, the case was tried by agreement before the court sitting as a jury and resulted in a judgment against appellant for $400 and costs. This appeal followed, and appellee cross-appealed.

Four arguments are made for a reversal of this judgment, only one of which merits serious consideration. Minor contentions are that appellee failed to pay the premium due on the policy on December 20, 1944, and that it lapsed on said date. A simple answer to this is that admittedly appellant owed appellees a sum largely in excess of the premium due at that time, for on January 24, 1945, it paid him $300, on account of disability existing both before and after December 20, 1944, thus treating the policy as not having lapsed, but as being in full force and effect. Another is that appellee failed to comply with the policy by making proof of loss. This, if not done, was waived by making payment without requiring proof. So, also, is the contention waived that appellee was not attended at least once each week by a physician, as the policy required.

As stated above, the principal and most serious assignment of error argued by appellant is that it made a full, complete and final settlement with appellee, as evidenced by the typewritten release on the back of the

draft given him on January 24, 1945, for $300, which was indorsed by appellee in his own handwriting. Appellee is a reputable and well known lawyer of long standing in the city of Blytheville, being 69 years old at the time of trial. He testified positively that he did not see the release on the back of the draft; that he was struck in the eye by some foreign object about October 21, 1944, and from November 7 thereafter was completely disabled for two and one-half months and partially disabled for more than three months; that he was under the care of a physician most of the time and for a short time was in a hospital in Memphis, Tennessee; that when the draft was delivered to him by the adjuster, there was very little discussion between them at the time about appellee's claim. The adjuster said he told appellee, "You have two months' total disability and one month's partial, according to your doctors' reports. He said, 'That is satisfactory.' So I asked the privilege of using his stenographer, had her write this draft up, and write the release on the back. I handed it to Judge Barham and left town. That is all that pertained to the case at that time."

Appellee says he thought this was a payment on account and that nothing was said to indicate that it was a full and complete settlement, which was not intended as he was not then well, but was still partially disabled and being treated by the doctor. According to the adjuster himself, the payment made did not cover the full amount then due for two months total and one month partial disability, or $500, which he says he told appellee was due him, thus corroborating appellee that it was a payment on account and was made for a part of the liability already accrued, about which there was no dispute, and this payment and the so-called release itself cannot be construed as a consideration for a release of liability already accrued and thereafter accruing for partial disability.

It is also undisputed that appellee and the adjuster had no discussion about a settlement in full and there was no mention of a release in full or of a release of any kind, and appellee says that had he known that the pay-

ment was made as one in full, it would not have been accepted. It is significant that the adjuster testified, as above quoted, that appellee was entitled to pay for two months' total and one month's partial disability, or a total of $500 then due, to which appellee agreed, and then immediately gave him a draft for only $300, leaving a balance then due of $200.

We think the trial court was justified by the evidence in finding that the payment was not made and accepted as one in full and in rendering judgment against appellant for the additional sum of $400. A question of fact for the jury was made and the finding of the court sitting as a jury is just as binding as the verdict of a jury.

On the cross-appeal but little need be said. The finding of the court of the duration of appellee's disability is binding on him. While his testimony is that he had two and one-half months of total disability and more than three months of partial disability, the court was not required to find for him for the full amount he claimed, even though no one testified to the contrary.

The trial court probably found, or at least it was justified, in finding that appellant owed appellee $200, balance due on the January 24, 1945, payment, and two months' partial disability of $100 each, or a total of $400. Appellee did not pay either of the December or March quarterly premiums of $37 each, or a total of $74, which should be deducted from the judgment of $400, leaving a balance of $326 with interest at 6 per cent. from the date of the judgment. The judgment will be modified to this extent, and as so modified, is affirmed.

[redacted]

HUMMEL *v.* STATE.

4421 196 S. W. 2d 594

Opinion delivered October 14, 1946.

[redacted]

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

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

Ed. F. McFaddin, Justice. Appellant was convicted of the crime of sodomy for having unnatural sexual relations with the prosecuting witness, a married female seventeen years of age. The questions herein discussed are among the twenty-seven assignments of error contained in the motion for new trial.

I. *Was the Prosecuting Witness an Accomplice?* Appellant asked an instruction to the effect that the prosecuting witness was an accomplice and that appellant could not be convicted on her uncorroborated testimony. This instruction was refused, but the court gave the following instructions numbered 5 and 6 at the request of appellant:

"No. 5. If you find that" the prosecuting witness "willingly and of her free will and consent and without deception on the part of the defendant had the relations with him with which he is charged in the indictment, then

she would be an accomplice and you cannot convict upon the uncorroborated testimony of an accomplice.

"No. 6. You are instructed a conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof."

The trial court was correct. If the prosecuting witness was an accomplice, then her testimony had to be corroborated to sustain a conviction. If the prosecuting witness was not an accomplice, then her testimony did not have to be corroborated to sustain a conviction. The rule is well established that, unless the testimony shows conclusively that the prosecuting witness is an accomplice, then the question of whether such witness is an accomplice, is a mixed question of law and fact and is properly submitted to the jury. *Edmonson* v. *State,* 51 Ark. 115, 10 S. W. 21; *Melton* v. *State,* 43 Ark. 367; *Norris* v. *State,* 168 Ark. 151, 269 S. W. 46.

In *Strum* v. *State,* 168 Ark. 1012, 272 S. W. 359 (a sodomy case), the record showed conclusively that the prosecuting witnesses (two boys) did consent to the act of sodomy; so it was held that their testimony had to be corroborated. In the case of *Smith* v. *State,* 150 Ark. 265, 234 S. W. 32 (a sodomy case), the evidence showed that the prosecuting witness did not consent; so her evidence did not have to be corroborated. Also, in *Woolford* v. *State,* 202 Ark. 1010, 155 S. W. 2d 399, the evidence showed that the prosecuting witness did not consent, so his testimony did not have to be corroborated. We there stated:

"Finally, it is stated that appellant could not be convicted upon the uncorroborated testimony of the boy, because the latter was an accomplice. *Strum* v. *State,* 168 Ark. 1012, 272 S. W. 359. A complete answer to this argument is that the injured boy was not an accomplice within the meaning of § 4017 of Pope's Digest, or in any other sense, as he did not consent."

Appellant was a practicing physician. The prosecuting witness went to him for treatment, which he agreed to undertake. Thus, there existed a most confidential relationship—that of physician and patient. Herzog on Medical Jurisprudence, § 96 states: "Fiduciary relationship between physician and patient. It is said that the relation of a physician to his patient is one of highest trust and that the physician must act with the utmost good faith."

See, also, 41 Am. Juris., p. 192; 48 C. J., p. 1111, and 13 C. J., p. 408.

The prosecuting witness swore that appellant committed the crime of sodomy on her while he was treating her. She said:

"I didn't consent. He said it was necessary."

In view of the physician-and-patient relationship existing between appellant and the prosecuting witness at the time, and in view of her testimony, as just quoted, we hold that a fact question was made for the jury as to whether or not the prosecuting witness "willingly and of her own free will and consent and without deception on the part of defendant" submitted to the crime of sodomy upon her.

As stated by the Georgia Court of Appeals in the case of *Perryman* v. *State,* 63 Ga. App. 819, 12 S. E. 2d 388:

"One who voluntarily participates in an unnatural act of sexual intercourse with another is also guilty of sodomy. One who does not so participate is not guilty. 'Voluntary' as defined in Webster's International Dictionary (1922) means 'proceeding from the will; unconstrained by interference; unimpelled by another's influence; spontaneous'."

The court correctly submitted to the jury the question of whether the prosecuting witness was an accomplice; and the verdict of the jury settled that factual question in the negative.

II. *Testimony of Alleged Acts of Sodomy with Another Female Witness.* The trial court permitted the

State to introduce testimony concerning a similar act alleged to have been committed by appellant with another female. Appellant's counsel objected to this evidence, framing the objection in these words:

"In addition to the general objection, it is objectionable specifically in that it is proof of another crime and is highly prejudicial to the defendant. It is proof of another crime alleged to have been committed six months prior to the offense on which he is being tried, and with . . . a different individual."

The trial court limited the testimony of the other act of sodomy by this instruction to the jury:

"You are instructed that evidence introduced by the state in this case, of a similar offense occurring prior to the offense charged in the indictment was admitted solely for the purpose of showing the defendant's intent, motive, habits and practices, and you may consider it for this purpose and this purpose only. The defendant is not on trial for any offense except the alleged offense against" the prosecuting witness "and the defendant cannot be convicted on . . . the alleged offense with the other witness."

The trial court was correct, and, with the limiting instructions as above quoted, there was no error on this point. We said in *Hearn* v. *State,* 206 Ark. 206, 174 S. W. 2d 452:

"This court has repeatedly recognized and declared that evidence of other crimes, recent in point of time, and of a similar nature to the offense then being tried, is admissible as bearing on the question of intent. Some such cases are: *Puckett* v. *State,* 194 Ark. 449, 108 S. W. 2d 468; *Lewis* v. *State,* 202 Ark. 6, 148 S. W. 2d 668; *Monk* v. *State,* 130 Ark. 358, 197 S. W. 580; *Cain* v. *State,* 149 Ark. 616, 233 S. W. 779. These cases involved such offenses as robbery, larceny, homicide, or operating a gambling house. We perceive no good reason why the same rule should not apply to sex crimes; in fact, courts of other states have held that, in sex crimes, evidence of other acts of a similar nature, recent in point of time, is admissible as bearing on the question of intent. Some

such cases are: *Suber* v. *State,* 176 Ga. 525, 168 S. E. 585; *State* v. *Derry,* 202 Iowa 352, 209 N. W. 514; *State* v. *Bisagno,* 121 Kan. 186, 246 P. 1001; *State* v. *Wargo,* 83 N. H. 532, 145 Atl. 456; *Strand* v. *State,* 36 Wyo. 78, 252 Pac. 1030, and *State* v. *Dowell,* 47 Idaho 457, 276 Pac. 39, 68 A. L. R. 1061. See, also, West's Digest, 'Criminal Law,' § 371."

III. *Sufficiency of the Evidence.* Decency is best served by omitting the details of the evidence. The court submitted the case to the jury on proper instructions. The verdict of the jury, in effect, found that the prosecuting witness was not an accomplice; and, with that question determined, it follows that the testimony of the prosecuting witness is sufficient to sustain the conviction.

IV. *Other Assignments of Alleged Error.* It would unduly prolong this opinion to list and discuss each of the twenty-seven assignments of error contained in the motion for new trial. It is sufficient to say that we have examined each assignment, and find no merit in any of them.

Affirmed.

HUGHES *v.* CAIN.

4-7951 196 S. W. 2d 758

Opinion delivered October 14, 1946.

M. V. Moody, for appellant.

Philip McNemer, for appellee.

MINOR W. MILLWEE, Justice. This appeal involves the validity of an order of adoption of Sidney Pat Cain, the seven-year-old son of appellee, Mrs. Sidney Cain, by appellant, Catherine Fink Hughes, the child's paternal great-aunt. Appellee filed her petition for a writ of *habeas corpus* in Pulaski Chancery Court on October 3, 1945, to secure the custody of her son from appellant.

The record discloses the following facts which appear from the allegations of the petition for *habeas corpus* and the exhibits thereto attached: Appellee resides with her husband and their second child in the state of Texas

where the husband is permanently employed. Appellant was appointed guardian of Sidney Pat Cain by order of the Pulaski Probate Court on October 8, 1941, but this order was declared void by the same court on June 21, 1943. By the last order appellant was awarded temporary custody of the child pending a determination of the child's status by the juvenile court, to which court the matter was referred. On March 16, 1943, appellant filed an amended petition for adoption of the child in the Pulaski Probate Court. This petition states the names of the parents and alleges that they are living together as husband and wife in New Iberia, Louisiana; that the child is abandoned and had been in the custody and care of appellant for more than three years. On October 14, 1943, an order of adoption was entered in the Pulaski Probate Court pursuant to the petition. This order recites the appearance of appellant, her attorney and the referee of the Pulaski Juvenile Court. It also states that an attorney appeared for the parents of the child and opposed the adoption and that the State Department of Public Welfare filed a report recommending the adoption. There is no showing in either the petition or order of adoption that the parents were made parties to the proceedings, or given any notice thereof.

In her petition for *habeas corpus* filed in the chancery court, appellee alleged that the order of adoption entered in probate court on October 14, 1943, was void in that the record failed to show many facts essential to jurisdiction of the subject-matter and the persons of appellee and her husband. It was alleged that neither the petition nor order of adoption shows legal notice to, or the consent of, the natural parents as required by statute. It was also alleged that appellee had no notice of the adoption proceedings, did not consent thereto, and that the attorney whom the record purports to show as having appeared for her did so without her authority, knowledge or consent.

On November 7, 1945, appellant filed a general demurrer alleging that the petition for *habeas corpus,* together with the exhibits thereto, failed to state facts sufficient to constitute a cause of action or to invoke the

jurisdiction of the chancery court. On November 10, 1945, appellant also filed an answer containing a general denial and alleging the validity of the order of adoption. The demurrer of appellant was overruled at a hearing on November 14, 1945. Appellant elected to stand on her demurrer and declined to controvert the facts alleged in the petition for *habeas corpus*. Whereupon the petition for writ of *habeas corpus* was granted and custody of her son was awarded to appellee.

By § 255 of Pope's Digest, it is required that a petition for adoption shall state the name and residence, if known, of the parents of the child to be adopted. Section 256 of Pope's Digest provides that the parents of the child sought to be adopted must be made defendants to the petition by name and notified of the proceedings by personal service of summons, if residents of the state, said summons to be made returnable at any time within twenty days after its date. This section further provides that whenever the petition discloses that the parents are nonresidents, the clerk shall cause publication of an "adoption notice" once in some newspaper of general circulation published in the county, warning such nonresidents to appear within 20 days of the date of the notice. The form of the notice is set out in the statute. It is also required that the clerk shall, within ten days after publication of the notice, mail a copy thereof to those defendants whose place of residence is stated in the petition and who have not been personally served with summons.

Section 259 of Pope's Digest provides that adoption of a child shall not be permitted without the written verified consent of the parents, if living. It is further provided, however, that such written consent may be dispensed with under certain conditions, among which are: (1) the abandonment of the child by the parent for six months next preceding the filing of the petition, or (2) if the parent has lost guardianship of the child by an order of the juvenile court. Sections 255, 256 and 259, *supra,* were enacted as a part of Act 137 of 1935. By Act 328 of 1937, now a part of § 262 of Pope's Digest, it is provided that service of summons and publication of

notice shall not be necessary where the parents appear and file their verified written request and consent to the adoption.

The institution of the petition for a writ of *habeas corpus* constitutes a collateral attack upon the order of adoption and the only inquiry proper to be made is whether the probate court had jurisdiction to enter the order of adoption. Before the order of adoption can be held binding against a non-consenting parent the court rendering it must have jurisdiction of both the subject-matter and the person. Where a court is exercising special statutory jurisdiction the record must show upon its face that the case is one where the court has authority to act. This court in the case of *Morris* v. *Dooley,* 59 Ark. 483, 28 S. W. 30, 430, in construing an earlier adoption statute, said: "Unless all jurisdictional facts appear in the record itself, the judgment in the proceeding will be void upon collateral attack."

In 1 Am. Jur., Adoption of Children, § 40, p. 642, it is said: "As has been said, consent, or its procedural equivalent, notice, forms the basis of a proceeding for adoption. It is a jurisdictional fact, a condition precedent, compliance with which is essential to full validity and effect of the decree. There can be no doubt that the rights of the parents cannot be cut off, in the absence of consent, unless they have had notice of the proceeding and an opportunity to resist the action, in which event failure to appear might be regarded as equivalent to consent."

It is contended by appellant that the record of adoption shows that the child had been abandoned for more than six months and that the parents had lost guardianship of the child by an order of the juvenile court, thus dispensing with necessity of their consent to the adoption proceedings under the provisions of § 259, Subsections 2(a) and (d) of Pope's Digest. While the order of the probate court annuling its former order appointing appellant guardian of the child shows that the matter was referred to the juvenile court, there is no showing that an order was ever entered by that court declaring

the child abandoned, or, if such determination was made that the parents had any notice of the proceedings.

In the order of adoption the probate court made no finding that the parents had abandoned their child, but the petition does allege that the child was abandoned and had been in the custody of appellant for three years. However, the petition also stated the names of the parents and that they were living together as husband and wife in New Iberia, La.

The provisions of the adoption statutes of several states regarding the question of notice are similar to ours. The courts of these states in construing their respective statutes have held that, while abandonment of a child by its parents may be sufficient ground for an adoption without their consent, such abandonment must be judicially adjudged, and notice to the parent of the adoption proceeding is essential to cut off his rights. See Annotations, 24 A. L. R. 424, 76 A. L. R. 1080.

Under a Missouri statute it is required that the court order notice of the adoption proceedings to a parent whose written consent is not filed, and such consent may be dispensed with where the parent has abandoned the child. In the case of *Child Saving Institute* v. *Knobel*, 327 Mo. 609, 37 S. W. 2d 920, 76 A. L. R. 1068, the Missouri court held that a non-consenting parent was entitled to notice and an opportunity to be heard on the question of abandonment. In construing the statute the court said: "We have not overlooked the further provisions of § 1096 that the consent of a parent shall not be required if such person is insane, or is imprisoned under a sentence which will not expire until two years after the date of filing the petition; or if he or she has willfully abandoned the child or neglected to provide proper care and maintenance for the two years last preceding such date. This provision dispenses with the consent of the parents in certain specified cases, but it does not dispense with notice. It indicates that the lawmakers thought that this class of parents were not fit persons to have the custody of children, and the evident purpose of dispensing with consent of the parents in such cases

was to authorize the court to decree an adoption in such cases even though the parents objected to such adoption and refused to give consent thereto. But authority of the court to decree adoption in such cases without consent of the parents does not mean that such parents are not entitled to notice and an opportunity to be heard on the questions of insanity, imprisonment, and abandonment or neglect of their children.''

Our statute authorizes an adoption without consent of the parents where it has been judicially determined that they have abandoned their child, but it also requires notice to the parents in order that they may be heard on the question of abandonment. Since it affirmatively appears from the record of the adoption proceedings that the parents were nonresidents of the state, and their consent to the adoption was never given, it was necessary that service be obtained by publication as provided in § 256 of Pope's Digest, *supra,* before the probate court could acquire jurisdiction of the person of appellee. The record fails to show that this notice was given. The probate court being without jurisdiction, the order of adoption is void in so far as the rights of appellee are concerned, and is, therefore, subject to collateral attack in the *habeas corpus* proceedings.

The order of adoption also states that an attorney appeared for the parents and opposed the adoption. However, it is alleged in the petition for the writ of *habeas corpus* that this attorney had no authority to appear for the parents and that such appearance, if made, was without the knowledge or consent of appellee. Appellant declined to controvert this issue, and the demurrer of appellant admits this allegation of the petition to be true.

It follows that the trial court correctly overruled the demurrer of appellant to the petition for writ of *habeas corpus,* and the decree is accordingly affirmed.

FOX BROTHERS HARDWARE COMPANY *v.* PHILLIPS.

4-7957 196 S. W. 2d 754

Opinion delivered October 14, 1946.

Compere & Compere and Coleman & Gantt, for appellant.

Y. W. Etheridge, for appellee.

HOLT, J. May 20, 1938, appellee, Mrs. Jessie Phillips, executed a mortgage in favor of Fox Brothers Hardware Company, mortgagee, in the amount of $987.99, on the following described lands in Ashley county, Arkansas: Frl. N½ NW¼ NW¼ NE¼ and NE part SE¼ NW¼, section 7, township 19 south, range 8 west, contain-

ing 135.84 acres.'' This mortgage was recorded May 21, 1938. Mrs. Phillips was the wife of L. M. Phillips, the brother of Ray Phillips. These two brothers were partners in the mercantile business, were involved in debt, and the above mortgage was executed by Mrs. Phillips as security for a debt which her husband and Ray Phillips, or Phillips Brothers, owed Fox Brothers Hardware Company.

Thereafter, on December 9, 1940, while the mortgage was in full force and effect, Mrs. Jessie Phillips executed her warranty deed for a consideration of $1,000 to Fox Brothers Hardware Company, grantee, covering the identical land embraced in the mortgage, *supra.* This deed was recorded December 16, 1940. At the time Mrs. Phillips executed this deed, Phillips Brothers had not paid its debt to Fox Brothers Hardware Company, which the mortgage had, as indicated, been executed by Mrs. Phillips to secure.

December 26, 1940, after Mrs. Phillips executed this deed, Fox Brothers executed in favor of Mrs. Jessie Phillips a written ''Option to Purchase'' the land described in the deed ''on or before November 15, 1941, at and for the sum of one thousand eighty-six and 03/100 dollars ($1,086.03) plus six per cent. interest thereon from December 9, 1940.'' The option contained a provision, among other things, reserving to Fox Brothers Hardware Company ''all oil, gas or other minerals upon said lands and the right to sell and execute oil, gas and other mineral leases on said lands or any part thereof at any time,'' in case the option should be exercised by Mrs. Phillips.

There was a further provision that: ''If no demand be made on said Fox Brothers Hardware Company on or before said November 15, 1941, accompanied by tender of said cash payment of five hundred dollars, together with said promissory note for the balance aforesaid, this option shall on the day following said November 15, 1941, be automatically terminated without action on the part of either party hereto, time being of the essence of this agreement.'' It appears that no attempt was made by

Mrs. Phillips or by Phillips Brothers to exercise the option prior to its expiration date.

The transactions above enumerated between Mrs. Phillips and the Fox Brothers Hardware Company were handled on behalf of Mrs. Phillips through her husband, L. M. Phillips, and her brother-in-law, Ray Phillips.

It was the contention of appellee, Mrs. Jessie Phillips, in the trial court, that when she executed the deed, *supra,* she thought it was a mortgage given to secure the then outstanding debt of Phillips Brothers to Fox Brothers Hardware Company, and that she so intended it, and she asked that said deed be canceled and declared a mortgage. The court found the issues in favor of appellee, and this appeal followed.

The primary and decisive question presented for our determination is whether the warranty deed of Mrs. Jessie Phillips to Fox Brothers Hardware Company, December 9, 1940, was intended and accepted as a mortgage as found by the trial court?

The testimony discloses that Oscar L. Blackwell, one of the appellees, was a minor son of appellee, Mrs. Jessie Phillips, by a former marriage, and the land in question here was deeded to Mrs. Jessie Phillips by her former husband and father-in-law following a decree of divorce to Mrs. Phillips, September 19, 1932. By this decree, custody of the child was also awarded Mrs. Phillips.

We have before us the original deed and mortgage above referred to. Both appear to be regular and in the usual standard form. The entire deed (with the exception of the acknowledgment and certificate of record appearing on the back) is embodied on the front of one sheet of paper. At the top appears in large letters the words "Warranty Deed," and at the bottom the deed is signed by Mrs. Jessie Phillips.

At the time the deed was executed Mrs. Phillips was in a hospital, about to undergo a serious operation, and she testified: "On the day I was to be operated on, Ray brought the instrument to the hospital with a

notary public, and I signed it before her (the notary public) at the hospital just before I went on the operating table," and barely knew what she was doing; that she did not read the instrument and did not think she would have known what it was if she had read it. She had absolute confidence in her husband and his brother; "I knew what our agreement had been, that it should be a mortgage, and relied on it that the paper I signed was the mortgage we agreed upon. I thought I had a right to sign a mortgage to help prevent a lawsuit or bankruptcy or whatever bad might have resulted from failure to satisfy Fox Brothers." She had not discussed this matter with any agent of Fox Brothers Hardware Company before she signed the deed. She would not have signed the deed if she had known it was not a mortgage. She first learned that she had signed a deed and not a mortgage sometime in 1943, when she intended to lease the land for oil development.

Miss Jean Hopson, the notary public who took Mrs. Phillips' acknowledgment to the deed, testified as to Mrs. Phillips' condition at the time: "I was present and saw Mrs. Jessie Phillips sign the said deed as grantor, otherwise I would not have signed the acknowledgment; also I would not have signed the acknowledgment had I not thought that she knew what she was doing at the time. Had there been any unusual circumstances in connection with this acknowledgment they would have made a definite impression upon me, and if there had been anything in the appearance or conversation of Mrs. Phillips which would indicate she did not understand the nature of the transaction, I would not have taken her acknowledgment."

At the time of the execution of this deed, absolute on its face, the mortgage, *supra,* executed May 20, 1938, was in full force and effect.

As this court said in *Anderson* v. *Powell,* 146 Ark. 87, 225 S. W. 24, "In determining whether an instrument, absolute upon its face, was intended by the parties as a mortgage, the court 'will consider the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances, verbal or written, as well as the

acts and declarations of the parties.' *Scott, White & Co.* v. *Henry & Cummingham,* 13 Ark. 112. In the application of this test to the evidence in a given case, it is necessary to indulge the presumption that a deed is what it purports to be on its face, and that the burden rests upon one asserting otherwise to overcome the presumption by clear, unequivocal and convincing evidence. *Gates* v. *McPeace,* 106 Ark. 583, 153 S. W. 797."

In *Clark-McWilliams Coal Co.* v. *Ward,* 185 Ark. 237, 47 S. W. 2d 18, this court again announced the rule in this language: "The presumption arises that the instrument is what it purports to be; and, to establish its character as a mortgage, the evidence must be clear, unequivocal and convincing. By this is meant that the evidence tending to show that the transaction was intended as a security for debt, and thus to be a mortgage, must be sufficient to satisfy every reasonable mind without hesitation."

In Vol. 1 (8th ed.), Jones on Mortgages, p. 416, § 329, the text writer says: "Payment of taxes by the grantor after execution of a deed is further evidence that it was not intended as an absolute conveyance, but merely as a mortgage; while payment of taxes by the grantee indicates that he regarded himself as owner, and negatives the idea of a mortgage."

With the above well-established rules of law in mind, and after a careful review of the testimony presented by this record, we have reached the conclusion that appellees have failed to meet the test, or burden of proof, imposed upon them and that the trial court erred in holding otherwise.

There are many significant facts that stand out in this record.

At the time the deed was executed, Phillips Brothers had not paid their debt to appellant and the 1938 mortgage which Mrs. Phillips had executed as security for this debt was still outstanding and had not been satisfied. Immediately following the execution of the deed, appellant, Fox Brothers, placed it of record and made

a written request to the collector of Ashley county to transfer ownership of the land on the tax books from Mrs. Phillips to Fox Brothers Hardware Company. This was done, and thereafter, since 1940, all taxes accruing on the land have been paid by Fox Brothers without any attempt, so far as the record discloses, on the part of Mrs. Phillips to pay these taxes. It is also significant that the "Option to Purchase" executed by appellant at approximately the same time the deed was executed contained a provision reserving to appellant all oil, gas and mineral in and on this land.

Just why it was necessary for Mrs. Phillips to execute a second mortgage in favor of appellant approximately two and one-half years after the first mortgage on identically the same land, securing the same debt, is not satisfactorily explained.

"One of the recognized tests on the issue of mortgage or no mortgage is the relationship between the consideration for the conveyance and the actual value of the property conveyed," *Newport* v. *Chandler*, 206 Ark. 974, 178 S. W. 2d 240, 155 A. L. R. 1096.

On this question as to the value of the land at the time the deed in question was executed, December 9, 1940, we think the preponderance of the testimony supports appellant's contention that its value at that time was approximately $1,000.

On behalf of appellant, the testimony of F. L. Parsons, R. E. Farrar, Thomas Compere and Wm. C. Norman, all familiar with the land here involved and land values in the vicinity, was to the effect that this tract of land was worth approximately $1,000 December 9, 1940, when the deed was executed.

On behalf of appellees, two witnesses, Mrs. Phillips and L. L. Morris, testified on land values. Mrs. Phillips testified: "Q. When did you first learn that you had signed a deed and not a mortgage? A. Sometime in 1943, when I intended to lease the land for oil development. I learned then that I had signed a deed and not a mortgage. . . . Q. Now, going back to the oil lease. What

price were you offered per acre for a lease on the land for oil and gas development? A. I was offered $5,000 for a lease on the land if I could get the title back to the land from Fox Brothers. Q. Have you been offered any price for the land since this controversy has come up? A. Yes, sir, I have been offered $8,000."

It would appear from this testimony that Mrs. Phillips does not confine her estimate of values to the time when she executed the deed in question, December 9, 1940. We think a fair inference to be drawn from this testimony is that she was testifying as to values subsequent to 1943, after land values had appreciated on account of oil developments.

Appellees say in their brief: "What was the value of the land? L. L. Morris, the only competent witness who has testified, states that it was worth about $5,000 due to its proximity to Crossett, a closed town." The record reflects that this witness testified on August 30, 1944. We quote from his testimony: "Q. Are you familiar with land values in Ashley county, particularly in the neighborhood of the (land in question here)? A. Yes. Q. Are you familiar with the market value of land similar to this land and similarly located, taking into consideration the timber on it, its location, and like qualities? A. Yes. Q. What would you say is the fair market value of this particular 135.84 acres of land, taking those elements into consideration? A. I would say from $25 to $30 per acre. If cut up into small tracts, it would sell for a better price in view of its nearness to Crossett, a closed town, I would say from $40 to $50 per acre. I would say two-thirds of the land would be suitable for this purpose. Q. What would you say the oil rights, lease and royalties would be worth on this land? A. There is no wild-cat development going on in that neighborhood now and one could hardly sell a lease. Last winter, when there was such development, she should have sold a lease for approximately $5 per acre, and half royalties from $5 to $25 per acre."

We think that a fair deduction from this testimony is that Mr. Morris was not testifying as to land values on

December 9, 1940, when the deed in question was executed, but values subsequent thereto.

Nor do we find any evidence of fraud on the part of appellant in this case. If appellee's husband and her brother-in-law, while acting as her agents, practiced a fraud upon her and by misrepresentations induced her to sign an instrument which she thought was a mortgage, these acts on the part of her agents certainly could not be charged to appellant who was not a party to such fraud and deception, and, as we read the evidence, had no knowledge thereof.

For the reasons stated, the decree is reversed, and the cause remanded with directions to dismiss appellees' complaint for want of equity.

WILLIAMS *v.* STATE.

4424 196 S. W. 2d 751

Opinion delivered October 14, 1946.

Rehearing denied November 4, 1946.

Williams & Williams and *R. S. Dunn,* for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

ROBINS, J. Information was filed by the prosecuting attorney against appellant, charging him with murder in the first degree, alleged to have been committed on

January 9, 1946, by killing Inez Williams, wife of appellant. In a "bill of particulars" filed by the prosecuting attorney in response to a motion of appellant and order therefor by the court, it was set out that "The State of Arkansas relies upon assaults committed on or about the 9th day of January, 1946, upon the person of Inez Williams, deceased, by the defendant, Perk Williams, in which assaults the defendant used his hands, fist and feet in a cruel and inhuman manner upon the person of the said Inez Williams, deceased, which resulted in shock, physical pain, suffering and injuries, mental agony and anguish, which assaults by the defendant upon the person of Inez Williams, deceased, directly contributed to, hastened and accelerated her death."

Having pleaded "not guilty," appellant was tried by a jury, found guilty of manslaughter and his punishment fixed at imprisonment in the penitentiary for two years. From judgment in accordance with the verdict this appeal is prosecuted.

For reversal appellant argues only that the evidence adduced was not sufficient to authorize a finding by the jury that Inez Williams' death was caused by the assault alleged to have been made upon her by appellant.

Appellant and his deceased wife lived on a farm ten miles west of Booneville, Arkansas. They had four children, two of whom, a boy, Randel, aged thirteen, and a girl, Lois Harlowe, aged 9, were at home at the time the difficulty is said to have occurred. A son, J. C., was in the navy, but came home after the difficulty and before his mother's death. A daughter, Selma, was working in Kansas City. For at least three years before her death Mrs. Williams had been in bad health. She was afflicted with extremely high blood pressure, which caused her at times to expectorate blood and which finally caused abnormal conditions in her heart and other organs.

This version of the difficulty was given by Randel Williams: "I came in from school; when I got to the creek I heard daddy hollering, I knew he was drunk. I went on home and helped him carry in wood, then I went out to milk. When I was about half through my sister

came out on the porch hollering. She said for me to come in. When I came into the house my mother and daddy were fussing and fighting. I separated them and she sat down for a while. I went on out and milked my cow, and when I came back in they had started fussing again. Daddy started the fussing. He was hitting her, hitting her on the head mostly. He had hold of her hair. Mother came in the kitchen and he followed her. She got some of his wine. She said that she was going to pour it out, and he grabbed hold of the hair of her head. I was trying to keep him from beating her. We all fell down. She got up and went into the front room and sat down. He came in and grabbed hold of the hair of her head and began hitting and beating her and kicking her. He jerked her down. Mother was on the floor when he was kicking her. He was kicking her all over. He almost kicked her into the fireplace. The fire scorched her dress. I managed to get him down, and we went up to the Lewis', a mile and a half from my house. The licks left black and blue spots all over her body. When my mother came back from Lewis' she went to bed. After that, until she went to the hospital, she got up once in awhile and sat by the fire. She never did stay up over five or ten minutes. Before the fight she was spitting up blood, not very bad. After the fight she began spitting up more."

Mrs. Lizzie Shackleford testified that she visited Mrs. Williams at the hospital, where she was taken on January 15, and that Mrs. Williams' leg was "beat black" from the knee to the upper portion of her hip, and her left eye was black.

Mrs. Clara Lewis testified that on the night of the difficulty Mrs. Williams was unable to lie down in bed and had to be propped up.

Lois Harlowe Williams, nine-year-old daughter of appellant and deceased, corroborated her brother, Randel, as to the difficulty, saying, "He tromped her and kicked her and pulled her hair" after he had beaten her.

Dr. S. P. McConnell testified that when Mrs. Williams was brought to the hospital she had very high blood pressure, was unable to lie down, was gasping for breath

and spitting up blood; that she had had high blood pressure for three years. This occurred in his testimony: "Q. With the facts that he did assault her and kick her, and you knowing her condition prior to that time and after that time, can you tell this jury that the assault hastened her death? A. I'd not hesitate to say it would make her condition worse and her previous condition resulting from maltreatment would probably hasten her death by making it worse, but, as being the direct cause, I wouldn't say. Q. But it would have a tendency to aggravate it? A. Yes, in a way it would aggravate her condition, that would be the tendency. Q. Knowing her condition as you know it and knowing he did assault her on the 9th day of January, that he did kick her about the head, can you say that hastened her death? A. I would say that it would have a tendency to."

Dr. McConnell testified that she died at his hospital on January 19th of hypostatic pneumonia, caused by a leakage of blood into the lungs, due to the inability of the heart to take care of the circulation.

Appellant denied that he beat or kicked his wife on the occasion mentioned in the information. There was medical testimony introduced by appellant tending to show that the beating and kicking said to have been administered to her by appellant did not in any manner contribute to her death, but that her death resulted from the high blood pressure and complications caused by it.

"The question whether the death charged in an indictment for homicide was the result of the felonious or unlawful act of the defendant, so as to afford a basis for a charge of homicide, is one of fact for the jury to determine." 26 Am. Jur. 509.

In *Kee* v. *State,* 28 Ark. 155, this court approved this statement from Bishop on Criminal Law, § 653:

" 'Whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible, if death follows, he will be holden for murder or manslaughter, though the person beaten would have died from other causes, or would not have died from this one,

had not others operated with it; provided, that the blow really contributed mediately or immediately to the death as it actually took place in a degree sufficient for the law's notice.' ''

The jury evidently found, despite appellant's denial, that appellant had assaulted his wife in the manner detailed by the two children, and, of course, this finding is binding on us. *Bell* v. *State,* 93 Ark. 600, 125 S. W. 1020; *Quertermous* v. *State,* 95 Ark. 48, 127 S. W. 951; *Tiner* v. *State,* 109 Ark. 138, 158 S. W. 1087; *Allison* v. *State,* 161 Ark. 304, 256 S. W. 42; *Taylor* v. *State,* 186 Ark. 162, 52 S. W. 2d 961; *Arnett* v. *State,* 188 Ark. 1106, 70 S. W. 2d 38; *Link* v. *State,* 191 Ark. 304, 86 S. W. 2d 15; *Burnett* v. *State,* 197 Ark. 1024, 126 S. W. 2d 277.

So the only question for our decision is whether there was any proof from which the jury might find that the assault caused or hastened the death of Mrs. Williams. Admittedly, this woman was sickly and almost an invalid. The assault made upon her by appellant, as detailed by witnesses for the state, was a savage and brutal one. She was confined to her bed almost continuously from the time the assault took place until her death. In less than a week after the difficulty she was forced to go to a hospital where she died ten days after the attack had been made on her. When we consider all these circumstances along with the testimony of Dr. McConnell as to the tendency of the attack to aggravate her condition, we are impelled to the conclusion that there was substantial evidence to support the jury's finding that the attack made on Mrs. Williams by appellant caused or contributed to her death. See *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851; *Jackson* v. *State,* 206 Ark. 611, 176 S. W. 2d 909; *State* v. *Chiles,* 44 S. C. 338, 22 S. E. 339.

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

MORGAN *v.* HATTENDORF.

4-7937 196 S. W. 2d 997; 197 S. W. 2d 477

Opinion delivered October 14, 1946.

Rehearing denied November 18, 1946.

James A. Plotner, for appellant.

Price Shofner, for appellee.

GRIFFIN SMITH, Chief Justice. In street vernacular it might be said that the parties litigating have commuted between Probate, Chancery and Circuit Courts in a man-

ner disclosing diligence and legal finesse entirely consonant with the respective purposes of winning a decison.

As an example of conflict in jurisdiction, the appeal is from action of the Chancery Court in denying the plaintiff's prayer in an ejectment suit filed in Circuit Court.

Evaline Morgan, colored, died when about ninety years of age. In 1902 she purchased the real property which is the subject matter of this controversy, and continued to own it. In April, 1944, C. L. Kraft was appointed guardian of the person and [curator of] the estate of Evaline when she had become mentally incompetent. James L. Morgan was Evaline's stepson, and together they occupied a residence on the property. It was mortgaged to a bank to secure an indebtedness of more than $600, with interest. In July following his appointment Kraft petitioned for a probate order directing sale of Evaline's equity, alleging she was then an inmate of an institution where room, board, and certain benefits were provided, but "[she is not being supplied with] clothing and other things necessary for her well-being." The prayer was that sale be authorized under Act 402 of 1941. The property brought $1,125, of which $435.12 was paid to the guardian by Hattendorf. No appeal was taken from the judgment. September 20th Hattendorf gave Morgan notice to vacate, and upon his refusal suit in unlawful detainer was filed. October 11 the sale was confirmed,[1] a judgment recital being that the proceedings were according to law "and that the facts set forth in the petition for sale entitled the guardian to make said sale."

On Morgan's motion the cause was transferred to Chancery. Morgan was in possession. It was stipulated that appellant was not a party to the guardian's suit. Other points of agreement are (a) that Evaline had promised to will the property to her stepson in consideration of support; (b) that the cause was heard by Chancery ". . . and rights of the parties to the property were tried by that court"; (c) questions submitted included Morgan's contention that he was entitled to vacate

[1] The order directing sale was made at the April term, and the judgment of confirmation was at the October term.

former judgments on the ground of Evaline's agreement to make the will.

April 18, 1945, the Court found that Morgan had breached his contract to support Evaline, and therefore had no interest in the estate. The decree states that testimony on this issue was heard, reflecting contentions of each side.

Within a few weeks after this decree was rendered Evaline died. Time for appealing expired in October. June 20, nearly four months before the appeal period had terminated, Morgan probated a will executed by Evaline, in which the property was devised to him. This action was not challenged, and that record stands.

Upon the one hand, it is insisted that Morgan's property rights became final under the will, while on the other hand it is urged that his interest in the subject matter was adjudicated by the decree wherein it was found that consideration for the will had failed.

First—Hattendorf's Rights.—Appellee bought at a guardian's sale regular on its face. The judgment of confirmation contained recitals which, if true, gave the Court jurisdiction. But, as it is now urged, the agreed statement shows the sale was not advertised as provided by law, hence the judgment is void and the transaction may be collaterally attacked. Our view is that the sale comes within the rule announced in *Day* v. *Johnston,* 158 Ark. 478, 250 S. W. 532. See also *Collins* v. *Harris,* 167 Ark. 372, 267 S. W. 781; *Alexander* v. *Stack,* 172 Ark. 530, 289 S. W. 484; *Roberts* v. *Miller,* 173 Ark. 38, 291 S. W. 814; *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39; *Sullivan* v. *Times Publishing Co.,* 181 Ark. 27, 24 S. W. 2d 865; *Dodd* v. *Hopper,* 182 Ark. 24, 30 S. W. 2d 837; *Swindle* v. *Rogers,* 188 Ark. 503, 66 S. W. 2d 630; *Levinson* v. *Treadway,* 190 Ark. 201, 78 S. W. 2d 59; *Jordan* v. *The Midland Savings & Loan Co. of Denver, Colorado,* 193 Ark. 313, 99 S. W. 2d 260; *Tuchfeld* v. *Hamilton,* 203 Ark. 428, 156 S. W. 2d 887; *Fisher* v. *Cowan,* 205 Ark. 722, 170 S. W. 2d 603.

In the Day-Johnson case Act 263 of 1919, now Pope's Digest, § 6257, was discussed. After tracing the law's

course subsequent to 1891, the opinion says: "In short, the decision of *Apel* v. *Kelsey,* 52 Ark. 341, 12 S. W. 703, 20 Am. St. Rep. 183, is re-enacted as to those probate court judgments which contain the recitals that the court authorized and ordered the sale, that the guardian or administrator was duly and legally appointed and qualified, that the sale was conducted according to law, and that the facts set forth in the petition entitled the guardian or administrator to make the sale; and, this being true, private sales made under the orders of the court are not void when confirmed, and are subject to attack only on direct appeal . . . save for fraud or duress, as provided in this Act of 1919."

Hart v. *Wimberly* deals with a minor's rights in respect of homestead and it is not in conflict with *Day* v. *Johnston* because in Hart's case power of the Legislature to authorize sale of such homestead to pay debts was held to be in conflict with Art. 9, §§ 6 and 10, of the Constitution of 1874.

Day v. *Johnston* is cited in *Swindle* v. *Rogers* to support the holding that validity of the appointment of a guardian may not be collaterally attacked; and, in *Levinson* v. *Treadway,* Mr. Justice MEHAFFY said: "The probate court is a court of superior jurisdiction, and, when acting within its jurisdictional rights, its judgments are not open to collateral attack, if they contain the proper recitals and were not procured by fraud; but, if they show on their face that the statute was not complied with, or [if] it is shown that the judgment was procured by fraud or duress, they are open to collateral attack."

In *Tuchfield* v. *Hamilton* reason for the *Day* v. *Johnson* rule is discussed, the comment being: "This Act [of 1919] was intended to give assurance that one might acquire a good title at a probate sale, to the end that estates would not be sacrificed where their sale was required and had been ordered."

There is no suggestion of fraud, duress, or collusion in connection with the sale to Hattendorf. The only objection is that it was not advertised—a fact admitted by the stipulation. But it is not shown that Hattendorf knew of

this defect, nor was he required to inquire beyond court records to determine if his purchase would be legal.

Second — Morgan's Position. — When the probate court ordered a sale of the land, the guardian's ward was living. Morgan was not a necessary party; but, irrespective of this, he submitted his contentions to a court of equity and the decree was that he had not fulfilled the agreement to support Evaline. In fact, she was then in an institution at public expense—the county hospital. It is agreed that the will actually made in 1939 and subquently probated was pursuant to the same promise he set up in the Chancery case. Before the will could have become effective through death of the testatrix, she became insane, and there was a judicial finding that consideration had failed. There was no period of sanity during which Evaline could have revoked or destroyed the will. We think a complete answer to the fact that the will *was* probated is that the issue of Morgan's right to the property was adjudicated before the so-called devise became effective, *prima facie,* through Evaline's death.

Affirmed.

Mr. Justice McFaddin was absent and did not participate in the consideration or determination of this case.

Griffin Smith, Chief Justice (on rehearing). It is argued by appellant that the Court overlooked Act 402 of 1941. The statute was considered, but the result was not affected by reason of it. Although the parties agreed that proceedings were brought under the Act's terms, a mistake as to what law applied would not be of consequence if the Court had jurisdiction and proceeded by virtue of appropriate legislation.

Act 402 is entitled, "An Act providing for the sale of dower, curtesy and homestead rights and interest belonging to minors or persons of unsound mind and for other purposes". It was introduced as House Bill 228, but was amended by eliminating minors. Through error

the words "to minors" were not taken from the title. Although the rule is that when the meaning of an Act is in doubt the title may be looked to as an aid in determining the legislative intent, yet where, as here, the measure as finally adopted carried an amendment striking the word "minors" from the text, there is nothing to construe. The error is mentioned in order that lawyers who do not have access to official records of the General Assembly may have the information.

DANSBY SCHOOL DISTRICT NO. 34 *v.* HAYNES SCHOOL DISTRICT NO. "H."

4-7946 197 S. W. 2d 30

Opinion delivered October 21, 1946.

[redacted]

Smith & Smith, for appellant.

Hal B. Mixon, for appellee.

SMITH, J. This cause was heard in the court below upon an agreed statement of facts from which we copy the following recitals.

On June 2, 1945, a petition was filed with the County Board of Education of Lee county, signed by nineteen electors comprising a majority of the electors residing in the Dansby School District No. 34, requesting the School Board to dissolve that district and attach its territory to Haynes School District No. H. Notice was published, as required by law, that the petition would be presented to the County Board of Education on June 26, 1945, at 2 p.m. at the office of the county school examiner.

On June 20, 1945, a writing was filed with the County Board signed by a number of electors who had signed the original petition, demanding that their names be stricken from said original petition. The writing filed June 20th contained sufficient signatures to reduce the number of signers of the original petition to three names, a number less than a majority of the qualified electors in the district, there being twenty-nine qualified electors residing in the district.

On June 26th, the date set for the hearing of the original petition, the county examiner announced that the board would not meet as several of the members could not attend, and there was no quorum present, and the chairman announced that the meeting would be adjourned for lack of quorum until 2 p.m., June 29, 1945.

On June 29, 1945, shortly prior to the meeting of the board, with all its members present, a third writing was filed with the County Board, signed by a number of electors who had signed the writing filed June 20, 1945, stating that they had reconsidered their action in withdrawing their names, and requesting that their names be reinstated on the first petition.

The attorney for the Dansby District was notified that the board was meeting, and that a third writing had been filed, after which the attorney appeared and asked the board for a continuance of the hearing, which motion was denied. The board thereupon considered the petition and the writings referred to, and ordered the consolidation and made and entered appropriate orders accomplishing that purpose. This third writing filed with the board contained sufficient signatures, which if reinstated would constitute a majority of the electors in the Dansby District. No notice of any kind was given of the filing of this third writing, referred to by the witnesses as the third petition.

On the appeal to the circuit court the order of the board in abolishing the Dansby District, and consolidating its territory with the Haynes District was affirmed, and this appeal is from that judgment.

The proceedings above recited were had under the authority of Act 327 of the Acts of 1941, which created a system of county boards of education. Section 10 of this act authorizes the board to hold both called and adjourned sessions, and the board had the same authority to take any action on the day to which it adjourned as it had on the day on which it convened.

The important questions in the case are whether the board had the authority to permit an elector to restore his name to the petition, after having asked that it be stricken, and if so whether a new petition was required after the stricken names had been restored.

A new petition was not required. There was in fact only one petition and it is conceded that proper notice of the intention to present it was given. The fact that

names were stricken from and later restored did not make a new petition. The only petition in the case was one asking the consolidation of the districts. Jurisdiction to act was conferred upon the board by filing a proper petition containing the requisite number of signers, and giving the notice thereof required by the statute. These requirements having been met, the board had the authority to consider and pass upon the petition and its action accorded with the provisions of § 11481 of Pope's Digest.

This section requires the board to find, among other findings, whether the required number of electors had signed the petition and provides that "any elector signing said petition may have his name stricken from said petition, upon written demand, at any time prior to the final action of said county board upon said petition."

Unquestionably an elector has the right to have his name stricken from the petition. *Rural Special School District* v. *Special School District,* 186 Ark. 370, 53 S. W. 2d 479. But does he not also have the right to have his name restored, provided the request for that action is taken "at any time prior to the final action of said county board?" The intendment of the statute appears to be that the signers of the original petition have the period of time from the date the original petition was filed, to the time of submission for final action by the board, to determine whether their names shall be withdrawn. If when the petition is finally submitted to the board for its action, an elector who has signed the original petition has indicated in writing that he wishes his name to be considered as a signer, then his signature has not been withdrawn.

The case of *Texarkana Special School Dist.* v. *Consolidated School Dist. No. 2,* 185 Ark. 213, 46 S. W. 2d 631, involved the statute then in force governing the change of boundaries of school districts, which could be done upon a petition filed with the county court. We likened the filing of this petition to an election, in which the elector had cast his ballot when the petition was filed, the filing of which, in the absence of deception or fraud practiced upon the elector, became irrevocable so far as

the casting of his ballot is concerned. The same analogy to an election is found in the existing law, except that the time of the election is changed from the date of the filing of the petition to the time when the petition is presented to the board for its final action. In other words, the election has not been held until the petition has been presented to the board for its final action, prior to which time the elector has the right to determine whether his name signed to the original petition shall be included or excluded.

It is essential, of course, that the petition when filed contain the requisite majority, but the question whether it did contain that majority is to be determined as of the time the petition is presented to the board for final action. Prior to that time names appearing upon the petition may be stricken upon the written demand of the elector who had signed, but even so it may be restored provided the elector makes written demand that this be done, and the instrument referred to as the third petition was such a demand. This demand does not add a new name to the original petition, it merely restores a name to that petition which appeared thereon when it was filed.

It was urged that the board erred in refusing to grant a continuance, the purpose of which is not stated, but may be surmised to have been to afford opportunity to solicit vacillating petitioners to again change their minds, but we think this was a matter within the discretion of the board, and no abuse of this discretion is shown, as the electors had ample time to be solicited and to have determined whether they wished their names to be included or excluded.

The judgment is therefore affirmed.

DUMAS *v.* OWEN.

4-7950 196 S. W. 2d 987

Opinion delivered October 21, 1946.

Rehearing denied November 18, 1946.

A. A. Thomason, W. H. Kitchens, Jr., Wade Kitchens and *Melvin Chambers,* for appellant.

Garner & Clegg, for appellee.

SMITH, J. This is the fourth appearance of this case in this court. Opinions on former appeals are *Owen* v. *Dumas,* 200 Ark. 601, 140 S. W. 2d 101; *Dumas* v. *Smith, Chancellor,* 201 Ark. 1057, 147 S. W. 2d 1013, and *Dumas* v. *Owen,* 205 Ark. 777, 171 S. W. 2d 294. We will not review these decisions except in so far as they are important to the decision of the question raised on this appeal.

The relevant points decided on those appeals were as follows: E. L. Owen owned, at the time of his death in 1912, 240 acres of land, and was survived by his widow

and ten children. W. E., one of these children, claimed to have acquired title to all the lands owned by his father, at the time of his death, under deeds from his mother, his insistence being that the will of his father empowered his mother to execute these deeds. We held on the first appeal that the will had not conferred the power to execute these deeds, and that they were ineffective to convey the title. The primary purpose of the will, as appears from the opinion on the first appeal was to support testator's widow after his death, and while we held that W. E. Owen had not acquired title to the land, we did hold that he had a valid claim against the estate to be reimbursed for contributions made to his mother for her support, and was entitled also to be reimbursed for the discharge of certain liens against the lands, and the decree was remanded with directions to state an account. It was sought to prohibit that proceeding in the case reported in 205 Ark. *supra,* where that relief was denied.

The account was stated and the decree approving it was affirmed October 26, 1943. See 205 Ark. 777, *supra.* The decree there affirmed, which was rendered June 22, 1942, recited, "that the plaintiff is entitled to have and recover of and from the following described land to-wit: southeast quarter of section 18, and the west half, southwest quarter of section 17, all in township 18 south, range 20 west, being the property of the estate of E. L. Owen, deceased, the sum of $2,635.12, with six per cent. interest thereon from the 19th day of April, 1942, until paid. That said sum is declared to be a lien upon said land to secure the payment thereof, which lien is now and forever established and fixed, provided, however, that the defendants or either of them, or any one of them, may redeem from said lien and discharge same by the payment of said amount, together with interest and any costs of this proceeding which might be due the plaintiff herein." It was ordered that the foreclosure of this lien shall be postponed during the life of the widow of E. L. Owen. The right there given to pay this debt and discharge the lien was never exercised. Had it been the litigation might have ended.

On August 5, 1945, the widow of E. L. Owen, the testator, and certain of his heirs, executed a mineral deed to Henry Stevens, trustee, conveying to Stevens an undivided 9/20ths interest in the oil and gas in and under the southeast quarter of section 18, and the west half of the southwest quarter of section 19. The purpose of this trust was not stated, but was for the evident purpose of defending litigation prosecuted by W. E. Owen in regard to the land.

Subsequently, on a date not stated, W. E. Owen filed a petition for an order to sell the above described lands in satisfaction of the decree which had awarded him judgment for $2,635.12, in which he alleged the death of his mother, and that no part of the decree had been satisfied.

On a date not stated, a response to this motion and petition was filed, which recited the previous history of this litigation. It was alleged that on July 21, 1937, the widow and the heirs of E. L. Owen executed to W. E. Owen a mineral deed covering all the land, that this deed was procured through the false and fraudulent representation that it was required to negotiate and sell an advantageous oil and gas lease which was to be executed for the purpose of satisfying the lien of W. E. Owen against the land, and of providing for the support of Mrs. E. L. Owen, their mother, and that there was no other consideration for the deed, that after receiving this deed, W. E. Owen made no effort to lease the land as had been agreed he would do, but instead brought suit to quiet title under the deeds he had obtained from his mother, which were canceled under the opinion in the first appeal. It was further alleged that this deed to W. E. Owen, dated July 21, 1937, was not filed for record until June 29, 1939, and since being placed of record has so clouded the title that Mrs. Owen, the widow, could make no lease or other disposition of the land as the will of her husband authorized her to do. She and the heirs who joined in the response to W. E. Owen's petition for an order of sale, prayed that the deed to W. E. Owen be canceled as having been obtained by fraudulent

representation, and without any consideration except these fraudulent representations.

These respondents further alleged that in May, 1940, they had obtained a purchaser for a lease, which they could not consummate without the consent of W. E. Owen, which he refused to give.

This petition for an order to sell in satisfaction of the judgment in favor of W. E. Owen, and the response thereto, apparently raised all the issues which were raised in the subsequent proceedings, some of which will presently be discussed.

The prayer for an order of sale was granted, and in the decree ordering this sale, rendered May 22, 1944, it was ordered that unless the judgment was paid within forty days from the date of the decree, the land should be sold by a commissioner appointed to make the sale on July 27, 1944. There is no ambiguity in this decree as to the interest in the land ordered sold.

The decree reads: "That upon the sale of said property as aforesaid, and the confirmation thereof by the court, all the right, title and equity of redemption of the defendants (and all the heirs and their wives are named) in and to said property, and any part thereof, shall be and the same is hereby adjudged from that date to be foreclosed and forever barred thereafter."

In the response filed by Stevens, it was alleged that the said W. E. Owen, after obtaining this conveyance dated July 21, 1937, not only refused to execute an oil and gas lease, but refused and prevented them from doing so, that they did in fact negotiate a lease conveying 17/20th of the mineral interest for a consideration of $4,600 to a purchaser ready and willing and able to pay that sum for the lease, but that they were unable to consummate the sale for the reason that the deed to W. E. Owen constituted a cloud on the title which he declined to remove, and he declined also to join in the execution of the lease which they had negotiated. It was prayed in this response that the deed to W. E. Owen, dated July 21, 1937, be canceled, and that the judgment in W. E. Owen's favor be reduced by crediting thereon

certain expenses incurred by other heirs of E. L. Owen in the support of their mother. Notwithstanding this response, the court made the order for the sale of the property set out above.

The sale was had on the day and upon the terms provided in the decree of sale, and there can be no question, but that if some person, not a party to the litigation, had been the purchaser, he would have acquired, after the confirmation of the sale, the entire title to the 240-acre tract, including the oil and gas.

The commissioner appointed to make the sale made it, and filed his report showing a sale to W. E. Owen for the consideration of $12,500, and in due course this report of sale was approved, as was also the deed from the commissioner to W. E. Owen. This deed recited the conveyance to Owen of the entire interest of all the heirs of E. L. Owen, and all other parties to the suit, conveying "all and singular the rights, privileges, hereditaments and appurtenances thereunto belonging, or in anywise appertaining." These proceedings were had in the case styled *W. E. Owen* v. *Emma Dumas, et al.*, No. 5641, which was the number and style of the case reported in 200 Ark., *supra.*

This was apparently the end of that litigation as no appeal was prayed or taken from any of the orders and decrees set out above. When the response to the petition for the order of sale was filed, there was filed also a *lis pendens* notice advising and warning that respondents were praying the cancellation of the deed to W. E. Owen from the widow and heirs of E. L. Owen, dated July 21, 1937.

The commissioner's deed to Owen was dated September 25, 1944, and was filed for record that day. On September 23, 1944, before the time for an appeal from the order confirming the sale or the decree of sale had expired, a new suit was filed by Stevens, trustee, styled *Henry Stevens, Trustee, plaintiff,* v. *W. E. Owens, et al., defendants.* This suit was given a new number, to-wit: 6423. The prayer of this complaint reads as follows: "Whereas plaintiff prays that he be declared the owner

in fee of a undivided 9/20ths of the oil and gas and other minerals of said land, that his title thereto as against the defendants be forever quieted and confirmed, and the mineral deed from defendant, dated July 21, 1937, as to plaintiff's mineral interests be declared null and void, and a cloud upon his title and that the same was executed without authority under the will of W. E. Owen, and that in every event the same be subordinated to the interests of plaintiff and that defendants be estopped to claim adversely to plaintiff's interest."

This complaint filed by Stevens is a very voluminous instrument and recited in detail the preceding litigation. It alleges that before the bidding at the commissioner's sale began, W. E. Owen caused his attorney to announce publicly to the bidders in the course of the bidding, that Owen owned all the oil and gas and other minerals in the land being sold, and that but for this announcement a bid of from twenty to twenty-five thousand dollars would have been made.

The deposition of one Shep Beene was taken on interrogatories, which does not appear to have been crossed by W. E. Owen. The witness stated that he attended the sale for the purpose of bidding and that in his opinion the mineral rights were worth from fifty to sixty dollars per acre, and that he would have bid that amount but for the announcement that the mineral rights were not being sold. As the bidding progressed he said to the attorney who made the announcement, "We are getting the surface and timber pretty high, are we not?"

Other heirs, some owning interests not represented by Stevens filed an intervention adopting the allegations of Stevens' complaint and joined in the prayer for the relief prayed by him. A motion was sustained to dismiss this intervention, and this appeal is from that decree.

It is argued that this intervention raised issues which had been adjudicated with one exception, presently to be discussed, and this appears to be true.

It may be true that the deed to W. E. Owen from the widow and heirs constituted him a trustee for the benefit of himself and his mother and the other heirs, and

that he proved unfaithful to his trust, in that he refused to execute the lease which the deed to him contemplated he would do, and that he should at least have permitted the heirs to execute the oil and gas lease which they had negotiated. It may also be true that it was error to order the sale in satisfaction of the debt due W. E. Owen under the facts stated. But these issues were all raised in the pleadings praying and resisting the order of sale to satisfy the lien, yet a decree was rendered ordering the sale, from which no appeal was taken. The sale was reported, and no exceptions thereto were filed and it appears to have been confirmed and the commissioner was ordered to execute to W. E. Owen, as purchaser, a deed to the land sold, all of it, and all interests therein. No appeal was prosecuted. On the contrary, within the time when an appeal might have been taken, Stevens, as trustee, filed a new suit under a new number, in which he sought to litigate the questions raised in the pleadings before the court when the decree fixing the date for the sale was rendered. There must be an end to litigation and there was an end to this litigation when no appeal was taken from the decree fixing the date for the sale of the land in satisfaction of the debt due W. E. Owen and the subsequent proceedings under that order. The only new question raised in the intervention, from the dismissal of which is this appeal, is that Owen's attorney stated at the sale that the mineral rights were not being sold. It would have been a valid objection to the confirmation of the commissioner's report of the sale to have shown that Owen had stifled the bidding, but no such objection to the confirmation of the report of the sale was made. It was not shown when interveners became aware of this fact, if it occurred. But it was alleged to be true in the complaint in the case No. 6423 which Stevens filed September 23, 1944, which was two days prior to the date on which the court approved the commissioner's deed.

Nor does it appear that the bidding was in fact stifled to any great extent by W. E. Owen. He bid, and, when his note given at the sale matured, paid the commissioner the amount of his bid and note, to-wit: the sum of $12,500. It was not shown that the land possessed any

great value aside from the mineral rights. The heirs complained that they had not been permitted to consummate a lease which they themselves had negotiated for 17/20ths of the mineral rights for a consideration of $4,600.

It is true Beene testified that he would have bid as much as fifty to sixty dollars per acre, but for the announcement that the mineral rights were not being sold. This would have been from twelve to fourteen thousand four hundred dollars. Evidently others did bid, otherwise Owen might have bought the land for the amount of his judgment. But whatever the truth on this new issue may be, the fact remains that this objection to the confirmation of the sale was not made when it might and should have been.

The confirmation of the decree and report of sale is conclusive of any issue which might and should have been raised in opposition to the confirmation, and all the issues now sought to be raised could then have been raised and we must give conclusive effect to these confirmation orders. See *Jones* v. *National Bank of Commerce of El Dorado,* 207 Ark. 613, 182 S. W. 2d 377, and cases there cited. It follows that the decree from which is this appeal must be affirmed, and it is so ordered.

H. B. DEAL & COMPANY, INC., *v.* LEONARD.

4-7963 196 S. W. 2d 991

Opinion delivered October 21, 1946.
Rehearing denied November 18, 1946.

Ezra Garner and *Leo F. Laughren,* for appellant.

Sam Goodkin, J. V. Spencer and *L. B. Smead,* for appellee.

McHaney, Justice. Appellant is a foreign corporation, authorized to do business in this state. Appellees, other than Leonard, are Charles E. May, Albert C. Merritt, Slim Upton, Aubrey O. Fielder and Clarence T. Key. They brought this action against appellant, under the provisions of the "Fair Labor Standards Act of 1938," U.S.C.A. Title 29, § 201 *et seq.,* as amended, to recover at the rate of time and one-half pay for all time worked by each of them in excess of 40 hours per week. They alleged in the complaint their employment by appellant in the construction of the Ozark Ordnance Works near El Dorado, Arkansas, which plant was designed and constructed by the U. S. Government for the manufacture of anhydrous ammonia and ammonium nitrate to be used in the manufacture of munitions of war, and which product was to be shipped by the Government outside the state of Arkansas; that they were employed by appellant to check and make records of incoming building material, supplies and equipment as they were unloaded from railroad cars or trucks moving in interstate commerce; that they were engaged in commerce or in the production of goods for commerce, within the meaning of said act as amended; that they were not paid for overtime for the hours worked in excess of 40 per week; and that appellant was indebted to them for such overtime pay. Appellant's answer admitted its corporate capacity, but denied all

other allegatons of the complant. In addition it alleged that it entered into a contract with the U. S. A. to perform certain services in connection with the construction of the Ozark Ordnance Works, hereinafter referred to as the Plant, and attached a copy of said contract as an exhibit to its answer; that under said contract appellees were employees of the U. S. A., and, as such, were exempt from the provisions of said Act; that neither of the appellees was engaged in commerce or in the production of goods for commerce, as alleged by them, but were engaged in a local matter; that the work of appellees as set out in the complaint was not in interstate commerce, as the materials and shipments had reached their point of destination in Arkansas, and had come to rest at and before the times appellees made the records mentioned in the complaint, and that said records were never the subject of interstate commerce; and that the material and equipment referred to in the complaint was the property of the U. S. A., and as such did not constitute interstate commerce, but that said shipments were administrative acts of the U. S. A. in the prosecution of a war.

By stipulation a jury was waived and the case was submitted to the court sitting as a jury. Trial resulted in findings and judgments in favor of appellees for overtime pay found to be due each of them, plus the same amount as liquidated damages, plus an attorney's fee in each case of $250. The total judgment in favor of each is as follows: For Leonard, $1,057.60; for Merritt, $672.22; for Fielder, $509.68; for Key, $728.62; for May, $563.10; and for Upton, $778.82. This appeal followed in due course.

The applicable provisions of the Fair Labor Standards Act, upon which the action is based, are: "Section 207 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . ."

"(3) For a work week longer than 40 hours . . . unless such employee received compensation for his employment in excess of the hours above specified at a

rate not less than one and one-half times the regular rate at which he is employed.

"Sec. 216 (b). Any employer who violates the provisions of . . . section 7 of this Act shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." The Act defines the words "commerce," "goods" and "produced" as follows:

"Sec. 203 (b). 'Commerce' means trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof.

"(i). 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j). 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state.

"Sec. 202. *Congressional finding and declaration of policy.* (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, or labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free

flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b). It is hereby declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938."

Appellees state that they are covered by said Act "because (1) they were engaged in commerce, or (2) because they were engaged in an occupation necessary to the production of goods for commerce," and in addition they quote and rely upon the provisions of § 203 (j) which defines the terms "produced" and the phrase "production of goods" which has already been quoted.

The questions presented for decision, as we see it, are: (1) Were the appellees or any of them "engaged in commerce or in the production of goods for commerce?" (2) Was the material and equipment referred to in the complaint the property of the U. S. A. and, therefore, was never in commerce within the meaning of said Act?

A congressional finding and declaration of policy of the Act are set out in § 202, and the U. S. Supreme Court, in *U. S.* v. *Darby,* 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A. L. R. 1430, in stating the "evils aimed at by the Act," said: "As we have said, the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate

commerce which it has in effect condemned as 'unfair.' as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce. See *Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245, 49 S. Ct. 112, 73 L. Ed. 311, 60 A. L. R. 1060; *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 54 S. Ct. 423, 78 L. Ed. 814.'' If, therefore, these appellees were engaged in commerce or in the production of goods for commerce, they are covered by the Act.

The appellees were all non-manual workers. They were clerks, record keepers, time keepers, and checkers of material that were shipped into the plant and checked material and supplies out on requisitions by various authorized persons to be used in the construction of the plant. One or more of them were promoted to the position of foreman for a time, and one, Upton, was a water man, making deliveries of drinking water and cups to the other appellees and other employees and maintained toilet facilities, etc.

It appears to be undisputed that all material and supplies shipped in for this plant are consigned or billed on the lading to the Area Engineer of the War Department, El Dorado, Ark., for the account of H. B. Deal & Co., Inc. Prior to the construction by the Government of a railroad track from Norphlet to the Plant, some 3 or 4 miles distant, material and equipment for the Plant that arrived by rail and billed as above stated are delivered to the Area Engineer and hauled to the Plant in Government trucks. After the completion by the Government of the short line of railroad all cars of material and equipment were delivered by the carrier, Mo. Pac. Ry. Co., to the Area Engineer at the junction of its switch track with the Government's line, and was moved to the Plant over the Government's line by a Government locomotive. All the work done by the appellees in connection with such shipments was done at the plant, some 3 or 4 miles away from Norphlet. It may be true, possibly is, that one or more of the appellees did some checking of material and made some records thereof when cars were unloaded onto Government trucks prior to the completion of the line from Norphlet to the plant. We think this fact, if it be a

fact, would not furnish a sound reason to say that appellees were engaged in commerce within the meaning of the Act, for the reason that the interstate journey of the shipment had come to rest when the carrier delivered the shipment to the Area Engineer at the point of destination. While El Dorado was the named point of destination of all shipments, by an arrangement with the carrier, the cars were delivered at Norphlet, a small town near El Dorado, at least after the Government's line was built from thence to the plant. We assume, for the purpose of this opinion, that all shipments originated outside of Arkansas. And for the further reason that the material and equipment were delivered to the agent of the Government or to the Government itself and by him or it to appellant, the ultimate consumer. They were not to be shipped out in commerce again, and, of course, the buildings, and the machinery and equipment installed in them were not the subjects of commerce. The plant was a very large and costly one. Many buildings were erected, covering several thousand acres of land.

In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460, the court said: "The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it is intended that interstate movements should terminate." In this connection Major Campbell, Area Engineer, testified without any dispute that he was the authorized representative of the Government, the contracting officer, Corps of Engineers, in the construction of the plant, and that the United States Government accepted the box cars and took them into its possession and under its control at the spur. The bills of lading indicated where the interstate movement terminated and the testimony of Major Campbell shows that the cars of material and equipment were delivered to the ultimate consumer and that their movement in commerce had ended before any of the appellees did any work in connection with them. So, they were not engaged in commerce within the meaning of said Act.

But appellees insist that, if they were not engaged in commerce, they were engaged in the production of goods for commerce. This argument is based on the fact

that the plant was to be used in the manufacture and shipment of ammonium in commerce when completed, which is, in our judgment, a false assumption, since the Government would use the product of the plant for the manufacture of munitions to be used in the prosecution of the war in which we were then engaged, and, while it would cross state lines, the Government is the sum of all the states and of itself knows no state lines in the manufacture and shipment of war material. Moreover, the Act does not purport to apply to the Government. It applies to employers of labor who are engaged in commerce. It says: "No employer shall . . . employ any of his employees who are engaged in commerce," etc. Clearly, it has no reference to the Government. But the proof shows that another company operated the plant after completion, and it is not contended that any of the appellees were connected in any way with its operation.

In *Brue* v. *J. Rich Steers, Inc.,* 60 Fed. Supp. 668, both points were decided against appellees here. The court said: "It is further contended by plaintiff that he was engaged in the production of goods for interstate commerce as he was handling materials which had been shipped in interstate commerce, including steel forms, stone, sand, tremie cement, and structural steel. This argument must be eliminated for these materials had passed into the actual physical possession of the ultimate consumer. See Fair Labor Standards Act, 29 U.S.C.A., § 203 (i).

"It is also urged in behalf of plaintiff that in helping to construct a dry dock to be used in the building of vessels for interstate commerce, he was engaged in the production of goods for interstate commerce. A completed dry dock, when used for the building and repair of vessels, may be so closely related to interstate commerce that its employees might be regarded as being engaged in interstate commerce. But a distinction must be made between the original construction of a dry dock before it is erected and used and after it is erected. *Barbe* v. *Cummins Construction Co.* (D. C.), 49 Fed. Supp. 168, Affirmed, 4 Cir., 138 Fed. 2d 667.

"One employed as an inspector of concrete work in the original construction of a new building is not himself engaged in interstate commerce or in the production of goods which pass into interstate commerce, nor did his services directly relate to interstate commerce, although the building, when finished, is intended for use for the production of goods for interstate commerce. *Noonan* v. *Fruco Const. Co.*, 8 Cir., 140 Fed. 2d 633; *Scott* v. *Ford, Bacon & Davis* (D. C.), 55 Fed. Supp. 982; *Wells et al.* v. *Ford, Bacon & Davis*, 7 Labor Cases, Par. 61, 929, affirmed 6 Cir., 145 Fed. 2d 240. See, also, *Dollar* v. *Caddo River Lumber Co.* (D. C.), 43 Fed. Supp. 882.

"Such is the interpretation by the Wage and Hour Division of the Department of Labor, in Bulletin No. 5, paragraph 12, which says that—'The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act.''

See, also, the Noonan and other cases cited in the above quotation. What was said in the Noonan case applies with equal force here. To interpolate just a little, "It is difficult to perceive how the close ties and connections of the watchmen (checkers and clerks) to the productive processes involved in the construction of the plant can be stretched to also cover the productive processes involved in the making of munitions. The operations of the watchmen (checkers and clerks) were not a vital function of, nor an integral part in, the productive processes connected with the manufacture of munitions, nor did the work have any of the essential characteristics of munition manufacture."

In *Dollar* v. *Caddo River Lumber Co.,* 43 Fed. Supp. 822, Judge MILLER of the Western District of Arkansas, held, to quote a headnote: "An employee engaged in construction of sawmill to replace sawmill destroyed by fire was not engaged in 'commerce' or 'production of goods for commerce' within the Fair Labor Standards Act, notwithstanding that new sawmill, after its construction, was used in commerce and in production of goods for commerce. Fair Labor Standards Act, 1938, 29 U.S.C.A. 201 *et seq.*"

To support their contention that appellees were engaged in commerce "because their activities were in connection with the unloading of materials moving in interstate commerce," appellees cite and quote from a number of cases, *Walling* v. *Goldblatt Bros., Inc.,* 128 Fed. 2d 778; *Walling* v. *Mutual Wholesale Food & Supply Co.,* 46 Fed. Supp. 939; *Clyde* v. *Broderick.* 144 Fed. 2d 348; and a number of others, but especially do they rely on *Clyde* v. *Broderick,* of which thay say the "facts were identical to those in the case at bar." We cannot agree with appellees that the facts in that case are identical or even similar to those here. In that case the "trial court sustained a motion to dismiss the action on the grounds that it appeared from the complaint that the employees were not 'engaged in commerce or in the production of goods for commerce' within the purview of the Fair Labor Standards Act." On appeal the Circuit Court of Appeals for the Tenth Circuit held that the complaint did state a cause of action and summarized it as follows: "Fairly summarized, the complaint states that Broderick and Gordon were engaged in the construction of an ammunition plant at Salt Lake City, Utah, pursuant to a contract with the United States Government, and the Remington Arms Company. That during the construction period, equipment, tools and other supplies either owned by Broderick and Gordon or rented or purchased by them, for use on the project were transported on their order from points outside into the state of Utah, and after use there boxed, crated and shipped to points outside the state. That the appellants were employed as warehouse or tool inventory clerks 'to handle the tools and equip-

ment which were shipped to the Utah Ordnance Plant from points outside the state of Utah,' and to prepare the tools and equipment thus shipped, and when said tools and equipment were no longer needed on the project they boxed, crated and otherwise prepared them for shipment to various points outside the state of Utah. Appellants claimed overtime hours in excess of the statutory workweek and prayed statutory compensation therefor . . ."

The distinction between that case and this is the allegation in that case that the plaintiffs were engaged in unloading of tools and equipment which had been shipped in interstate commerce and the preparation of tools and equipment for shipment in interstate commerce, whereas here the material and equipment which had moved in interstate commerce had been delivered to the ultimate consumer and its interstate movement had ended before appllees had anything to do with it, and such material and equipment went into the construction of the plant, without either allegation or proof that any part of it was to be prepared for shipment or be reshipped in interstate commerce.

We think all the cases cited and relied on by learned counsel for appellees are distinguishable from the case at bar and have been by counsel for appellant in the reply brief. To take them up and discuss each of them would unduly extend this opinion.

We, therefore, hold that appellees were not engaged in commerce or in the production of goods for commerce within the purview of the Fair Labor Standards Act, and that said Act has no application to the Government of the United States of America in its activities in the prosecution of a war.

The learned trial court erred in holding otherwise and its judgment is accordingly reversed and the cause dismissed.

Robins, J., dissenting. I respectfully dissent from the majority holding as to all of the appellees except John Allen Upton, whose work apparently did not in any

manner pertain to the production or movement of goods in interstate commerce.

The duties of appellees, George G. Leonard, Charles E. May, Albert C. Merritt, Aubrey O. Fielder and Clarence T. Key, were to check inbound shipments of material, consigned to their employer. They did this work by inspecting the freight as it was unloaded from the railroad cars or from the trucks. As one of the appellees put it: "I performed these duties as the materials were being unloaded from the railroad cars and trucks." More than half of these shipments originated outside the state of Arkansas. The checking was not done *after* delivery of the freight to their employer, but *while* such delivery was being effected. Therefore, when their work was performed the movement of the goods from point of origin outside of Arkansas to consignee was still incomplete.

Even if those employees of appellant who were actually engaged in construction should be held not to be engaged in work of an interstate nature, it does not follow that all of appellees were excluded from the benefits of the Fair Labor Standards Act. The interpretative bulletin of the Wage and Hour Division of the Department of Labor (Bulletin No. 5, paragraph 12), which is quoted in the majority opinion, while it states that the employees engaged in the original construction of buildings are not *generally* within the scope of the Act, concludes thus: "There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act." "The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described he is covered by the Act." *Walling* v. *Jacksonville Paper Company,* 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460.

It seems to me that these checkers were engaged in work that was essentially a part of interstate commerce as defined in various decisions of the Supreme Court of the United States. The same kind of work as that involved here was held to be subject to the Fair Labor Standards Act in the case of *Walling* v. *Goldblatt Bros., Inc.,* 128 Fed. 2d 778, certiorari denied 318 U. S. 757, 63 S. Ct. 528, 87 L. Ed. 1130. I think the reasoning of the opinion in that case and the authorities cited therein control here.

The contention that the Fair Labor Standards Act does not apply in the case at bar because the appellant was performing a contract for the United States Government is, in my opinion, completely answered by the opinion of the supreme court of Iowa in the case of *Umthun* v. *Day & Zimmerman, Inc.,* 235 Ia. 293, 16 N. W. 2d 258.

I am authorized to state that Mr. Justice MILLWEE concurs in the views expressed above.

PEARCE *v.* CHARLES J. UPTON & COMPANY, INC.

4-7965 196 S. W. 2d 761

Opinion delivered October 21, 1946.

Hale & Fogleman and *Rieves & Smith,* for appellant.

Everard Weisburd, for appellee.

ROBINS, J. This suit was begun in the court below by Elizabeth Baker Crawford, as executrix of the estate of

E. B. Crawford, deceased, against E. B. Crawford & Company, Incorporated. The substance of her complaint was that on May 1, 1939, F. S. Hubbard and R. E. Lawson had executed their promissory note for $2,500, payable in $50 monthly installments, to E. B. Crawford & Company, but that in truth said note really belonged to E. B. Crawford personally, having been given by Hubbard and Lawson for the purchase money of E. B. Crawford's interest in National Funeral Home, of West Memphis; and that after the death of her testate, E. B. Crawford & Company, with knowledge that the note really belonged to the Crawford estate and without notice to her, accepted a settlement from one of the makers of the note on a basis of a discount of $500, and credited its account against Mr. Crawford with the proceeds of said note as thus discounted. She further alleged that said discount was improper and unnecessary for the reason that collection of the entire amount could have been made from at least one of the makers of the note; and she prayed judgment against E. B. Crawford & Company for the sum of $500 to reimburse the estate for this improper discounting of the note belonging to it.

The answer of E. B. Crawford & Company admitted that the note, while payable to it, was in reality the property of E. B. Crawford, but alleged that E. B. Crawford himself had put up the note as collateral with the Bank of West Memphis to secure the overdraft of E. B. Crawford & Company, which had been caused by his (E. B. Crawford's) withdrawal of company funds. It also admitted that E. B. Crawford & Company did accept $1,900 as payment in full of said note on which there was at the time due $2,400 and alleged that this was done without notice to Crawford's executrix, because the bank was demanding payment of the indebtedness which the note secured and was threatening to sell the note and apply the proceeds thereon, and that it was necessary to make the discount and collect it while the opportunity to do so existed.

Appellant, Nell Elkins Crawford Pearce, filed intervention on March 17, 1941, in which she alleged that she was the mother of E. B. Crawford, deceased, and that her

son managed her affairs under a power of attorney; that one of the investments made by E. B. Crawford for her was the purchase of an interest in the National Funeral Home, title to which was taken in the name of E. B. Crawford, but that same belonged to intervener. She denied that her son owed E. B. Crawford & Company $2,500 or any other sum; alleged that there was no necessity for the discount, and that E. B. Crawford & Company knew of her equitable ownership of the note; and she asked for judgment against E. B. Crawford & Company, either for the entire amount of said note or for $500, the amount of the improper discount.

E. B. Crawford & Company responded to the intervention, denying that it knew that intervener had any interest in the National Funeral Home or in said note. It also pleaded laches and estoppel as defenses against the intervention.

After the filing of the suit E. B. Crawford & Company, Inc., changed its corporate name to that of Charles J. Upton & Company, Inc.

E. B. Crawford acquired the interest in National Funeral Home in 1937. At least a part of his investment therein was represented by three checks, one for $2,000, one for $200 and one for $1,000, drawn by him on his own bank account. He sold this interest in National Funeral Home to F. S. Hubbard and R. E. Lawson on May 1, 1939, taking from them in part payment the $2,500 note involved in this controversy.

Mr. Crawford was managing officer and a stockholder of E. B. Crawford & Company. He owned two of the five shares of the company (the amount of the entire capital stock being $20,000), two shares being owned by C. J. Upton and one share by appellant, Mrs. Pearce. Owing to Crawford's personal use of funds of the corporation it became necessary for it to borrow. A loan for it from the Bank of West Memphis was negotiated and E. B. Crawford put up as collateral the note for $2,500, executed by Hubbard and Lawson, which was in form payable to E. B. Crawford & Company, though it

is conceded by all parties that it did not belong to the corporation.

E. B. Crawford died November 12, 1939. At that time there was a balance of $2,268.27 due on his overdraft with the corporation. It developed that much of the other collateral put up with the bank to secure the above mentioned loan of E. B. Crawford & Company was worthless, and the bank began to insist on collection of the $2,500 note, installments of which were in arrears. Hubbard, who seemed to be the only solvent maker, disputed liability, asserting that misrepresentations had been made to him by Crawford as to the amount Lawson (Hubbard's co-purchaser) had paid. Hubbard claimed that Crawford told him Lawson was paying him $700, which amount Hubbard also paid Crawford, in addition to the amount of the note. Hubbard insisted that after giving the note he had discovered that Lawson had not been required to pay any cash whatever. To settle the dispute and to effect collection of the note, Mr. Upton, who had succeeded to the management of E. B. Crawford & Company, agreed to let Hubbard pay the balance of the note, less a discount of $500.

After her son's death and after the settlement of the Hubbard and Lawson note, the proceeds of which were credited to E. B. Crawford's overdraft with E. B. Crawford & Company, appellant, Mrs. Nell Pearce, sold her share of stock in E. B. Crawford & Company to S. T. Lockhart.

The lower court found that the note involved herein was not the property of the estate of E. B. Crawford, deceased, and dismissed the complaint of the executrix. The court also found that E. B. Crawford & Company had no knowledge of Mrs. Nell Pearce's interest in the note, but that since it failed to notify the executrix of Crawford's estate of its intention to discount the note it was liable to Mrs. Pearce, who was found by the lower court to be the owner of the note, in the sum of $500, representing the amount which it failed to collect on the note from Hubbard and Lawson.

From a decree in accordance with these findings Mrs. Nell Pearce has appealed, and urges here that the decree of the lower court in her favor should have been for the full amount of the note, and not merely the amount of discount thereon.

Charles J. Upton & Co., Inc. (successors to E. B. Crawford & Co.), has cross-appealed, and its insistence is that it is not liable to appellant in any sum whatever.

Mrs. Elizabeth Crawford, executrix, has not appealed.

This controversy presents two questions: First, was the interest in National Funeral Home, ostensibly owned by E. B. Crawford, in fact the property of appellant so as to entitle her to the proceeds of the note executed by Hubbard and Lawson for purchase money of this interest? And, second, was the conduct of appellant such as to estop her from asserting, when she did, her claim to this note and its proceeds?

As to the first question posed it may be said that there was a dispute in the testimony. While appellant testified that the interest in the funeral home purchased by Crawford was bought with her money, and while her testimony was somewhat corroborated by other circumstances proved, the original checks drawn by Crawford to pay for at least part of the outlay made by him in this investment were introduced in evidence and they showed to have been drawn on Crawford's individual bank account—and this in the face of the fact that appellant testified that for a considerable portion of the time her funds were kept by her son in a separate "trustee" account in the bank. E. B. Crawford's widow testified that appellant in talking to E. B. Crawford about the funeral home had spoken of it as "your funeral home." She further stated that in all business dealings transacted by her deceased husband for appellant the papers were executed in Mr. Crawford's name as trustee and not in his name individually. In none of the documents affecting this investment did it appear that Crawford was a trustee or agent of anyone.

In the view we take of the case it is not necessary for us to resolve the conflict in the testimony as to this phase of the case or to determine whether, as between her and her deceased son's estate, appellant was entitled to the proceeds of this note.

There is no conflict in the testimony as to appellant's failure, until after the death of her son, the only person, other than herself, who really knew about the matter, and until after all the transactions as to the note had occurred, to assert any interest in this note or its proceeds; nor does appellant offer any reason, other than complete confidence in her son, for her conduct in not doing so.

Appellant must have known of the sale of the interest in the undertaking establishment, which she asserts was hers. She does not contend that her son turned over to her the cash payment of $700 which he received from Hubbard; and it is unreasonable, considering that she was a stockholder and director of E. B. Crawford & Company, to assume that she did not know that this note had been hypothecated with the bank and was being used by her son to secure a debt of the corporation incurred by reason of his own overdraft. After his death, when diligence would have dictated that she require an accounting from his estate, as to this fund, she appears not to have done so, but sold her stock, representing one-fifth of the assets of the corporation, including the proceeds of this note, without asserting that the proceeds of this note belonged to her. Presumably, when she sold her stock, she received value for her twenty per cent. share of the assets of the corporation of which assets the proceeds of the note had become, through application to the overdraft of her son, a part.

"It is difficult," said Judge Eakin, in the case of *Jowers* v. *Phelps,* 33 Ark. 465, "to define special acts or conduct which in all cases would amount to an estoppel. Generally it is said that if the owner of property, *with a full knowledge of the facts, stands by,* and *permits it to be sold to an innocent purchaser,* without asserting his claim, he will be estopped."

This court held in the case of *Brookfield* v. *Brookfield,* 145 S. W. 245 (headnote 2): "By failing to object to a mortgage given by his brother, who held the legal title partly in trust for plaintiff, plaintiff is estopped to deny liability of his interest under the mortgage after a sale of the brother's interest."

In the case of *Brashear* v. *Crew,* 131 Ark. 593, 199 S. W. 386, the appellant had sought to restrain the sheriff from selling under an execution against appellant's husband certain land standing in the husband's name at the time of rendition of the judgment, but which the wife and husband both testified was bought for her and with her funds. In affirming the decree of the lower court denying relief to the wife this court said: "We are of the opinion that the chancellor was correct in holding that appellant was in no attitude to assert a claim to the property against the creditors of her husband, for the reason that she had permitted the title to rest in his name for an unreasonable length of time, and thus gave him the opportunity to deal with his creditors on the faith of his ownership of the property. *Bank* v. *Norwood,* 50 Ark. 42."

"If a trustee or agent converts the subject of his trust or agency into money, and pays the same in due course of business, in discharge of his own indebtedness, to one ignorant of the nature of his title, the payee acquires a perfect and indefeasible title as against the real owner, and the right of the principal to follow the money is gone." 2 Am. Jur. 307.

In the case of *Haffke* v. *Hempstead County Bank & Trust Company,* 165 Ark. 158, 263 S. W. 395, the appellant, Mrs. Haffke, had intervened in a suit brought by the bank to foreclose a mortgage given to it by her husband. She claimed an interest in the property, and had not joined in the mortgage. In affirming the finding of the chancery court against her, we said: "We think the court properly found against the intervention of Mrs. Haffke for the following reasons: She permitted the 1921 crop to be appropriated to the debt due the bank without advising the bank that she had any interest in the land

on which she could predicate a claim to an undivided interest in the crop. We think she must have known that her husband represented to the bank, as a basis for the credit extended him in 1922, that he had the right to mortgage the crops."

"Where C., knowing the facts, remained silent for 16 months after W. acquired certain notes in which C. was interested, and until after W. had entered into contracts with a third party changing his condition and his relationship to the maker of the notes, he was estopped to complain." *Price* v. *Center* (headnote 4), 200 Ark. 19, 138 S. W. 2d 391.

In the case at bar, it was shown that appellant permitted her son to invest the funds sought by her herein in property, title to which was taken in his own name, permitted him to sell the property as his own, permitted him to take a note payable to the corporation for part of the purchase money of this property and permitted him to use this note as collateral for a loan to the corporation which his overdraft with it had made necessary. Upon his death, she made no demand for the note or its proceeds until after this suit was filed; and she sold her stock in the company without disclosing that she held a claim against it that would consume one-eighth of its authorized capital. Equity and good conscience required that she assert her claim to the funds in dispute before the rights of a third party thereto arose, and, not having done so, she was, under the authorities cited above, estopped to demand payment from the corporation.

It follows that so much of the decree of the lower court as awards judgment in favor of appellant against appellee, E. B. Crawford & Company (or its successor), is reversed, and the intervention of appellant is dismissed for want of equity.

4-7959 196 S. W. 2d 765

Opinion delivered October 21, 1946.

[redacted]

Claude F. Cooper, for appellant.

Joe Clay Young, for appellee.

SMITH, J. This suit was filed to set aside the probate of the last will and testament of Isaac C. Fitzgerald, which had previously been admitted to probate. It was alleged that the execution of the will had been procured through the undue influence of the testator's wife, and that the testator lacked testamentary capacity. But little effort was made to sustain the allegation that the execution of the will had been procured through undue influence, but much testimony was heard tending to show a lack of testamentary capacity; after hearing all of which the court found "that the petitioners had failed to meet the burden of proving the allegations set out in their complaint" and it was dismissed, from which order is this appeal.

Isaac C. Fitzgerald, the testator, was eighty-one years old at the time of his death, which occurred July 17, 1943, and his will was admitted to probate on the 6th day of August, 1943.

The testator had been twice married. He had one son, P. A. Fitzgerald, by his first marriage. By his second marriage he had a daughter named Mattie, who married one Newman. He had no other children. Under

the will here contested, the testator devised only one dollar to each of these children. The balance of his estate, consisting of an 80-acre farm, and a small amount of personal property, was devised to his wife, who survived him and was named as executrix without bond. He had lived with his last wife for thirty years.

This appeal presents only one question, the question of fact, whether the testator had testamentary capacity at the time of the execution of the will. Twelve witnesses testified on behalf of appellants, and three on behalf of appellee, and this testimony may be summarized as follows:

The will was dated June 24, 1938. In June, 1934, Mr. Fitzgerald, the testator, became seriously ill, and was carried to a hospital where a prostatic operation was performed, and he remained in the hospital until August following his operation. He was never afterwards as vigorous physically and mentally as he had previously been. Various witnesses testified to numerous incidents which to say the least were eccentric. He required the constant attention which his wife gave him. He stated to a number of persons that he had made a will in which he devised his property to his wife, with remainder to his children in equal shares, and so he had, but under the will here in question he revoked his former will which was dated September 3, 1937.

A number of witnesses testified that Mr. Fitzgerald became quite feeble, but much of this testimony relates to his condition subsequent to the date of the will. Several witnesses testified that a cancer developed on the side of Mr. Fitzgerald's head, which was removed by a surgical operation.

A neighbor testified that she had had dinner at Mr. Fitzgerald's home, that he finished eating before they did, and that he left the table and washed his false teeth in a bucket containing the drinking water, and Mrs. Fitzgerald said, "Don't say anything to him, because this is one of Daddy's off days." Other witnesses expressed the opinion that while Mr. Fitzgerald was not "plumb crazy, he was not in his right mind." But if Mr. Fitz-

gerald had what witnesses referred to as "off days" it appears certain that there were other days which were not off days, and that one of these days was the day on which the will was executed.

Lacey Gibson, the tenant on the farm, who apparently has no interest in the litigation, testified that Mr. Fitzgerald asked witness to take him to the law office of N. F. Lamb in Jonesboro, as he wished to execute a new will giving his wife full control of all of his property. A party consisting of Gibson, his wife and Mr. Fitzgerald and his wife went to Jonesboro to see Mr. Lamb. No reference was made to the will during the trip. When the party reached Jonesboro, Mr. Fitzgerald ascended the stairs leading to Mr. Lamb's office, without assistance, and Mr. Lamb prepared the will under directions and upon information given him by Mr. Fitzgerald. The chancellor knew, as we do, that for half a century Mr. Lamb was one of the state's leading and most reputable lawyers. Gibson saw the will prepared and signed, but he did not sign as an attesting witness, nor did his wife whose testimony corroborated that of her husband. Mrs. Fitzgerald, who was present during the conversation between Mr. Lamb and Mr. Fitzgerald had nothing to say. After the execution of the will, the party continued their journey to Clay county, where Gibson carried Fitzgerald to make a visit there.

The impression which some of the witnesses had that Mrs. Fitzgerald dominated her husband may have originated in the fact that Fitzgerald was an illiterate man unable to sign his name, and Mrs. Fitzgerald attended to all of Mr. Fitzgerald's affairs which required any writing to be done. Fitzgerald signed the will by mark.

The most convincing testimony in the case was that given by Dr. Ira Ellis, who had practiced his profession for thirty years, the last twenty-seven of which was in the neighborhood where Fitzgerald lived, and he had been Fitzgerald's family physician for a number of years. He was the immediate past president of the Poinsett-Craighead County Medical Association. He recalled the prostatic operation and performed the operation on

Fitzgerald's head, this being to remove a growth on the scalp, which was not malignant, and had no connection with the skull, and he testified that neither operation affected Mr. Fitzgerald's mentality. This witness testified that he knew Mr. and Mrs. Fitzgerald as their family physician in their home, and that Fitgerald was not an ignorant man, although illiterate. He regarded Fitzgerald as a man of fixed opinions and his wife as unusually obedient. He attended Fitzgerald in his last illness, and he had never observed any mental breakdown; on the contrary, Mr. Fitzgerald talked rationally on the night he died.

We conclude that the finding in this case is not contrary to a preponderance of evidence, and the decree is, therefore, affirmed.

PERRIN *v.* PRICE.

4-7964 196 S. W. 2d 766

Opinion delivered October 21, 1946.

George M. Booth, for appellant.

Schoonover & Steimel, for appellee.

HOLT, J. The court below sustained a general demurrer to appellant's complaint. He refused to plead further, and from the decree dismissing his complaint for want of equity comes this appeal.

We have many times said that in testing the sufficiency of a complaint on demurrer, all allegations therein, that are well pleaded, are admitted to be true. *Oliver* v. *Western Clay Drainage District,* 187 Ark. 539, 61 S. W. 2d 442; *Ready* v. *Ozan Investment Company,* 190 Ark. 506, 79 S. W. 2d 433; and *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244.

It is also the settled rule that: "The defense of the statute of frauds may be raised by demurrer to a complaint whose allegations disclose a contract falling within the terms of the statute." *Stanford* v. *Sager,* 141 Ark. 458, 217 S. W. 458 (Headnote 3).

The material allegations of the complaint were that appellees, Clifford Price and Herbert H. Price, were the duly qualified and acting co-executors under the will of John W. Price, deceased; "That part of the assets of the said estate consisted of the following real property located in the northern part of the city of Pocahontas, Arkansas, to-wit: Block sixteen (16) and the west part of block fifteen (15), Dalton's Addition to the town of Pocahontas; that said blocks and lots lie in the north part of Pocahontas, Arkansas, and are known as the price Pasture Lots.

"That on the 15th day of March, 1945, the said co-executors then and there having authority to make private sale of the lots aforesaid and as set out herein, under a power contained in the aforesaid last will and testament of the said J. W. Price, as aforesaid, entered into negotiations with this plaintiff aforesaid, and while acting in their capacity as such co-executors as aforesaid, whereby the defendants sold to this plaintiff for a consideration of the sum of $1,500 the lands herein described, and the plaintiff herein paid the defendants as co-executors as aforesaid on the purchase price of said land and lots the sum of $100, leaving a balance of $1,400; that upon payment of the said $100 as aforesaid, the defendant, Clifford Price, while acting as co-executor and under the power contained in the said last will and testament, executed a receipt and contract of sale in writing to this plaintiff, showing the consideration, amount paid, and a

description of the property conveyed"; that appellant "has tendered to the defendants (appellees) and now tenders to them the sum of $1,400, but that the defendants refuse to accept the same and also refuse to execute and deliver to him a deed of conveyance to said property."

The will, which was made an exhibit to and a part of the complaint, provided among other things that the co-executors were "authorized whenever they deem it advisable to sell any of the personal property or real property that may be under their control at private sale and make such sales on whatever terms they may deem most advantageous."

A copy of the receipt or memorandum referred to in the complaint, *supra,* was made an exhibit to and a part of the complaint, and provides: "Pocahontas, Arkansas, March 5, 1945. Received from W. F. Perrin $100, payment on town lots, north Pocahontas, at a price of $1,500, known as the J. W. Price pasture lots. (Signed) Clifford Price, Executor."

Appellant's prayer was that appellees as co-executors "be required by this court to accept said purchase money and the balance due on the purchase price as aforesaid, and to execute to this plaintiff a conveyance of said property, and that said sale as aforesaid be specifically enforced by this court."

The primary question for determination is whether the receipt or alleged contract, *supra,* evidencing the alleged sale of the lots in question, falls within the ban of the statute of frauds? We think, under former holdings of this court, that it does come within the ban and is unenforceable. Section 6059 of Pope's Digest provides: "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 property authorized."

We think the memorandum or receipt in question here is totally lacking as to the time within which payment was to be made and the method and conditions of payment.

In the early case of *St. L., I. M. & S. Railway Co.* v. *Beidler,* 45 Ark. 17, this court held: (Headnote 1.) A memorandum of a transaction for the sale of land which does not show the terms and conditions of the sale, the price to be paid and the time for payment is not sufficient to satisfy the requirements of the statute of frauds."

This rule has many times been reaffirmed by this court. In the recent case of *Schuman* v. *Hughes,* 203 Ark. 395, 156 S. W. 2d 804, the following receipt or memorandum was relied upon by appellant as enforceable and not coming within the ban of the statute of frauds: "Property taxes. Feb. 16, 1940. Received from Charley Hughes five dollars on acct., 1113 W. 9th St. $5.00. Balance, $245.00. W. M. Kaplan." This court in that case held that it failed to satisfy the requirements of the statute, denied specific performance, and said: "The receipt or memorandum, *supra,* may not be relied upon to enforce specific performance of the alleged contract to sell for the reason that it does not embrace the terms and conditions of the alleged sale, the time and method of payment, and, therefore, is not sufficient to satisfy the requirements of the statute of frauds, § 6059 of Pope's Digest, and is unenforceable," and in the same volume of our reports, in *Tate* v. *Clark,* 203 Ark. 231, 156 S. W. 2d 218, where a receipt or memorandum in the following form was relied upon: "Little Rock, Arkansas, December 28th, 1940. I hereby accept from B. E. Tate twenty-five dollars ($25) as down payment on property located at 705 East 5th St., lots one and two, city of Little Rock, Arkansas. Balance of $425 to be paid when abstract and deed and all records are cleared and O.K.'d by B. E. Tate's atty. (Signed) A. J. Clark," this court said: . . . The alleged written memorandum of the contract does not embrace all the terms and conditions of the alleged sale without resorting to extrinsic evidence and is, therefore, prohibited by the statute of frauds and void. Being void and unenforceable for the reason that it is indefinite and

uncertain as to the terms and conditions of the sale, damages cannot be recovered for a breach thereof.

"The doctrine announced in the case of *St. L., I. M. & S. Ry. Co.* v. *Beidler, supra,* (45 Ark. 17) has been often reaffirmed by this court, and the case was specifically cited and reaffirmed in the case of *Briggs* v. *Frazer,* 157 Ark. 518, 249 S. W. 9."

We conclude, therefore, that the trial court did not err in sustaining appellant's demurrer, and accordingly the decree must be and is affirmed.

HULL *v.* HULL.

4-7960 196 S. W. 2d 905

Opinion delivered October 21, 1946.

F. O. Butt, for appellant.

Claude E. Fuller, for appellee.

MINOR W. MILLWEE, Justice. Plaintiff, Lennie Hull, brought this action in ejectment against the defendants who are the children and sole heirs at law of Gully Hull, deceased, claiming title and the right of possession to approximately two acres of land in the northwest quarter, of the northeast quarter section 29, township 20 north, range 25 west, in Carroll county. King's River flows from the south line to the west line of the forty-acre tract across its southwest corner, forming a five-acre triangle. The strip in controversy is about four rods wide and extends across the south portion of the five-acre triangular tract.

The amended complaint, which was filed in response to a motion to make more definite and certain, alleges that plaintiff purchased the five-acre tract from J. C. Price and wife, by deed dated September 9, 1944, which was attached as "Exhibit A"; that J. C. Price purchased from William G. Price by deed dated January 2, 1917, which was attached as "Exhibit B"; that John Bussey and others conveyed the lands to William G. Price by deed on August 1, 1894. While the record shows that this deed was attached to the complaint as "Exhibit C," it seems to be conceded by plaintiff that it was not found until shortly before trial. It was also alleged that John Bussey and others owned and conveyed the title of all those who had title from the Federal Government down to them, but that plaintiff was unable to find deeds or records of the grantors from the government other than the conveyances exhibited to the complaint, and that such instruments had been lost or destroyed. It was further alleged that William G. Price was in adverse possession of the lands under color of title and paid taxes thereon

from the date of his purchase in 1894 until his death, which occurred soon after his conveyance to J. C. Price, and that J. C. Price had maintained possession in like manner since 1917, except that defendants had been encroaching upon the two-acre strip in controversy, but had and claimed no title thereto and were occupying and cultivating a portion of said strip permissively.

The answer denied the allegations of the complaint and excepted to the exhibits on the grounds that they were irregular in form and did not describe the lands in controversy. Defendants also claimed title by adverse possession by their father from 1903 until his death, and by the defendants since the death of their father. Trial to a jury resulted in a judgment and verdict for plaintiff.

At the trial plaintiff offered in evidence the patent from the government to J. L. Dickson dated January 1, 1850, and a deed from Dickson to Jameson Bussey. Defendants objected to the introduction of the two instruments on the grounds that they did not adequately describe the property, were not attached as exhibits to the complaint, and defendants had not had an opportunity to examine them. When the objection was made, the trial court permitted counsel for defendants to examine the instruments and the objection as to the sufficiency of the descriptions was withdrawn. The objection that the instruments were not attached to the complaint was overruled. The trial court did not commit error in overruling the objection. These instruments were at least inferentially pleaded in the complaint as lost instruments. The court would doubtless have granted defendants further time to examine the instruments, if such request had been made. It is now conceded that the two instruments properly describe the lands in controversy and defendants were in no manner prejudiced by the ruling of the court.

The trial court overruled defendant's specific objection to the introduction of the deed from John Bussey and others to William Price dated August 1, 1894, on the ground that the description in said deed was inadequate to convey title. This description is as follows: "Part of northwest quarter of the northeast quarter, section 29,

township 20 north of range 25 west, commencing northeast corner of said forty, run south to a center cross fence, thence west with said fence on west to Starks, said line run west containing 38 acres, more or less." The contention of defendants that the description is insufficient to identify the lands in controversy must be sustained. It would be impossible to identify the lands in controversy by the description employed. Plaintiff insists, however, that the word "except," before the word "commencing" was inadvertently omitted by the scrivener, and should be read into the deed. But if we supplied this alleged deficiency in the wording of the deed, the lands could not be located without resort to some form of supplemental proof to explain the means of identification employed by the grantor. *Parker* v. *Cherry,* 209 Ark. 907, 193 S. W. 2d 127. In 28 C. J. S. Ejectment, § 92, p. 968, it is said: "Where the description in a grant, deed or conveyance is insufficient to identify the premises covered thereby with the premises in controversy, such identity must be shown by other evidence, and when this is done the deed or patent is admissible." Plaintiff failed to offer such proof and the description was inadequate. Since the instrument was ineffective to convey title, it was, therefore, inadmissible to establish a link in the record title plaintiff was seeking to establish by its introduction without resort to other evidence to identify the lands. *Lane* v. *Queen City Milling Co.,* 66 Ark. 646, 50 S. W. 274.

It is argued by plaintiff that those from whom he obtained title had been in peaceable and adverse possession of the lands under color of title and payment of taxes since August 1, 1894, and that such possession vested title. While this allegation was made in the complaint, the burden was upon plaintiff to establish it. J. C. Price testified that he had paid taxes on the lands since his purchase from William Price in 1917. No proof was offered showing the nature or extent of the possession of William Price. The substance of the testimony of J. C. Price was that defendants were in actual possession of, and cultivating, a greater portion of the lands in dispute from the date of his purchase in 1917. He also testified

that there was considerable controversy over the disputed tract during this period, but that defendants were permitted to occupy the lands until a survey was made. Plaintiff has not occupied the lands since his purchase from J. C. Price in 1944, nor did he cultivate the disputed tract during a period of 4 years that he rented from Price prior to his purchase. We think the proof is insufficient to show that plaintiff and those under whom he claims title have been in peaceable and adverse possession of the lands under color of title since 1894.

It is insisted by defendants that there was no substanial evidence to show that their possession and cultivation of the lands was permissive, and that the trial court erred in submitting the issue of adverse possession to the jury. While the evidence adduced on this issue is not entirely satisfactory, we are unable to say that the verdict is without substantial evidence to support it. Plaintiff had the lands surveyed, after giving defendants proper notice, following his purchase of the lands in 1944. The surveyor testified that Gurnie Hull, one of the defendants, assisted in making the survey, designated the starting point from which it was made and made no objection to the survey. This was a circumstance which the jury might consider in determining whether the cultivation and possession of the lands by defendants was permissive, as contended by the plaintiff, instead of adverse.

In support of his contention that the possession by defendants was permissive, plaintiff offered to prove certain statements made by Gully Hull while he was cultivating the lands tending to show that such cultivation was by permission of J. C. Price until a survey could be made. Defendants' objection to this testimony was sustained. In view of a retrial of the case, we think it appropriate to say that this testimony was competent and should have been admitted. The declarations and admissions of one while in possession of land, which tend to show that his holding was not adverse, are admissible in evidence to prove the fact. 2 C. J. S. Adverse Possession, § 221, p. 826. In *Norden* v. *Martin,* 202 Ark. 180, 149 S. W. 2d 550, this court reaffirmed the rule laid

down in the case of *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456, as follows: "It is well settled that declarations and admissions of one in possession of land, relating to the title thereof and adverse to his interest, are admissible against him; and declarations and admissions of a person made while in possession, adverse to his title are admissible against his successors in interest and all who claim under him." See, also, *England* v. *Scott,* 205 Ark. 47, 166 S. W. 2d 1014.

On account of the error in admission of the deed from John Bussey and others to William G. Price without other evidence to identify the lands under the description employed in the deed, the judgment is reversed, and the cause remanded for a new trial.

SCAIFE *v.* STATE.

4425 196 S. W. 2d 902

Opinion delivered October 21, 1946.

A. M. Coates, for appellant.

Guy E. Williams, Attorney General and *Earl N. Williams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. December 17, 1943, appellant stabbed his wife and her mother—(Mrs. Susie Davis). Each died within a short time; Mrs. Davis in less than an hour, and Mrs. Scaife while being taken to a hospital at Helena. A jury, by some process of reasoning not required to be expressed, appears to have found that there were mitigating circumstances and that lethal use of a hunting knife amounted to murder in the second degree in respect of the charge that the defendant had " . . . unlawfully, wilfully, feloniously, and with malice aforethought, and after deliberation and premeditation" murdered his wife, Jennie Ruth. A prison sentence of ten years was imposed. Appeal resulted in affirmance of the judgment October 2, 1944. See *Scaife* v. *State,* 207 Ark. 664, 182 S. W. 2d 679. Rehearing was denied October 30. This court's mandate issued November 3.

December 27, 1944, the Governor issued his proclamation in which it was said, " [I] do hereby grant a stay of sentence" until the Phillips Circuit Court convened in April, 1945, " . . . and such disposition be made of the case [charging that Scaife murdered Mrs. Davis] as the court officials may deem advisable."

The next record entry is a motion by the Prosecuting Attorney dated May 8, 1945. It recites that "a continuance has been had in the case now pending." Prayer was that a commitment be issued, in compliance with the 1944 judgment. In response it was insisted that because four terms of Court had intervened (Pope's Digest, §§ 3968, 3969) and the information charging Scaife with murdering Mrs. Davis had not been tried, he was entitled to discharge—not only as to the offense undisposed of, but likewise the Court was powerless, for want of jurisdiction, to direct issuance of a commitment based upon the 1944 judgment of imprisonment.

While it is stated in appellant's response to the petition for commitment that the State, on its own motion, dismissed the second charge of murder, the record does not contain an order to this effect.

Davis v. *State,* 169 Ark. 932, 277 S. W. 5, holds that a court has the inherent power to enforce its own orders, once a legal judgment or decree has been rendered. On the other hand, there is the comment that such necessary authority does not confer upon courts the implied discretion to permanently refuse to compel compliance with valid orders. Again it was said that courts have no inherent power to mitigate or avert appropriate penalties by refusing to inflict them in individual case.[1]

Section 18, Art. VI, of the Constitution, authorizes the Governor, in all criminal and penal cases other than treason and impeachment, to grant reprieves, commutations of sentence and pardons after conviction. He may also remit fines and forfeitures under such rules and regulations as may be prescribed by law. A "furlough," so called, has been construed to be a commutation. *Williams* v. *Brents,* 171 Ark. 367, 284 S. W. 56.

The constitutional provision investing the Chief Executive with power in the matters enumerated contains the further authority that he may grant reprieves and pardons in case of treason . . . by and with the advice and consent of the Senate; but if the Senate is in recess, he may "respite the sentence until the

[1] In *Millsaps* v. *Strauss,* 208 Ark. 265, 185 S. W. 2d 933, Act 76, p. 40, approved February 9, 1923, Pope's Digest, Sec. 4053, is mentioned. When the Millsaps-Strauss opinion was written March 5, 1945, measures passed by the General Assembly had not been assigned numbers as Acts. In a footnote it was sought to call attention to enactments affecting criminal procedure, suspended sentences, etc., and a notation was, "Senate Bill No. 169 of the Fifty-fifth (1945) General Assembly." Senate Bill 169 became Act 298: an appropriation for the Pine Bluff Negro Normal School. The Reporter, in checking for the Act number, did not notice the error previously made, hence the reference is not only wrong, but is misleading. For more accurate information, see Act 262 of 1945, approved March 20, p. 602; also, Act 158, approved March 2, 1945, and Act 302 of 1945. The latter relates to parole matters and is found at page 690.

adjournment of the next regular session of the General Assembly.[2]

It will be observed that the term "respite of sentence" is used in regard to the Governor's right to act where a conviction had been had for treason, and the Senate is in recess. Nowhere is there a suggestion that the executive may "stay a sentence." He may relieve against execution of the sentence, but cannot prevent its issuance as a part of the judicial process; and the court's judgment stands, irrespective of a ministerial officer's power to enforce it after the Governor has acted.[3] Clemency, under our Constitution, comes *after*, not before conviction and judgment. *Hutton* v. *McCleskey,* 132 Ark. 391, 200 S. W. 1032.

We must, however, assume what was probably true: that "stay of sentence" was intended for "stay of execution." The purpose was to place the convicted man on a basis of temporary freedom. Since technical terms are not necessary to a pardon, commutation, or reprieve, the Governor's proclamation served its purpose and the language employed is not an issue here. See *Williams* v. *Brents,* 171 Ark. 367, 284 S. W. 56.

When this Court's mandate was sent to the Clerk at Helena, the judicial transaction had been completed, although the trial judge had a continuing right to enforce appropriate orders. When the respite given under the Governor's proclamation expired, (as it concededly did before Circuit Court directed that a commitment be issued) it became the duty of that tribunal to do whatever was incidentally necessary to give effect to the judgment. Jurisdiction was reacquired following affirmance on appeal.

While the Supreme Court has power, in certain circumstances, to make orders in furtherance of its

[2] Another requirement is that "[The Governor] shall communicate to the General Assembly at every regular session each case of reprieve, commutation or pardon, with his reasons therefor, stating the name and crime of the convict, the sentence, its date and the date of the commutation, pardon, or reprieve."

[3] This statement has no reference to the effect of a pardon in restoring citizenship or "wiping away the infamy."

supervisory authority,[4] and consonant with statutory provisions,[5] customary procedure is for a mandate to be sent the Circuit Clerk; whereupon all authority pertaining to the cause touching the affirmed judgment attaches, and the Clerk of the trial court, as a duty pertaining to the transaction in question, must (in criminal cases) execute a commitment and deliver it to the Sheriff if there is affirmance.

Facts revealed in the case at bar make it mandatory that the clerk of the Phillips Circuit Court proceed as directed here. The clerk of this court is ordered to issue his mandate at once.

Affirmed.

ANDERSON *v.* STATE.

4422 **197 S. W. 2d 36**

Opinion delivered October 28, 1946.

Rehearing denied November 25, 1946.

[4] Article VII, Sec. 4, Constitution of 1874.

[5] Pope's Digest, Secs. 4241-42-43, *et seq.*

Denver L. Dudley, Bon McCourtney and *T. J. Crowder,* for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Dave Anderson prosecutes this appeal to reverse a judgment of conviction against him for grand larceny.

On the night of July 11, 1945, a thief entered the home of Tom Lane in Jonesboro, Arkansas, by cutting a screen door and took $23 and a wrist watch belonging to Lane. The next morning Lane notified the local and state police departments, and the usual notices of the burglary, containing a description of the watch, were sent to officers and police departments over the country. Two weeks later, Lane received notice from the police department of St. Louis, Missouri, that his watch was in a pawn shop in that city. Lane paid $15 to the pawn shop and redeemed his watch. The watch was identified by its serial number and Lane testified that the watch had a value of $50 at the time it was stolen.

Sheriff Leon Brown testified that he went to St. Louis when the watch was located. He talked with defendant who was in the custody of the St. Louis police and again later when he was returned to this state. The sheriff testified that defendant admitted that he had possession of the watch and told the sheriff that he bought

the watch from William Jones, or an unknown youth, for $15. Defendant also told witness that he formerly lived in Marked Tree, Arkansas.

Although there are other assignments of error in the motion for new trial, defendant's chief contention, and one which has given us much concern, is that the evidence is insufficient to sustain the verdict. It is argued that the statement made to Sheriff Brown fails to show that defendant was ever in possession of the watch, and that such possession may not be inferred merely from the statement that defendant bought the watch from an unknown youth. It is further insisted that the admission of defendant that he purchased the watch from another was the only statement from which proof of possession might be inferred and must be accepted by the jury as true in its entirety. We cannot agree that defendant did not state that he had possession of the watch, nor do we agree that the jury were bound to accept the entire statement as true. The following question by the prosecuting attorney and answer given by the sheriff are found in the record. "Q. You say he admitted having had the watch in his possession? A. He did." On cross-examination Sheriff Brown also testified that defendant told him he got the watch from some unknown negro youth and that he then gave it to some boy to pawn for him. Defendant did not tell the officer when he bought the watch or how long he had it in his possession, but the first statement was made two weeks after the theft when the watch was recovered from the pawn shop.

In *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833, this court said: "The rule has long been maintained by this court that unexplained possession of property recently stolen constitutes legally sufficient evidence to warrant 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. The weight to be given to the testimony and the inference to be drawn therefrom are questions for the jury. It was a matter for the jury to determine the reasonableness and sufficiency of the explanation given by the accused of his possession of the stolen property." This rule has been con-

sistently followed in many recent cases. *Bowser* v. *State,* 194 Ark. 182, 106 S. W. 2d 176; *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93; *Woodall* v. *State,* 200 Ark. 665, 140 S. W. 2d 424; *Davis* v. *State,* 202 Ark. 948, 154 S. W. 2d 812; *Krokrich* v. *State,* 208 Ark. 208, 185 S. W. 2d 922.

In *Gunter* v. *State,* 79 Ark. 432, 96 S. W. 181, 116 Am. St. Rep. 85, a conviction was upheld where the only evidence connecting the defendant with the commission of grand larceny was his recent possession of five of the 33 chickens alleged to have been stolen. In commenting on the sufficiency of the evidence this court said: "Such evidence raises no presumption of law as to the guilt of the accused, but only warrants an inference of fact, of more or less weight according to the particular circumstances of each case, which the jury may draw therefrom as to his guilt. It makes a question for the jury, and is sufficient to warrant conviction where it induces in the minds of the jury a belief, beyond a reasonable doubt, of the guilt of the accused."

In *Green* v. *State,* 169 Ark. 330, 275 S. W. 652, the court, in an opinion by Chief Justice McCulloch, said: "It has been decided by this court that unexplained possession of recently stolen property constitutes legally sufficient evidence of the guilt of larceny. The trial jury is warranted in drawing the inference of guilt or innocence according to the reasonableness of the explanation of the possession, weighed in the light of the particular circumstances of the case." And, in *May* v. *State,* 135 Ark. 400, 205 S. W. 807, this court said: "Appellant's possession of the head of the recently stolen animal, if not satisfactorily explained, was sufficient to warrant the jury in concluding that he was guilty of stealing the animal, and it was properly left to the jury to determine whether or not appellant's explanation of the possession of the stolen property was satisfactory and reasonable and consistent with his innocence."

The jury are the sole judges of the weight of the testimony and credibility of the witnesses and it was their duty, of course, to consider the whole statement made by the defendant to the sheriff. In doing so they

were not required to accept or reject such statement in its entirety, but it was their duty to accept such portions of the statement as they believed to be true and to reject that which they believed to be false. *Pickett* v. *State,* 91 Ark. 570, 121 S. W. 732. It was within the province of the jury to determine the reasonableness of defendant's statement that he purchased the watch from an unknown negro youth, and we cannot say that their rejection of this part of the account of his possession of the property was arbitrary and capricious. This is especially true when the statement is viewed in connection with the further statement that he gave the watch to another boy to pawn for him. We, therefore, hold the evidence sufficient to sustain the verdict of the jury.

It is also argued that the trial court erred in permitting Lane to testify that the jeweler from whom he purchased the watch appraised its value at $50 at the time it was stolen. Conceding that this testimony was hearsay and inadmissible, the record fails to reflect that defendant objected to its introduction and the alleged error was not brought forward in the motion for new trial. Defendant's objection to the testimony was, therefore, waived and the question may not be raised for the first time on appeal.

Action of the trial court in permitting Sheriff Brown to testify that extradition was granted by the governor of Missouri at the request of the governor of Arkansas is assigned as error. It appears from the record that counsel for defendant told the jury in his opening statement that the governor of Missouri had refused to grant extradition. It was shown by the testimony that defendant obtained his release from custody through *habeas corpus* proceedings in a Missouri court after extradition had been granted. The matter of extradition should never have been injected into the case. Since it was done by counsel for defendant in his opening statement to the jury, he may not complain of an error which he invited. The trial court so ruled in passing on defendant's objection to the testimony, and the admission of this testimony did not constitute reversible error.

There are other assignments of error in the motion for new trial pertaining to the giving and refusal to give certain instructions. It would serve no useful purpose to set out these instructions. We think the instructions given fully and fairly declared the law as applicable to the facts and that matters embraced in the instructions refused were sufficiently covered by those given by the court.

We find no prejudicial error in the record, and the judgment is affirmed.

MOORE *v.* LAWSON.

4-7966 196 S. W. 2d 908

Opinion delivered October 28, 1946.

J. L. Shaver, for appellant.

Giles Dearing, for appellee.

McHaney, Justice. Appellants own lands on which they grow rice adjacent to and lying west and north of lands owned by appellee, on which the latter grows cotton, corn and hay. Appellee brought this action to recover damages to his land and crops caused by the negligence of appellants in permitting rice water to flow from their rice lands onto the lands and crops of appellee. He alleged that he prepared five acres of his land in the spring of 1945 to plant in corn, but that appellants flooded his land after it was prepared to such an extent that he was unable to plant it and was thereby damaged to the extent of the rental value of $15 per acre, or $75. He also alleged that, in the fall of 1945, appellants cut their dams and embankments and turned their rice water into his mature cotton crop, causing the complete destruction of five acres of cotton that would have produced a bale to the acre and was worth $650. The answer was general denial, and a plea that, if appellee were damaged by water, it was the result of excessive rainfall.

Trial resulted in a verdict and judgment against appellants in the sum of $300, from which is this appeal.

For a reversal of this judgment, appellants first contend that the court erred in refusing to direct a verdict in their favor at their request, because the damage to the cotton could not be ascertained with any reasonable certainty. The court correctly refused to direct a verdict for appellants. The evidence was sufficient to show that they caused their rice water to flow into and upon five acres of mature cotton in the late summer or fall, upon which it remained for a sufficient length of time to kill all the cotton growing thereon and completely destroyed it; that the five acres would have produced five bales; and that cotton was worth 24 or 24½ cents per pound. It is said the evidence fails to disclose the weight of a bale of cotton and the jury would have to guess at the weight. We assume that the jury was composed of persons of good common sense, of average intelligence and reasonable information, and that such a jury would know what everybody else knows—that a bale of cotton means one which weighs 500 pounds. Appellee's loss of five bales of cotton meant the loss of about two

and one-half tons of seed, and we think the judgment for $300 was amply established even had the jury not awarded any amount for the rental value of the corn land.

It is next argued that the court erred in giving appellee's instruction No. 2. This instruction correctly submitted to the jury the question of the negligence of appellants in the destruction of the cotton, and if they found from a preponderance of the evidence that they carelessly and negligently cut their dams and permitted the water to flow on appellee's crops to his injury they should find for him, and should "fix his damages in such sums as you find to be the fair market value of said crops so destroyed, which were matured, less the cost of harvesting and marketing the same." We think the court gave the correct measure of damages. The cotton was practically matured. It had grown bolls and some blooms. As said in *Brown* v. *Arkebauer*, 182 Ark. 354, 31 S. W. 2d 530, to quote headnote 4: "Where strawberries, at the time they were injured by defendant's cattle, had advanced to that state of maturity where picking would begin within a few days, the measure of damages for their destruction was the value of the berries at the time of their destruction, and not the rental value of the land."

The rental value of the land would not be the correct measure of damages, because the crop was made at that time. All that remained was to harvest and market it, and the jury, by its verdict, properly took these costs into consideration.

It is finally argued that the court erred in refusing to give their requested instruction No. 9. It related solely to the burden of proof which the court had placed on appellee in instruction No. 2, above mentioned, and it was not required to repeat instructions on the same question.

No error appearing, the judgment is affirmed.

JACKSON *v.* DILLEHAY.

4-8028 196 S. W. 2d 909

Opinion delivered October 28, 1946.

Rieves & Smith and *McMillen & Teague,* for appellant.

U. A. Gentry and *Buzbee, Harrison & Wright,* for appellee.

SMITH, J. This is the second appeal in this case. The former opinion is found in 209 Ark. 707, 192 S. W. 2d 354. In that opinion it was decided that the appellants there, who are also the appellants here, were the legally elected directors of the Security National Life Insurance Company, having been elected as such at the last preceding

meeting of the policyholders, held January 10, 1945. The by-laws of the insurance company provided for the election of the directors by the policyholders.

When that appeal was filed, the annual election of directors provided for in the by-laws of the insurance company was in the offing, and was due to be held January 14, 1946. An attempt was made to stay the election, and on January 7, 1946, we made and entered the following order: "Appellee's motion to stay proceedings pending final hearing in this court will be treated as a motion to stay the annual election of directors scheduled for January 14, 1946; and viewed in that light the relief is granted. The cause is advanced for submission January 28th. In the meantime, no election by stockholders is to be held, and the decree of November 28, 1945, shall temporarily govern the action of the parties not inconsistent with this order." The decree of November 28, 1945, was the decree from which the appeal had been taken, and the effect of the order above copied was to leave appellees in office and in control of the records of the company and to postpone the election.

The cause was submitted as ordered January 28, 1945, and on the following Monday, February 4th, the opinion first above referred to was delivered. Appellants filed a motion praying the issuance of an immediate mandate, to which a response was filed, and on February 18, 1946, this motion was overruled. On February 21st appellees filed a petition for rehearing, which was overruled March 4, 1946.

The policyholders' meeting scheduled to be held January 14, 1946, was held, but no attempt was made at that time to elect officers for the company. Attorneys for opposing litigants were present at this meeting, and after a conference between them, it was computed that March 4, 1946, would be the earliest date on which a meeting could be had following the action of the Supreme Court on the petition for a rehearing, if one were filed by the losing parties, and it was accordingly agreed that the meeting should stand adjourned to March 4, 1946, and minutes were prepared and okayed by opposing

counsel showing that by consent the policyholders' meeting was adjourned to March 4, 1946.

The opinion of February 4, 1946, ousting Dillehay from office as president of the company, was made final by the order of the court on March 4, 1946, overruling the motion for a rehearing. But in the meantime Dillehay had been active in obtaining proxies from policyholders, and he was present on March 4th at the company's office in West Memphis, with proxies from 8,329 policyholders. This was a clear majority of all the policyholders, there being 10,750 of them at that time. All of these proxies except about 500 were obtained subsequent to February 6, 1946.

It appears that when policies were issued each applicant executed a proxy with his application, giving the executive committee of the company the right to vote in the name of the applicant, at any regular or special meeting. But these were not the proxies which Dillehay had in his possession. He had proxies revoking the proxies executed with the applications for the policies.

Appellants in the first case who, under the opinion in that case, delivered February 4, 1946, were held entitled to discharge the duties of officers of the company, were not present in person when the meeting on March 4th was held; but their attorneys were present, and the attorneys stated that they were not present for the purpose of participating in the meeting, but were there for the purpose of protesting against holding the meeting, and to ask for adjournment thereof. This protest was in writing and reads as follows:

"The undersigned policyholders of the Security National Life Insurance Company, for themselves and for all others of like positions, object to the holding of, or an attempt to hold, an election of directors of the said company on March 4, 1946, and for reasons therefor say:

"1. That no election can be legally held under the stay order of the Supreme Court of Arkansas in the case of G. L. Jackson, *et al.*, appellants, v. G. L. Dillehay, *et al.*, appellees, number 4-7871, for the reason that the decision of the said court has not become final.

"2. That the individuals attempting to hold said election have no legal authority to conduct an election.

"3. That because of the injunction now in effect, the legally elected directors of said company, namely G. L. Jackson, C. J. Upton, John A. Cooper, E. M. Jackson, and V. E. Gilchrist, cannot at this time exercise the functions legally theirs, and because of such fact the policyholders are denied representation by the directors legally elected at the last election in that the proxies given by certain of the policyholders in their applications to the executive committee and which remain unrevoked may not be voted by anyone at this time; that because of such fact numerous policyholders will be deprived of a vote and voice in the affairs of the company.

"The undersigned ask that their objections be noted and be made a part of the record and that said election be stayed until the decision of the Supreme Court becomes final and said election can be legally called.

"Signed:

"Charley Upton
Joe R. Bowen
Bernard High
P. M. Dacus
J. H. Spears
J. E. Serric
V. E. Gilchrist
G. L. Jackson
John A. Cooper."

This protest was ignored after a telephone conversation with the clerk of the Supreme Court disclosed that a rehearing had been denied. In making that announcement Dillchay stated that it meant that he was out as an officer and director, but that he was still a policyholder, and he proposed that they proceed with the meeting, and to that end he nominated R. C. Hauser, one of the policyholders present, as chairman, and A. H. Goodman, another policyholder present, as secretary, and these persons were unanimously elected.

Hauser took the chair and announced that it was in order to determine what proxies were present, and two

policyholders present were named as tellers to make this examination and report. After examining the proxies which Dillehay had collected and presented, the tellers reportd that 8,329 policyholders were represented by proxies, all of which revoked the proxies given when the applications for insurance were made. In other words, they were new proxies, all but 500 of which had been obtained subsequent to the opinion of this court delivered February 4, 1946, declaring appellants to be the legal officers of the company. It was ascertained and reported that there were 10,759 policies in effect on March 4, 1946, and the proxies collected by Dillehay were a clear majority of that number. A policyholder present stated that he thought an entirely new board of directors should be elected, and he placed the names of five policyholders in nomination, and the votes of all the policyholders present and those of Dillehay's proxies were cast for the persons placed in nomination.

This suit was brought to have this meeting and the election then held adjudged to be illegal. The relief prayed was denied, and from that decree is this appeal.

The question presented is, of course, that of the legality of the meeting. It is undisputed that at this meeting a majority of all the policyholders voted in person, or by proxies, for the election of appellees as directors. It is undisputed that the policyholders' meeting which had convened at the time designated in the by-laws of the company on January 14, 1946, was adjourned, by consent of all parties, to March 4, 1946, and there is no question of lack of notice of the meeting.

The officers of the company who, under the opinion delivered February 4, 1946, were restored to their offices, did not attend the meeting held March 4, 1946. The order of the Supreme Court made March 4, 1946, overruling the petition for rehearing confirmed appellants' title to the offices, yet they did not attend the meeting of which they were fully advised.

The failure of the president, who had been restored to his office, to attend the meeting, and who, if present, would have had the right to preside, did not defeat the

right of the policyholders to hold a meeting. In Hillyer's Corporate Management and By-Laws, § 614, it is said: "In the absence of the president, the vice-president presides. If no one designated in the by-laws to preside is present, those present may select any one of their number to perform that duty." This was done.

Appellants say that the question involved on this appeal is purely one of waiver; "whether or not the appellants in agreeing, under the order of the Supreme Court prohibiting the holding of a policyholders' meeting *pendente lite,* that such meeting should be passed over from January 14 to March 4, 1946, waived the right to contest the validity of the meeting and election when the case had not been finally considered on that date."

Appellants had not waived the right to contest any action at the meeting held March 4, 1946, but they had no right to say that the meeting should not have been held. No attempt was made to show that the proxies held and voted by Dillehay had not been executed in the manner and form required by law and the by-laws of the company, nor is it denied that the policyholders thus represented constituted a majority of all the policyholders. There was full authority to hold the meeting held March 4, 1946. The court order staying the election expired on that date. It is not denied that all parties contemplated that the action of the court would have become final by and not later than March 4th, at which time it would have been finally determined whether appellants were in or were out of office, and so it was. In contemplation of this fact, the regular meeting held January 14, 1946, was by consent adjourned to March 4, 1946. In the interval between the date of the opinion of this court, delivered February 4, 1946, and the date on which that opinion became final on overruling the petition for rehearing, to-wit: March 4, 1946, appellees had been busy collecting proxies. This may not have been good sportsmanship, but we cannot say it was illegal. Appellants might have done the same thing, but they say appellees were in possession of the company's records containing the names and addresses of the policy-

holders. There is no contention, however, that appellants were denied access to these records.

It is true no mandate had issued on the order and decree of this court overruling the petition for a rehearing when the meeting was held on March 4th, but it is true also that the restraining order of this court had expired when the meeting was held, and this would have been true though no mandate ever issued. *Bertig Bros.* v. *Independent Gin Co.*, 147 Ark. 581, 228 S. W. 392; *Robeson* v. *Kempner*, 189 Ark. 27, 70 S. W. 2d 37; *Stroud* v. *Crow*, 209 Ark. 820, 196 S. W. 2d 548.

The decree is, therefore affirmed.

OWEN *v.* DIX.

4-7967 196 S. W. 2d 913

Opinion delivered October 28, 1946.

Sherrill, Cockrill & Wills, for appellant.

Talley, Owen & Talley, Sam Robinson and *Tom W. Campbell,* for appellee.

HOLT, J. February 7, 1946, a jury awarded appellee damages in the amount of $7,500 to compensate an injury sustained while a passenger on one of appellant's buses, and from the judgment comes this appeal.

A number of errors have been assigned in the motion for a new trial, but only three are argued here by appellant. These alleged errors are: (1) That the evidence is not sufficient to support the verdict; (2) that the court erred in permitting Dr. Autrey to answer a certain hypothetical question, and (3) that the judgment was excessive.

1.

The evidence was to the following effect: April 16. 1945, appellee was a passenger on appellant's bus going into Camden when the bus "hit a concrete bridge railing and post" causing an injury to his back. His version, of how the injury occurred, was: "A. I was on the bus on the front seat on the right side, as I said, sitting next to the window. We were riding along just before we got to the Ouachita River bridge, riding along, I judge, about thirty miles an hour, that is what I judge, and all of a sudden as we had gotten on one of those bridges, there are several bridges along there, as we got on one of bridges the bus swerved over to the right hitting the railing and post real hard lick throwing me forward off the seat. . . . I was thrown from the seat forward and the bus, after the first impact, went on down sliding hitting the post. I don't know how many different bumps but from the time it bumped, after it hit the first impact, I don't remember, but after the bus stopped I was lying down on my back holding onto the rod up here (indicat-

ing). Q. Is there a rod in front there? A. Yes, sir. Q. Did you suffer any pain? A. I sure did. Q. Where? A. In my back. Q. Where in your back? A. Low down, small of my back." When the bus "struck a hard lick against the concrete banister and post of the bridge" it "peeled the metal on the outside of the bus back quite a way, broke up the floor and bent the rod in front" of appellee. He was thrown forward and the small of his back hurt, causing him great pain, which caused him to "roll and tumble that night all night long," and kept him from sleeping. He tried to work, but was unable to do so because of the severe pain in his back. He quit work, returned home, and called a doctor who referred him to Dr. Newman, who later operated on him. Prior to the injury which he received on the bus from the collision, he had always been able to work, but has been unable to do any kind of labor since the collision and injury. Dr. Newman first saw appellee on May 29, 1945, following the injury which occurred on April 16th. Another physician treated him between those dates.

On November 25th, the pain in the lower part of appellee's spine became so great that an operation was performed by Dr. Newman. Appellee has since been under observation and his progress has been "very satisfactory." Dr. Newman testified in effect that appellee had had, for a long time, perhaps from childhood, a weakened disc in the lower part of his spine that had become "rotten" that was more susceptible to a rupture than a healthy normal disc and that when appellee sustained the injury to his back in the collision, the jar "set off a condition that was present," and caused it to rupture. We quote from Dr. Newman's testimony: "He (appellee) was carried under observation because I thought at the time he did have a ruptured intervertebral disc, and judging from the nerve changes it would be at the point where the first nerve passes the lumbo-sacral joint. The first nerve root comes out between the first and second sacral where we most frequently get ruptures. X-rays were taken which verified my findings of loss of lumbar curve. The spine was pulled in in a straight row. It also showed some degeneration or absence of the disc at the lumbo-sacral

joint and probably some at the fourth inter space. It was my impression that he did have a ruptured disc. . . . Q. The rupture itself, when it actually protruded out, would that be attributable to the accident? A. We attribute that to the accident," and on cross-examination, Dr. Newman testified: "Q. The condition was that the disc had degenerated? A. It was all rotten. Q. That had been going on for some time? A. Very likely had." On re-cross examination: "Q. Condition of that kind you might say the disc was in a weakened condition from some cause or other and that would make a person more susceptible to a rupture than otherwise? A. That is right. Q. In other words, a perfectly healthy normal disc it would take a greater injury to cause a rupture than one in a weak condition? A. We find that it does; you have got a diseased condition, if you want to call it that," and on redirect examination: "Q. Then your opinion is the accident itself is what precipitated the rupture? A. It set off a condition which was present. It probably had caused him no pain. He may have had some back aches or something like that but you get a minor injury and that may set it off and from then on it usually progresses; it is a progressive type of procedure. . . . Q. I believe you say this injury as you described it would be sufficient producing cause to bring about the rupture? A. It is sufficient to open that back up and start it protruding out. Q. And cause him to be disabled where he wasn't disabled before? A. That's right."

Dr. Newman further testified: "90 per cent. of that rupture came from between the fourth and fifth lumbar and fifth lumbar and first sacral; those spaces were open on the right side. I think I got a good handful of this rotten cartilagineous material out of each of the spaces."

Dr. Autrey, in answer to the hypothetical question presently referred to, which closed with the query: "State to the jury your opinion as to what caused his present condition?" answered, "I think his accident caused it."

Under this evidence, together with all the other testimony in the case, we are unable to say that there was no question for the jury as to appellee's suffering and con-

dition having been proximately caused by the injury received while a passenger on appellant's bus.

The testimony of Dr. Newman, who performed the operation, tended to show that appellee had a diseased condition of the disc in his lower spine for a long period of time, perhaps from childhood, prior to his injury on the bus; that the disc had become weak and "rotten" and more susceptible to rupture than a normal disc, and that his bus injury "set off a pre-existing condition that was present," causing a rupture of the disc.

The rule appears to be well settled that when a defendant's negligence aggravates, or brings into activity, a dormant or diseased condition or one to which the injured person is predisposed, the defendant is liable to the injured person for the full amount of the damages which ensue, notwithstanding such diseased or weakened condition.

In 38 American Jurisprudence, p. 741, § 82, it is said: "The established rule is that where the result of an accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the negligence which caused the accident is the proximate cause of the disability, and the person responsible for the negligence is liable for the entire damages which ensue. It cannot be said that the development of the disability under such circumstances was not a consequence which might naturally follow from the injury," and in 15 American Jurisprudence, p. 490, § 81, we find: "The general rule seems to be that where the result of the accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the defendant is liable for the entire damages which ensue, for it cannot be said that the development of the disease as a result of the injury was not the consequence which might naturally or ordinarily follow as a result of the injury, and therefore the negligent person may be held liable therefor. In other words, if a latent condition itself does not cause pain, suffering, etc., but that condition plus an injury caused such pain, the injury, and not the latent condition, is the proximate cause."

This rule of law appears to be well established by our own decisions. This court in *St. Louis Southwestern Railway Company* v. *Lewis,* 91 Ark. 343, 121 S. W. 268, said: "The court gave the following instruction to the jury over the objection of the defendant: 'If you find that the defendant company in this case is liable under the instructions heretofore given, and that the plaintiff received the injuries complained of in the manner alleged, and that at the time of such injury he was predisposed to hernia, but otherwise in good health, and that such injury was solely excited or caused by his fall from the car step described in the evidence, without his fault, and that his injury, whatever you find that to be, has directly resulted therefrom, then you are instructed that the plaintiff is entitled to recover to the fullest extent of whatever you find his injuries so received to warrant, notwithstanding such predisposition or weakness of the parts in regard to hernia.' This instruction states a rule of law well sustained by the authorities." (Citing cases.)

In *St. Louis Southwestern Railway Company* v. *Smith,* 102 Ark. 562, 145 S. W. 218, we held: (Headnote 3.) "A servant is not precluded from recovering for injuries resulting in inguinal hernia, due to the negligence of a fellow-servant for which the master was liable, though plaintiff was predisposed to that disease."

Also, in *Sutton v. Webb,* 183 Ark. 865, 39 S. W. 2d 314, we again held: (Headnote 5.) "Where plaintiff had previously suffered from arthritis in her arm, she was entitled to recover for injury to her arm inflicted by defendant's negligence, without regard to whether the damage might not have been so great but for the arthritis."

See, also, *Safeway Stores, Inc.,* v. *Ingram,* 185 Ark. 1175, 51 S. W. 2d 985, where this court held: (Headnote 3.) "An instruction that if plaintiff was suffering with stomach trouble at the time he ate the food complained of, but the food aggravated or accentuated his condition, causing him to suffer the disorder from which he complains, defendant would be liable, held correct."

2.

Counsel for appellee propounded to Dr. Autrey the following hypothetical question: "If previous to the 19th day of April, 1945, the plaintiff, John E. Dix, had always been able to do hard manual labor and if on that day he was riding a bus that collided with a concrete banister of a bridge hurling plaintiff forward in a twisting manner and immediately thereafter he suffered severe pain in his back and tried to work about two days thereafter, but the pain in his back was so severe he was unable to continue his employment; that he then returned to his home in Little Rock where he contacted his family physician and about a month later was referred to Dr. Newman and Dr.Newman kept him under observance during the time and applied a brace to plaintiff's back and that plaintiff complained with pain in his back, was unable to work and on the 28th day of October, 1945, Dr. Newman operated for a ruptured disc between the fourth and fifth lumbar vertebrae and the fifth lumbar and the sacrum and Dr. Newman operated on him and that plaintiff received no other injury and plaintiff's back is sore, state to the jury your opinion as to what caused his present condition?" His answer was: "I think his accident caused it."

Appellant objected to the question in the following language: "We object to that because it is not supported by the evidence. Dr. Newman did not testify there was a ruptured disc, but he testified there was a disintegrated disc due to rottening of the disc; they haven't proven the disc was ruptured, they have merely proven this disc was disintegrated, and Dr. Newman testified it had been for a long time in the process of disintegrating."

We cannot agree with appellant's contention that this hypothetical question was improper or not supported by the evidence. Specifically, it appears that appellant's objection to the question is based upon the contention that "Dr. Newman did not testify that there was a ruptured disc." We think this contention of appellant is not borne out by the testimony of Dr. Newman, *supra*, wherein he said: "It was my impression that he did have

a ruptured disc." We think this testimony, together with the other testimony which he gave, would warrant a finding by the jury that appellee did have a ruptured disc.

In *Masonic Mutual Accident Company* v. *Campbell,* 156 Ark. 109, 245 S. W. 307, this court said: "Counsel for appellant objected to the (hypothetical) question on the ground that it did not include undisputed facts, and then objected to the answer of the witness on the ground that it was not responsive to the question. We are of the opinion that each of the objections was properly overruled by the court. Appellee had introduced testimony tending to show that there was a bruised condition of Formby's toe, which had suppurated and then broken, and she was entitled to take the opinion of the expert as to whether or not this condition could have resulted from a healed wound which had become infected. All of the conditions were stated which were essential to taking the opinion of the witness on this subject, and there was no error in the form of the question."

In *Chicago, R. I. & P. Ry. Co.* v. *Isom,* 136 Ark. 624, 203 S. W. 271, this court said: "The hypothetical questions propounded to him assumed a state of facts to exist which the testimony in favor of the appellee tended to prove, and the appellee had a right to ask these questions from his viewpoint of the evidence," and in *Kansas City Southern Railway Company* v. *Akin,* 138 Ark. 10, 210 S. W. 350, this court held: (Headnote 4.) "Hypothetical questions were proper where there was testimony tending to prove the facts on which they were based," and in the body of the opinion, Judge Wood, speaking for the court, said: "Giving the evidence its strongest probative force in favor of the appellee, which the court must do, there was testimony tending to prove the facts upon which the hypothetical questions were grounded."

We think the question propounded to Dr. Autrey conformed to the rules above announced, and that no error appears.

3.

Finally, was the verdict excessive as appellant contends?

At the time of appellee's injury, he was 39 years of age, had always enjoyed good health, was able to work and had a life expectancy of 28 years. For some time prior to the injury, he had been earning approximately $3,000 per year and had been unable to work from the time of his injury, April 19, 1945. His hospital and medical expenses were approximately $760. The operation was a most serious one and obviously major in charter. Appellee's complete recovery is doubtful. Dr. Autrey testified: "I don't believe this patient will ever completely recover from this injury."

When these facts, along with other evidence, are taken into account by the jury, as was their right, we are unable to say that the verdict returned was excessive.

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

STEPHENS *v.* O'NEEL.

4-8103 196 S. W. 2d 917

Opinion delivered October 28, 1946.

Rowell, Rowell & Dickey, for appellant.

T. S. Lovett, Jr., and *E. W. Brockman,* for appellee.

McHaney, Justice. Appellant and appellee were rival candidates, in the democratic primary election held on August 13, 1946, for nomination to the office of circuit clerk and recorder of Lincoln county. The democratic county central committee cast up the election returns and found appellant had received 1,019 votes and appellee had received 1,036 votes, or a majority of 17 votes for appellee, who was accordingly certified on August 16, 1946, as the party nominee.

Appellant, on August 26, 1946, within the statutory period of ten days allowed for this purpose, filed his action to contest the certificate of nomination issued to appellee, the grounds of which are unimportant here. Attached to this complaint was an affidavit, captioned "Qualified Electors' Statutory Affidavit," as required by § 4738 of Pope's Digest, purporting to be signed by ten qualified electors who stated that the facts alleged in the complaint were true and correct to the best of their knowledge and belief. Thereafter, on August 30th, appellee filed his motion to dismiss the complaint on the ground, among others, that the signers of the affidavit were not qualified electors. On September 11, the court heard the evidence on the motion to dismiss, found that one of the affiants, J. E. Moore, was not a qualified elector, and dismissed the action. This appeal is from that order.

It is undisputed in this record, in fact it is conceded by appellant, that the affiant, J. E. Moore, made no assessment of his property or poll in 1944. An assessment was made by James E. Moore, a nephew of the affiant, on which, by mistake of both him and the collector, the affiant was permitted to pay taxes in 1945, and a poll tax receipt was issued to him. The affiant admitted that the assessment on file signed by James E. Moore was not his—that it was not his signature. While he thought he had assessed, there was no evidence of it on file with the assessor.

We have many times held that to be a qualified elector one must both assess and pay his poll tax in the manner provided by law. In fact it is so declared by statute, § 4739 of Pope's Digest, being § 6 of Act 123 of 1935, the last sentence of which provides: "Qualified elector is hereby construed to mean any person who is entitled to vote in said election or has assessed and paid a poll tax as required by law." We think the language "any person who is entitled to vote in said election" has reference to persons who have come of age since the last preceding assessing time before the election. All others, to be qualified electors, must have "assessed and paid a poll tax as required by law." Such is the plain and unambiguous language of the statute.

But we so held prior to the enactment of the statute. In 1932, in the cases of *Collins* v. *Jones* and *Burrow* v. *Watson,* both decided in a single opinion, 186 Ark. 442, 54 S. W. 2d 400, we said: "It is not only settled that the law applies alike to both men and women in regard to the assessment and payment of poll taxes as a qualification to vote, but it has also been several times decided that neither a man nor a woman can become an elector without being assessed as required by law (unless they have come of age since the assessment was due), although he or she possess a poll tax issued by the collector of taxes." Some of the other holdings in the same case are that a separate assessment in the manner provided by law must precede the issuance of a poll tax, that the assessment must be in writing, cannot be oral, and must be upon blanks approved by the State Tax Commission. See, also, *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257; *Murphy* v. *Trimble, Judge,* 200 Ark. 1173, 143 S. W. 2d 534.

Since the affiant, J. E. Moore, was not a qualified elector, as the trial court properly held, there remained only nine affiants on the affidavit which was an insufficient number to give the court jurisdiction to proceed with the contest. It has been so held in several cases, two of them being *Thompson* v. *Self,* 197 Ark. 70, 122 S. W. 2d 182, and *Murphy* v. *Trimble, supra.*

Therefore, the court properly dismissed the complaint and its judgment is accordingly affirmed.

ROBINS, J., concurring. I agree that the holding of the lower court was in accordance with former decisions of this court, in which it has been declared that a technical observance of the law as to making an assessment is essential to a valid poll tax receipt. But I believe that we should announce a determination to reconsider these decisions with a view to eliminating any requirement for eligibility of a voter not expressed in the constitution.

The constitution thus fixes the qualifications of voters in this state: They must be citizens of the United States, twenty-one years of age, residents of the state for twelve months, of the county for six months, of the precinct for thirty days, and must "exhibit a poll tax receipt or other evidence that they have paid their poll tax at the time of collecting taxes next preceding such election." No other limitation on the right to vote, except the provision authorizing disfranchisement of felons, is contained in the constitution. Nowhere does the constitution make the validity of a poll tax receipt, evidencing payment by the voter in the time required by law, depend on the voter's signature to an assessment list. Such a requirement cannot be justified on the theory that it is merely a part of a registration system, because our constitution, art. III, § 2, provides: "Nor shall any law be enacted whereby the right to vote at any election shall be made to depend upon any previous registration of the voter's name."

Neither the legislature nor the courts may properly add to or subtract from the constitutional definition of an elector. The participation, at the ballot box, by the citizen in the affairs of government is vital, and the citizen's path to the polls ought not to be beset with any barrier or impediment not put there by plain provision of the constitution.

I am authorized to state that Mr. Justice MILLWEE concurs in the views expressed above.

4419 196 S. W. 2d 922

Opinion delivered October 28, 1946.

[redacted]

L. DeWoody Lyle and *Sam M. Levine,* for appellant.

Guy E. Williams, Attorney General and *Earl N. Williams,* Assistant Attorney General, for appellee.

SMITH, J. This appeal is from a death sentence imposed upon appellant following his conviction for the crime of rape committed upon a child only 11 years old whose feelings we spare by omitting the mention of her name. He was defended by eminent and able counsel, under appointment of the court, who interposed such defense as the facts in the case permitted; and, who to be sure they had discharged the duties appertaining to their appointment have perfected this appeal.

When arraigned, as provided for and required by § 3876, Pope's Digest, and asked if he pleads guilty or not guilty appellant answered, "Yes, sir, Judge, I am guilty and I beg the mercy of the court."

There was offered in evidence at the trial the written confession of appellant, shown to have been freely and voluntarily made, in which the revolting details of the crime were recited. This statement coincided with the testimony of the assaulted child, whose identification of appellant as her assailant was unequivocal. Her testimony was corroborated by much other testimony. The evidence of the doctors who examined the child soon after the assault, as to lacerations sustained leaves no doubt as to the proof of the completed crime. As we have said proof of the commission of the crime is complete and

its grade may not be reduced to a mere assault with intent to commit the crime.

The child was sent by her mother with a five-gallon can to a suburban grocery store to buy kerosene. She was unable to carry that weight and bought only three gallons of oil. Appellant, driving an automobile, met the child in the road and offered to take her to her home. The invitation to be relieved of her burden was accepted, and the child got in appellant's car. But instead of driving her home, as he had promised, he drove to a secluded spot and committed his diabolical crime.

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

COMMERCIAL CASUALTY INSURANCE COMPANY *v.* LEONARD.

4-7958 196 S. W. 2d 919

Opinion delivered October 28, 1946.

Buzbee, Harrison & Wright and *Wayne Upton,* for appellant.

Caudle & White, for appellee.

GRIFFIN SMITH, Chief Justice. Joint liability of $30,250 was adjudged against Missouri Pacific Transportation Company and Mrs. John Leonard. Commercial Casualty Insurance Company carried the bus company's risk and reimbursed its client to the extent of $32,372.04, inclusive of interest and cost. The appeal is cited as *Missouri Pacific Transportation Company* v. *Simon,* 199 Ark. 289, 135 S. W. 2d 336.

Mrs. Leonard was indemnified by Hardware Mutual Insurance Company, but refused to participate in payment of the judgments. Commercial Casualty sued Mrs. Leonard and Mutual, alleging discharge of its contractual liability and asking that judgment be rendered against Mutual for $16,186.02—half of the amount expended. To a complaint in which it was urged that contribution generally lies among joint tortfeasors who act negligently, but innocently, the court sustained Mutual's demurrer.

Appellant, while admitting there have been no Arkansas cases sustaining its contention, thinks language in decisions ordinarily construed as supporting the settled doctrine that such contribution cannot be had, was merely expressions of the opinion-writers on a phase not germane to a determination of the issue involved. For example, in *Criner* v. *Brewer,* 13 Ark. 225, Chief Justice Watkins said, " . . . nor does the law recognize any contribution among tortfeasors." It is insisted that the statement was a gratuity because contribution was not involved. But there is more to the opinion than has been quoted by appellant, and the declaration was not an impetuous use of the pen; but, rather, it was the court's view of the law.[1]

[1] Said Chief Justice Watkins, speaking for the court: "In civil suits for trespass, the object is compensation to the party enjoined. Where the trespass is joint, the plaintiff can have but one satisfaction for the injury. In contemplation of law, all the trespassers are equally liable for such damage as the plaintiff has sustained, and though the plaintiff may sue all, or as many of them either jointly or severally, as he may elect, there can be no apportionment of the damages among them, according as each may have participated in a greater or less degree in the commission of the injury; nor does the law recognize any contribution among joint tortfeasors. Each defendant is guilty or not guilty of the whole trespass, and whether the defendant[s] be sued jointly or severally, it is the duty of the jury to award damages against all or each found guilty for the whole injury which the plaintiff has sustained by the trespass complained of."

In harmony with *Criner* v. *Brewer* is *McCulla* v. *Brown,* 178 Ark. 1011, 13 S. W. 2d 32. See *Berryman* v. *Cudahy Packing Co.,* 191 Ark. 533, 87 S. W. 2d 21. *Nettles* v. *Alexander,* 169 Ark. 380, 275 S. W. 708, is cited to emphasize appellant's argument that in recent years the Supreme Court has declined to pass directly on the question in cases not involving willful conduct or a violation of law.

In the Nettles appeal these sentences appear: "It may be said that counsel have cited cases of the highest authority sustaining their position [that one tortfeasor may enforce contribution from another similarly situated]. We do not review these cases, nor do we decide whether they should be followed by us, for the reason that [failure to make a corporation report had by legislative amendment been made criminal]. In other words, [Nettles'] cause of action is predicated upon a violation of the criminal laws of the state, and his right of contribution must fail on that account."

In *Hobbs* v. *Hurley,* 117 Me. 449, 104 A. 815, the court said : "As between 'joint feasors' in *pari delicto,* which means persons who by concert of action intentionally commit the wrong complained of, there is no right of contribution. Contribution may be enforced between joint tortfeasors not intentional and willful wrongdoers, but such only by legal inference of law." See *Ellis* v. *Chicago & N. Y. Ry. Co., et al.,* 167 Wis. 392, 167 N. W. 1048 (1918), and cases there mentioned.

It cannot be said that the wrong a jury found Mrs. Leonard had committed was intentional. On the contrary, there was evidence from which there could have been a holding in her favor, and for the purpose of this opinion it may be assumed she was not a purposeful tortfeasor. Still, we are met with a rule that has been accepted since Criner and Brewer litigated in 1853; and not until 1941 was there a recognition of the obligation it is here sought to impose, although much may be said for appellant's position when it is viewed from the standpoint of abstract equity.

The collision resulting in judgments obligating Commercial Casualty occurred in 1938. Following trial in March, and appeal, this court's opinion was delivered November 27, 1939.

Act 315 of 1941 was approved March 26. It is entitled, "An Act concerning contribution among tortfeasors, release of tortfeasors, procedure enabling recovery of contribution, and making uniform the law with reference thereto." Subsection 1 of § 2 reads: "The right of contribution exists among joint tortfeasors."

There is comment in *Schultz* v. *Young*, 205 Ark. 533, 169 S. W. 2d 648, regarding purposes of the legislation. It is there stated that the measure was prepared by National Conference of Commissioners on Uniform State Laws. The late J. S. Waterman, then dean of University of Arkansas Law School, referred to the act and copied construction of some of the provisions, made by the commission. See Bulletin for October 15, 1941, p. 15 *et seq.*[2]

Whatever may be said in respect of the equities between carriers of liability where joint tortfeasors are involved—and certainly argument in favor of contribution is not without merit in those cases where the damage was occasioned unintentionally and no law was violated—it appears to have been settled prior to 1941 that contribution did not exist. This situation was seemingly recognized by the General Assembly; but, since the transaction now before us occurred prior to the enactment, terms of that measure are not retroactive and cannot avail here.

If it be conceded that in an appropriate case justice, acting through a court of equity, would have the power

[2] Attention should be called to the fact that the Arkansas General Assembly, in adopting the proposed act, made certain modifications. An added provision is that "Nothing in this act shall be construed to affect the several joint tortfeasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury." Uniform Laws Annotated, v. 9, Miscellaneous Act, p. 164. Again, at page 168, it is shown that Arkansas added another paragraph providing that failure to serve third parties properly shall not delay prosecution of proceedings between original parties or impair original defendants' right of contribution. Sec. 7 (6), Act 315 of 1941.

to prevent one from being unjustly enriched at the expense of another, (consider "Contribution and Indemnity Between Joint Tortfeasors," by Robert A. Leflar, 81 University of Pennsylvania Law Review, p. 130)[3] the question arises whether appellant has brought itself within the terms of Act 196, approved March 23, 1927.[4]

We are cited to *Home Insurance Company* v. *Lack,* 196 Ark. 888, 120 S. W. 2d 355. "Generally," says the opinion, "any person who, pursuant to a legal obligation to do so, has paid even indirectly for a loss or injury resulting from the wrong or default of another, will be subrogated to the rights of the creditor or injured person against the wrongdoer."

When it adopted the 1927 act heretofore mentioned, the General Assembly undertook to safeguard rights of persons who were injured through the tortious conduct of another. But there are certain limitations. Even between the injured plaintiff and the defendant's insurance carrier a direct action does not lie "until after an execution [against the tortfeasor] is returned unsatisfied." This rule was announced in *Universal Automobile Insurance Co.* v. *Denton,* 185 Ark. 899, 50 S. W. 2d 592. There is the emphatic language: "We have a policy conforming to [Act 196 of 1927] which created a cause of action which would not otherwise exist, and the cause of action thus created can only be maintained under conditions specified, which are that, upon an execution being returned unsatisfied, the plaintiff in the judgment may maintain an action against the insurer for the amount of the damage not exceeding the amount of the policy."[5]

[3] Prof. Leflar is now dean of the School of Law, University of Arkansas.

[4] The act is printed twice in Pope's Digest, once as § 7774, and again as § 8007. (The matter appearing in small type on page 667 of the printed Acts of 1927, "§§ 1, 2, 3," was inserted by the compilers who prepared the acts for publication, and is not in the act proper).

[5] In *Standard Surety & Casualty Co. of New York* v. *Jackson,* 188 Ark. 724, Act 196 appears to have been erroneously cited as Act 116. It is correctly listed in the Southwestern Reporter, v. 67 2d, p. 585. Compare *National Casualty Co.* v. *Blackford,* 200 Ark. 847, 141 S. W. 2d 54.

The complaint's allegation regarding liability is that Commercial Casualty had discharged the entire judgment; that Mrs. Leonard was insured by Mutual, and that she had "failed and refused to pay" any part of the obligation. It is further said that Mutual agreed to indemnify Mrs. Leonard "from liability imposed by law" arising out of injuries received by the public. There is no claim that an execution had been issued, or that legal recourse against Mrs. Leonard had been futile—only that she "failed and refused to pay." This is not sufficient under Act 196 and the decisions construing it.

In discussing Act 196 we do not mean to say that appellant rested its right of recovery on that law. On the contrary, the theory was equitable contribution, irrespective of statutes. The failure to allege that Mrs. Leonard was insolvent does not control the issue, because in any event we would feel that the law, as construed from 1853 to 1927, should be reasserted.

Affirmed.

ISGRIG *v.* SRYGLEY.

4-7962 197 S. W. 2d 39

Opinion delivered November 4, 1946.

John M. Lofton, Jr., and *Grover T. Owens*, for appellant.

Baucum Fulkerson and *Rose, Dobyns, Meek & House*, for appellee.

GRIFFIN SMITH, Chief Justice. Rules relating to activities of Little Rock High School students who organized fraternities and sororities were adopted September 7, 1945. Adults, acting for members of these organizations, and because of their own interest in the subject, sought a restraining order. From the court's action in dismissing the complaint for want of equity this appeal has been prosecuted.

The regulations complained of make enrollees or participants in the groups ineligible to take part in certain activities or to receive designated honors, as shown in the footnote.[1]

[1] Quoting: "The policy of the Little Rock School Board relating to 'Rules and Regulations Pertaining to Fraternities, Sororities, and other Secret Clubs in the Little Rock High School' . . . makes pupils who are associated with or who are members of secret organizations ineligible to receive the following offices or honors:

Primarily it is insisted that the board abused its discretion; but, in addition, it is sought to reverse the decree because (a) when Acts 171 of 1929 and 169 of 1931 are read together, there is disclosed an intent to permit activities the board complains of; (b) the rule is in contravention of the First and Fourteenth Amendments to the Federal Constitution.

Dissatisfaction of school management with the groups it was sought to curb—hereafter referred to as Societies—followed physical injuries sustained by Junior College students who were being initiated more than ten years ago. The feeling appears to have been general that orderly procedure had given way to what might be termed unintentional acts of violence, and that the program with its unpleasant incidents would, if unchecked, build a barrier between young people, to the detriment of a very large majority.

In an effort to discharge official duties without being unduly harsh, the board, in 1935, adopted a resolution that those who subsequently joined the organizations, "or who, being already a member, . . . [participate] in the initiation of any new member," were ineligible to hold class office or to receive scholastic or class honors. It was resolved that " . . . commencing with the fall term of 1935, every student in the Senior High School and Junior College [will] be required to sign a written pledge to abide by the rule."

This status continued for two years. Evidence disclosed (Mrs. W. P. McDermott testifying as a director): " . . . An issue of the 'Tiger' came out, setting forth that compelling the pupils to sign this statement that they were not fraternity or sorority members was

(1) *Home Room.* (a) Officers. (b) Honorary positions ('Tiger' salesmen, ticket salesmen, etc.) (c) Membership in the Student Council, Girls' Council. (d) Membership on any committees. (e) Any social or political representative office. (2) *Inter-School Sports*: Football, basketball, track and any athletic contests which are scheduled after school. (3) *Band, Choral Groups, Glee Club.* (4) *Committee Appointments From the Student Council, Girls' Council, Athletic Council.* (5) *Any Office in the Student Body Association.* (6) *Scholastic Honors*: Honor Roll, National Honor Society, etc. (7) *Class Honors*: Tiger Editorial Staff, Banquet Toastmaster, etc. (8) *Miscellaneous*: The policy includes all honors given by the faculty or by the student body."

simply putting them in a position which would make them deceptive in their actions. [Two of the students] were very earnest in their presentation of the matter. They felt that we should rescind [the rule] in order to maintain a certain amount of integrity in the whole group; that many of them were signing the cards saying that they were not members when they were."

September 28, 1937, the board revoked the resolution of 1935. It is interesting, however, to observe the reasons for abandonment of the plan after two years of trial and many infractions. After mentioning that the resolution of 1935 was adopted because injuries had been sustained by " . . . several Little Rock Junior College students in a secret fraternity initiation," this statement appears: "[We have become convinced, through experience] that, because of lack of cooperation on the part of the parents, [the rule] is not being observed. Secret fraternities and sororities of students of the Senior High School continue to flourish, and the written statement required of every student . . . is being regarded by great numbers, not as a solemn pledge to be kept, but as a trivial promise to be broken." Net result of the resolution of 1937 was to abrogate the regulation promulgated in 1935, with this subjoined explanation: "We have, therefore, concluded to abolish the rule requiring the signing of the pledge cards and to return to our former position—which is, that when the student leaves the school grounds our responsibility ends."

In the litigation before us we are not required to demarcate a school board's duties and responsibilities in matters requiring discretion; nor could the General Assembly, without running the risk of possible hardships, injury, or extravagance, chart the limits in all cases, and define them. Something—and that *something* has fundamental substance—must be left to the judgment of board members; and this can be done only through the process of delegated power.

Appellees' brief asserts that the undisputed testimony shows that sorority and fraternity members con-

tinued to wear their insignia in open defiance of the authorities, and " . . . they forced pledges to wear bizarre clothing, shaved the heads of boy pledges, and made girl pledges wear their hair in pigtails. They continued to band together in elections, to congregate at the front door, forcing the 'barbarians' to use other entrances, and to reserve certain tables in the cafeteria for [fraternal] members. They remained so absorbed in fraternalism that scholarship slumped. In the language of the listed objections, they were undemocratic; they were snobbish. They carried petty politics into the school, set false standards, fostered habits of extravagance, and their [school work] was made secondary."

It is immaterial whether, as appellees insist, certain parts of the testimony were undisputed, or merely preponderated in favor of the decree, unless some rule of law is infringed.

First.—The board's action does not transgress Amendment No. 1 to the Federal Constitution. The amendment restrains Congress (a) from making laws respecting an establishment of religion or prohibiting the free exercise thereof; (b) abridging the freedom of speech, or of the press; (c) [preventing] the people peaceably to assemble and to petition the government for a redress of grievances.[2] Appellants have not seriously argued the constitutional provisions mentioned and we shall not discuss them because they do not apply; nor is due process of law, as contemplated by the Fourteenth Amendment, involved.

Second.—Act 171 of 1929 was intended, as the title says, to prohibit undemocratic practices in public schools. A public school fraternity, sorority, or other secret society, is defined to be any which seeks to perpetuate itself by taking in additional members on the basis of a vote of the society " . . . rather than upon the free choice of any pupil in the school who is qualified by the rules of the school to fill the special aims of the organization or society."

[2] See Arkansas Constitution of 1874, Art. II, §§ 4 and 6.

Section three of the act imposes upon school directors and boards of education the duty of expelling those who violate the law. It details the things that are prohibited.

Section four applies to any persons *not enrolled* in the school, directing that they refrain from soliciting members for such organizations; nor may such outsiders attend a meeting of a banned society.

Section six is: "The provisions of this act shall not apply to fraternities, sororities, or secret societies of the University of Arkansas, any State Teachers' College, or other State supported institutions of Junior College rank, or rank above Junior Colleges, or Senior High School Students of National Fraternities or Societies, nor to students of these institutions in their relation to such societies or organizations in these institutions; nor shall the provisions of this act apply to any non-secret society or organization authorized and sponsored by the public school authorities."

The answer to appellants' contention that they are protected by Act 171 is that it does not *authorize* existence of the societies, but (Sec. 6) merely exempts them from penalties otherwise provided; nor has the school board sought to compel the membership to disband. All it has done relates to discipline, deportment, and scholarship honors. This end is achieved by withholding recognition and privileges that accompany conduct conformable to reasonable rules.

Act 169 of 1931 and Act 184 of 1935 were attempts by the General Assembly to bring under a common heading the miscellaneous school laws from time to time enacted, many of which were obsolete, some being in conflict with others. The 1931 measure as printed in the official Acts (exclusive of index) contains 104 pages. Section 97(m) charges directors with the duty of doing ". . . all things necessary and lawful for the conduct of an efficient, free public school or schools."

The genius of our free school system is that it is alike available to rich and poor. Its beneficence may

influence the under-privileged child who happens to reside "across the tracks," or inure to the democratic deportment of those upon the Heights.

A number of interesting cases are cited in *Wilson et al.* v. *Abilene Independent School District, et al.*, decided October 26, 1945, by the Court of Civil Appeals of Texas, Eastland District. Headnote No. 9, 190 S. W. 2d 96, is: "Order of school board requiring all junior and senior high school students to sign pledge cards pledging that they are not and will not become a member of any fraternity, sorority or secret organization, not approved by principal, as a prerequisite to becoming eligible to participate in extracurricular activities is authorized by constitutional provision relating to support and maintenance of an 'efficient' system of public free schools, and is not violative of any other constitutional provision."

Essentials of the Arkansas and Texas constitutions relating to this subject are printed in parallel columns:

TEXAS	ARKANSAS
"A general diffusion of knowledge being essential to a preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."	"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of 6 and 21 years may receive gratuitous instruction."

In *Dickinson, State Auditor* v. *Edmondson*, 120 Ark. 80, 178 S. W. 930, Ann. Cas. 1917C, 913, it was held that under our Constitution (Art. XIV, § 1, copied above) no appropriation of funds for maintenance of the common schools was necessary; but that the General Assembly had the power, in respect of high schools, to authorize use of common school money. It will be observed that in the Texas and Arkansas constitutions similar words are used. In Texas the mandate is that the Legislature shall make provision for support and maintenance of *"an efficient"* system. In Arkansas it is directed that the State

maintain "*a general, suitable, and efficient system.*" The word "*efficient*" appears in each document. The term is emphasized by Mr. Justice GRAY who spoke for the Texas Court of Civil Appeals in the Abilene decision, who effectively conveyed the thought that a system could not be efficient if essential rules were being violated, if time apportionable to study was being utilized for social purposes, and if disinclination of a particular group to associate with others occasioned discord and brought on dissatisfaction.

Antell v. *Stokes,* (1934) 287 Mass. 103, 191 N. E. 407, is annotated in 134 A. L. R., p. 1274. The second headnote in the North Eastern Reporter is: "Rule of school committee prohibiting solicitation and initiation of high school pupils to unapproved secret student organizations, on penalty of expulsion from school, and requiring officers of such organizations to file certain information concerning them, *held* within authority of school committee." A supplemental annotation in 134 A. L. R. mentions the fact that the rule it announced in Vol. 27, p. 1074, had been sustained by the Massachusetts case. See, also, 24 R. C. L., p. 629, § 86, where it is said:

"In the absence of statute on the subject, regulations of school authorities prohibting the connection of students with Greek letter fraternities or denying certain privileges to such members have been uniformly upheld as proper disciplinary regulations." To the same end is the summary found at page 855 of Corpus Juris, Vol. 56. Contrary, *W. R. Wright, et al.* v. *Board of Education,* 295 Mo. 466, 246 S. W. 43, 27 A. L. R. 1061.

Whatever term may be used to illustrate the clash of will between teachers and pupils—whether insubordination, disregard of precept, or a failure to realize the importance of what was being done—it is without dispute that in 1937 representatives of groups similar to those with which we are now dealing met with school authorities and admitted that many of the young people were deceiving the men and women who were employed by taxpayers to transmit to them such educational facilities as the district afforded. Effect of the rep-

resentations was, "Whether you like it or not, we are going ahead with our societies. You may coerce us into signing the pledges, but you can't make us keep our promises."

A situation of this kind was not contemplated by those who provided a free school system. Some one, at some point, must hold a responsible hand; and some one must say to our maturing citizens that barter by threat is not an approved method of procuring results. This is particularly true when the thing sought to be approved has been put to the student body and emphatically voted down, as fraternities and societies were just before the resolution of 1945 was adopted.

Conceding, as anyone who reasons must, that group organizations may promote efficiency, and in some instances inculcate a sense of responsibility in young men and young women who have reached in life's span a period of juvenile dependability, it does not follow that school directors are without authority to impose reasonable restrictions in those instances where experience, observation, and a knowledge of the personality being dealt with suggest this course.

Affirmed.

WALLACE *v.* LONG, ADMINISTRATOR.

4-7972 197 S. W. 2d 20

Opinion delivered November 4, 1946.

Buzbee, Harrison & Wright, for appellant.

Bob Bailey, E. L. Holloway, Joe D. Shepherd and *E. G. Avery,* for appellee.

McHaney, Justice. Appellee as administrator of the estate of Major Long, Jr., his son, brought this action against appellant to recover damages for the negligent injury to and which resulted in the death of his said son. Appellant was, at the times hereinafter mentioned, engaged in some kind of construction work in or near Tulsa, Oklahoma, under the firm name of James H. Wallace Construction Company, and as such had numerous employees, one of which was appellee's son.

The facts tend to show that, on July 17, 1943, Major Long, Jr., hereinafter called intestate, was an employee of appellant; that he was a colored man, about 22 years old, but was strong and healthy; that he was engaged in unloading from a box car onto a truck what is called "gyp rock" which was sheets or slabs of material 8 feet long, 2 inches thick and 8 inches wide, and weighing about 175 pounds per sheet; that he and five other men were engaged in getting the "gyp rock" out of the car and loading it on a truck standing some 12 to 18 inches from the car, with two men handling each piece, one at either end; that in doing this one man had to walk backward to get out of the car and onto the truck with said material while the other walked forward; and that, at about 2 p. m. of said date, while he and his partner were carrying out a piece of this material, he, walking backward, stumbled over some loose material on the floor of the car as he neared the door and fell out of the door onto the truck, the heavy piece of material striking him in the right side, causing injuries from which he died on August 12, following.

It appears that, in loading said material for shipment by rail, it was stacked in the car in layers, with broken pieces of the same material between the layers to prevent breakage, and as the sheets or slabs were taken out of the car for loading onto the truck, these packing pieces would fall to the floor of the car and were left there, and that intestate stumbled over some of these pieces, causing him to fall.

The negligence relied on was the alleged failure of appellant to exercise ordinary care to provide intestate a reasonably safe place in which to work; permitting the packing pieces to accumulate in the working place; requiring him to walk backwards in carrying said material; in employing a foreman who told them to hurry their work; in parking the truck too far from the door of the car; and requiring him to work in a dangerous place without informing him of the danger.

Trial resulted in a verdict and judgment against appellant for $2,650 for Major Long, Sr., for loss of contributions, and $2,650 for the estate for conscious pain and suffering. This appeal followed.

For a reversal of the judgment, appellant urges that intestate assumed the risk as a matter of law and that the trial court erred in refusing to direct a verdict for him at his request so to do. Our attention is called to the provision of the Oklahoma Constitution, Art. 23, § 6, which provides: "The defense of contributory negligence or assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." It is conceded that this action is governed by the laws of Oklahoma, since the injury and death occurred there. But, it is insisted, that this provision of the Oklahoma Constitution is procedural and not substantive, and that the courts of this State are not bound on a cause of action arising in Oklahoma on a procedural provision of the Constitution of that State. Citing *Independent Oil Co.* v. *Beacham,* 31 Okla. 384, 120 P. 969 and *Muskogee Vitrified Brick Co.* v. *Napier,* 34 Okla. 618, 126 P. 792. Because of this contention, we are asked to overrule our case of *Missouri Pacific R. R.*-

Co. v. *Miller,* 184 Ark. 61, 41 S. W. 2d 971, which holds that said constitutional provision is applicable to trials in Arkansas for injury sustained in Oklahoma. We do not now determine whether our case is right or wrong, for the reason that in our opinion the question of whether intestate assumed the risk was a question of fact for the jury under the law of this state without regard to said constitutional provision.

It is true that we have held in many cases that "where the conditions under which a servant is put to work are constantly changing so as to increase or diminish his safety, it is the servants' duty to make the working place safe and that no duty in that regard rests upon the master," *Moline Timber Co.* v. *McClure,* 166 Ark. 364, 266 S. W. 301, but "that doctrine" says the court, "is an exception to the general rule that the master owes his servant the duty to exercise ordinary care to make the working place—reasonably safe." In that case the general rule was held to apply and not the exception, because the plaintiff there was working under the immediate supervision of the foreman, whose orders he was bound to obey, "and, if the foreman failed to exercise ordinary care in providing a working place—the defendant would be liable under the doctrine of *respondeat superior.*" The undisputed testimony here shows that intestate was working under James Rider, a straw boss or sub-foreman who was also performing the services of a laborer, and that he told intestate and the others, in effect, to leave the debris alone, and to hurry up and get the material out of the car. Rider called himself a "pusher" in getting the work done. So, the exception to the general rule stated above does not apply here, but the general rule. This matter of the foreman is the distinguishing feature between this case and another cited by appellant, *Howell* v. *Harvill,* 185 Ark. 977, 50 S. W. 2d 597. It is conceded that the court correctly submitted the question of assumed risk to the jury, but it is insisted that a verdict should have been directed, because, if the master was negligent in failing to furnish a reasonably safe place to work, still this fact was so apparent and obvious as to be discoverable to a person of ordinary intelligence,

and to know and appreciate the danger, that he should be held to have assumed the risk as a matter of law.

We cannot agree. The effect of the evidence is that the men were being hurried by the foreman who said he had been instructed to leave the debris on the floor. This was the first day intestate had worked at this particular job. He was only 22 or 23 years of age and under all the facts and circumstances, we think the court properly submitted the question of assumed risk to the jury.

On the question of the right of Major Long, Sr., to recover, we think the court should have directed a verdict for appellant, and against his right to recover. Intestate was of age and we think the evidence of his contributions to his father and the latter's dependency on him was very insubstantial. There was no legal obligation on intestate to help support his parents. Appellee testified that intestate earned $35 per week working for appellant, which he brought home and gave to appellee and his wife. His wife was sick, had been for a long time and died some few months after the son's death. The money that intestate contributed was for the care and support of his sick mother, although some of it went for general household expenses. Appellee was only 56 years of age when his said son died. He owns a six-room modest home in Wagoner. He paid his son's illness and funeral expenses to the extent of more than $600 out of his own funds, plus insurance on the son of $305. He was engaged in farming and growing livestock. We think all the facts and circumstances show a total lack of dependency of appellee on the earnings of his deceased son.

There are several facts and attendant circumstances in the record in this case that are not very satisfactory. In fact, they leave us in some doubt whether the intestate received the injuries about which complaint is made at the time and place and while in the service of appellant. For instance, Dr. Bamberl, an osteopathic physician, testified he was first called to see intestate on August 4, 1943, and he administered quinine which is a treatment

for malaria, but the patient did not have malaria, however the medicine was good to reduce his fever. The patient was taken to the hospital in Muskogee on August 11 where he died the next morning. Dr. Earnest of the hospital staff examined him and found him unconscious and in a very bad condition. He made an examination of the patient, but found no evidence of trauma, bruises or abrasions. The father gave him a case history, but made no mention of an injury until about a week after the patient's death, when the appellee, Major Long, Sr., came back and tried to get him to change his death certificate to show that intestate was injured in a Tulsa war plant, instead of showing as it did, that the cause of death was "undetermined." Also some lawyer who was not connected with this case and an undertaker tried to get him to so change his death certificate, all of which he refused to do. Also, the doctor's death certificate was made out and signed a day or two after the death, but another purported such certificate, dated March 7, 1944, with a typewritten signature of the name "A. W. Earnest," as the doctor making it, was filed with the Bureau of Vital Statistics of Oklahoma, which showed the cause of death of said intestate was "history—accidental injury, Tulsa war plant." He testified he did not make or sign the death certificate of March 7, 1944, and that he did not put in any certificate that the cause of death was "accidental injury, Tulsa war plant."

Another matter is that the payroll records of appellant show that intestate worked for appellant after the date of his alleged injury, and that one or more of the witnesses for appellee was not on the payroll at the time of the injury. Another fact is the complaint was not filed until May 25, 1945, although intestate died on August 12, 1943.

These and other facts and circumstances render it doubtful to our minds that intestate's death was caused by an injury, and that he probably died from functional causes not related to traumatic injury, as testified to by Dr. Earnest. But the jury is the sole judges of the

credibility of the witnesses and the weight to be given to their testimony, and their verdict has resolved the doubt in favor of appellee and we are reluctantly bound by it, in so far as it relates to a finding for the benefit of the estate of said intestate.

The judgment in his favor for loss of contributions will be reversed and the cause dismissed. The judgment for the benefit of the estate will be affirmed.

LEWIS *v.* TATE, MAYOR.

4-8104 197 S. W. 2d 23

Opinion delivered November 4, 1946.

Creekmore & Robinson, for appellant.

Batchelor & Batchelor, for appellee.

HOLT, J. This action was brought by appellant, Harley Lewis, against the mayor, recorder and members of the City Council of Mulberry, Ark. The allegations of his complaint were: "That he is a qualified elector of the City of Mulberry, Arkansas, is the owner of property within the corporate limits of said municipality, and is a taxpayer therein, and that he brings this suit on behalf of himself and all other persons similarly situated.

"By action of the State Board of Municipal Incorporations taken on November 15, 1945, as a result of an election held in Mulberry, the municipality was raised from an incorporated town to a city of the second class, and later it completed its organization by the election of the present officers and city council; that this occurred prior to July 19, 1946.

"That Mulberry does not have a general sewer system, but the council has ascertained and declared that there is a need for a comprehensive sewer system, but the cost of the system cannot be financed exclusively either by revenue bonds or by bonds issued under the terms of Amendment No. 13 to the Constitution of the State of Arkansas, and the city council has formed the plan of financing the cost of this sewer system by issuing a series of revenue bonds, to be supplemented by a series of $14,000 in bonds issued under authority of Amendment No. 13. Pursuant to this plan, the city council on July 19, 1946, passed Ordinance No. 88, calling a special election in the city to submit the question of the bond issue and a tax to pay the bonds and interest, this election to be held on August 27, 1946. A copy of Ordinance No. 88 is attached hereto as Exhibit "A" to this complaint.

"It is admitted that Ordinance No. 88 was duly passed and that both the ordinance and the form of the notice of the election comply with the provisions of

said Amendment No. 13; that the ballot was in proper form, the election was held and conducted, the vote canvassed, and the result declared under the law and in the manner provided for municipal elections, and the mayor on August 28, 1946, issued a proclamation showing that the election resulted in 121 votes for the bonds and for the tax, and 23 votes against the bonds and against the tax.

"Plaintiff alleges that the election is void for the reason that the notice of election was not given as required by Amendment No. 13, which expressly provides that the notice shall be by advertisement weekly for at least four times in some newspaper published in said municipality and having a *bona fide* circulation therein, the last publication to be not less than ten days prior to the date of the election. In the effort to comply with this provision, and in the absence of a newspaper published in Mulberry, the defendants published the notice of the special election in the "Mulberry" section of *The Press-Argus,* a weekly newspaper published in the near-by city of Van Buren, which is in the same county; that this notice appeared in the issues of July 26, August 2, 9, and 16, 1946, and there is attached hereto as Exhibit "B" to this complaint the upper half of page No. 4 of the issue of Friday, August 9, 1946, which shows the heading of the "Mulberry" section under which the special correspondent has collected news items about the City of Mulberry and its people, and in this section the notice appears. In addition to the publication in the newspaper, the defendants attempted to comply with the terms of the amendment by posting an identical notice to that published, in ten or more of the most public places in the city, more than thirty days before the date set for the election, and it is admitted that the inhabitants of Mulberry were fully advised of the election, as is evidenced by the very substantial vote for and against the proposals.

"Plaintiff further alleges that unless restrained by this court, the defendants propose to proceed under § 6 of Ordinance No. 88 to advertise a public sale of the

bonds, and they will make a sale of the bonds, with the result that the city will be involved in expensive, prolonged litigation, its credit will be damaged, and the taxpayers will be subjected to needless and illegal expenditure of public funds.

"Wherefore, the plaintiff prays an order of this court permanently restraining the defendants from proceeding any further with their attempt to issue the proposed $14,000 in bonds under the authority of Amendment No. 13, and that he have his costs herein expended and all other proper relief."

Ordinance No. 88, Exhibit "A," made a part of the complaint, provides in § 4: "Because no newspaper is published in the City of Mulberry, Arkansas, the mayor of said city is hereby authorized and directed to give notice of the special election by an advertisement published weekly, once a week for four times in the Van Buren *Press-Argus,* a newspaper published in the City of Van Buren, Arkansas, and having a *bona fide* circulation in the City of Mulberry, etc."

Appellees filed a general demurrer, which the trial court sustained, and upon appellant's election to stand on his complaint, and his refusal to plead further, the complaint was dismissed for want of equity. This appeal followed.

The sole question presented is the sufficiency of the publication of the election notice in the Van Buren *Press-Argus,* there being no newspaper published in Mulberry, Arkansas.

Appellant argues that this publication of the notice of the election, submitting the question of issuing bonds, was not a sufficient compliance with Amendment No. 13 of our Constitution, which provides: "Notice of said election (the election submitting the question of issuing bonds) shall be given by the mayor by advertisement weekly for at least four times in some newspaper published in said municipality and having a *bona fide* circulation therein; the last publication to be not less than ten days prior to the date of said election."

The identical question presented here was decided adversely to appellant's contention in the case of *Connerly* v. *Stephenson,* 181 Ark. 833, 28 S. W. 2d 60, 29 S. W. 2d 276. The facts in the Connerly case were similar in effect to those presented here. In that case, the City of Eudora called for a special election to vote on the question of an $8,000 bond issue for the purpose of constructing a public hall. No newspaper was published within the City of Eudora, so the notice was published in the *Chicot-Spectator,* a weekly newspaper printed in Lake Village, which had a general and *bona fide* circulation in Eudora. Lake Village and Eudora are cities within Chicot County. In that case, this court had under consideration the meaning and effect of the above provision of Amendment 13 relied upon by appellant here, and it was there said: "We do not think the word 'published' as used in the amendment is altogether synonymous with the word 'printed.' If that meaning alone should be attributed to the word 'published,' in the connection in which used, it follows that the people intended by the passage of the amendment to deny cities in which a weekly newspaper is not printed the privilege of voting bonds to build a public hall. Certainly it was not the intention of the people to penalize the city simply because a weekly newspaper was not printed therein. The intention was to accord to all cities the privilege, by a majority vote of the electors, of issuing bonds to build a public hall. As there is nothing in the amendment to indicate that the people intended to discriminate between cities of the State relative to voting bonds to construct a public hall, the word 'published' should not be restricted in meaning so as to result in such a discrimination. The common and ordinary meaning of the word 'published,' according to Webster's New International Dictionary, is 'to make public, to make known to the people in general.' The newspapers might be printed but never published. It is only published when put in general circulation. The proper and correct meaning of the word 'published,' as used in the amendment, is that the notice must be inserted for the required time in a newspaper that will make the special

election and the date thereof a public matter or known to the people in the city affected. In the instant case the notice was promulgated or proclaimed in a newspaper that had five hundred subscribers in the corporate limits of Eudora, and about one-half of which was devoted to the news of said town, being edited by a local reporter or editor.

"This court has adopted a liberal rule governing the sufficiency of notices of special elections. *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161; *Hogins* v. *Bullock,* 92 Ark. 67, 121 S. W. 1064, 19 Ann. Cas. 822. We think the liberal rule announced in the cases cited should be applied to the instant case, because in doing so the true intent of the people in the adoption of the amendment will be reflected in the construction of the word 'published' in the connection used without doing violence to the language and context."

In the present case, as shown by the allegations of the complaint and Exhibit "A," a part thereof, which on the demurrer are admitted to be true, there was no paper published in Mulberry, and the mayor and city council undertook to meet the requirements of Amendment No. 13, *supra,* by publishing the notice of the election in a long established weekly newspaper published in the near-by City of Van Buren, known as *The Press-Argus,* which had a *bona fide* circulation in Mulberry. One section of this paper was devoted to news items about Mulberry under the following large type heading, "MULBERRY, Mrs. T. J. House, Correspondent." We take judicial knowledge that Van Buren and Mulberry are both in Crawford County, but a few miles apart.

We conclude, therefore, that the *Connerly* v. *Stephenson* case, *supra,* is controlling here, and accordingly, the decree is affirmed.

4-7952 198 S. W. 2d 842

Opinion delivered July 8, 1946.

Rehearing denied September 30, 1946.

[redacted]

Sid J. Reid and *Buzbee, Harrison & Wright,* for appellant.

D. D. Glover and *W. H. Glover,* for appellee.

GRIFFIN SMITH, Chief Justice. Judgment for $7,500 was rendered on a jury's verdict to compensate the estate of Flobert Shoptaw because of his death. R. E. Sallee, doing business as Sallee Brothers (against whom the judgment went) has appealed on the ground that there was no substantial evidence of negligence.

Appellant manufactures timber products, and operates from Pocahontas. In March, 1945, it sent one of its trucks into Grant County. H. B. Jordan maintains an Esso filling station at Sheridan, and Shoptaw was his employe. Sallee's truck was driven by Clay Kincade. En route from Pocahontas to Warren by way of Sheridan, Kincade stopped for lunch half a block from Jordan's station. The rear "tractor" or axles of the truck were equipped with dual wheels, on each side. When Kincade had finished his lunch he discovered that the

inside right rear tire was "flat." Kincade walked to the filling station, where Shoptaw told him to drive the truck to the grease rack for necessary repairs.

Kincade stood by while Shoptaw removed the rim containing the punctured and deflated tires—casing, inner tube, and "reliner." Evidence offered by appellee (plaintiff below) is that the heavy metallic rims used on G.M.C. trucks are of two kinds: one "solid," a continuous circular casting or forging. The other is what manufacturers term a "split" or "breakable" rim: that is, the circumference or closed plane which forms the rim is cut at right angle to the curve, permitting the severed ends to be disengaged and overlapped. Result is that the circumference is reduced so that the casing may be put on or taken off.

One side of the rim contains a solid or made-on rim or flange to serve as a wall for the casing. The other side is made with a much smaller "ridge" or margin, having an inside groove. A so-called flange and "lock-rim" fit into the groove provided for that purpose. Since the main rim upon which the casing is mounted, and the lock-rim and flange which hold it in place, are made of steel or other metallic alloy, elastic to the extent that the circumference may be increased or decreased within limits, it follows that in mounting or demounting a casing, making repairs, etc., certain care must be exercised, and some skill is required.

After Shoptaw had removed the rims, vulcanized the tube, and had reassembled the parts, inflation was attained at eighty pounds pressure. He then replaced the "wheel" and had partially screwed on two of the "lugs" (or an inference to that effect arises from the testimony) when the inner tube blew out with terrific force. A part of the metallic equipment struck Shoptaw, injuring him fatally. The rim and locking device are exhibits and were brought to this Court.

Appellee's argument is (a) that appellant was negligent in delivering for repair a "flat" tire mounted on a defective rim; (b) appellant's conduct in using

". . . an International rim and wheel with split rim instead of the regulation G.M.C. rim and wheels that were of manufacturer's design" was negligence; (c) Kincade was negligent in directing Shoptaw to inflate to eighty pounds, ". . . when he knew the inner tube was defective, having been patched." (d) Because of defective "packing" or an imperfect valve, or due to a "leak," transmission grease escaped and had accumulated on the wheel, ". . . causing it to become more dangerous in operation by being slick," etc. (e) Appellant was negligent in not informing [Shoptaw] of defective condition [of the wheel] when [its condition constituted] a hidden danger, and when it was covered with grease, mud, and dirt to the thickness of an eighth of an inch, [preventing Shoptaw] from seeing, knowing, and appreciating the danger.

First.—(a)—There is no direct evidence that Kincade or appellant knew the rim was defective. Testimony was that prior to the trip to Sheridan Kincade stated he had experienced difficulty with the rim. Such testimony was used for impeachment purposes, Kincade having denied the alleged conversations. Appellee argues that the test is not what appellant or Kincade knew, ". . . but what, by the exercise of ordinary care, they could have known." If it be assumed that tire blowouts had occurred, there is no evidence that the malfunctioning of the locking device, now complained of, was known to appellant or Kincade, or that its actual condition was such as to put a reasonably prudent person on notice.

Second.—(b)—Testimony by appellee's witnesses is that the type of rim used on the truck was not unusual. There is no proof that it was inherently dangerous.

Third.—(c)—It was shown by appellee's own witnesses that a tire such as that repaired by Shoptaw carried from sixty-five to one hundred pounds of air—the amount depending upon load, road conditions, and the driver's preference. The casing did not "blow" or tear —only the inner tube gave way.

Fourth.—(d)—If dirt accumulated on the wheel because of escaping grease, that fact was more apparent to Shoptaw than it was to Kincade, for Shoptaw dismantled the equipment, worked with it, and put the parts back in the position from which they were taken.

Fifth.—(e)—The "hidden danger" complained of was an incident to the task Shoptaw undertook to perform. It is a grievous misfortune when tragedy occurs in the manner here disclosed; but before a defendant can be required to respond in damages (other than in cases of insurance and under Workmen's Compensation Laws) some negligence must be shown by substantial testimony.

Irrespective of the technical legal relationship created when Kincade went to the filling station for repairs —whether employer and independent contractor, master and servant, bailor and bailee—the naked fact remains that Shoptaw, acting for his principal, received the truck for the purpose of repairing the tube. The so-called "dangerous condition" it is contended Kincade knew of, or by the exercise of ordinary care could have become informed, related to the tire and rim upon which Shoptaw worked, and the condition was such as might have pertained to any rim in the circumstances here disclosed. It must be held, therefore, as a matter of law, that Shoptaw assumed the incidental risks. When, after dismounting the casing, repairing the tube, and replacing the equipment, he did not discover the flaws, how can it be said that a question of fact was made for the jury when Kincade failed to tell Shoptaw that the rim was warped, that the locking device might not function, and that eighty pounds of air pressure would possibly blow the casing off?

There should have been an instructed verdict for the defendant. The judgment is reversed, and the cause is dismissed.

Ed. F. McFaddin, Justice, concurring. The majority opinion uses this expression: "Irrespective of the technical legal relationship created when Kincade went to the filling station for repairs—whether employer and

independent contractor, master and servant, bailor and bailee—the naked fact remains that Shoptaw, acting for his principal, received the truck for the purpose of repairing the tube. . . ."

I quote the above sentence as the reason for this concurring opinion. It is because I think that the court should state what the relationship was between Sallee and Shoptaw, that is, whether (a) employer and independent contractor; (b) master and servant; or (c) bailor and bailee.

Not only should the court state the relationship, but should also then determine the case on the basis of the liability and legal consequences flowing from such relationship. This should be done so that the opinion might be a guide for litigants, lawyers and trial courts in future cases. I am thoroughly familiar with the rule that the Arkansas Supreme Court is not required to deliver written opinions. Such has been the law since *Vaughn* v. *Harp,* 49 Ark. 160, 4 S. W. 761. But when the court does deliver a written opinion, it should state the relationship of the parties and the legal consequences flowing from such relationship: this, because, when a written opinion is delivered, it should be a guide for future cases. As is so clearly stated in 15 C. J. 968:

"It has been considered, however, that even though an opinion is not required by statute, one should be written where the case involves the application of an old principle. . . ."

Such is the situation here: the case involves the application of an old principle—bailor and bailee—to the relatively new situations brought about by the development of motor vehicles.

In her effort to sustain liability, the appellee has cited such cases as *Stroud* v. *Southern Oil Transportation Co.,* 215 N. C. 736, 3 S. E. 2d 297, 122 A. L. R. 1018; and *A. L. Dodd Trucking Service* v. *Ramey,* 302 Ky. 116, 194 S. W. 2d 84. In his effort to avoid liability, appellant has cited such cases as *Varas* v. *James Stewart & Co.,* 223 Mo. App. 385, 17 S. W. 2d 651; *Feldewerth* v. *Great Eastern Oil Co.* (Mo. App.), 149 S. W. 2d 470; and *Bolin*

v. *Corliss Co.*, 262 Mass. 115, 159 N. E. 612. These cases have all been studied.

I concur, therefore, to point out what I consider was the relationship between Sallee and Shoptaw, and the legal consequences flowing from such relationship.

I. *The Relationship Between Appellant and Shoptaw.* Preliminary to the question of negligence, there should be determined the relationship of appellant and Shoptaw, in order to see the duty that the appellant owed Shoptaw. When Shoptaw accepted the work of removing the rim and tire from the truck, and repairing the punctured tube, and replacing the re-assembled tire and rim on the truck, then the relationship between appellant and Shoptaw became that of bailor and bailee; and not that of master and servant. In 8 C. J. S. 240, it is said: "Where articles are delivered by one person to another who is to perform labor upon them . . . the transaction is a bailment notwithstanding the articles are to be returned in altered form."

And in 8 C. J. S. 242, in distinguishing between bailor and bailee relationship as compared with master and servant relationship, it is said: "The relation of bailor and bailee is to be distinguished from that of master and servant in that property in the hands of the servant is in the possession and control of the master, the servant having only custody, while in the case of bailment the possession and control of the property, . . . passes to the bailee during the period of the performance of the contract, and in that a servant, as differing from a bailee, is subject to the orders and control of the owner of the goods."

See, also, 6 Am. Juris., 187. In *Warren* v. *Geater*, 206 Ark. 518, 176 S. W. 2d 242, we held that, when an automobile was delivered to a filling station operator to have repairs made on the car, the relationship between the automobile owner and the filling station operator was that of bailor and bailee. The same rule applies to this case: so I think that the appellant was a bailor and Shoptaw was a bailee.

II. *The Liability of a Bailor to a Bailee in a Case Like This.* In 6 Am. Juris., 290, in discussing the bailor's liability *in tort* for defects in the chattel, it is stated:

". . . where the bailor delivers an article to another for work to be performed upon it, as in the case of a chattel left to be repaired, there is authority for the rule that the bailor owes to the bailee a duty to disclose any condition of the chattel known to him, and unknown to the bailee, from which danger to the bailee, his property, or his servants might reasonably be anticipated during the work upon the chattel in the manner known to be intended, and if he (bailor) fails to give such warning, he is liable for injuries resulting therefrom without negligence on the part of the bailee. It seems, however, that the bailor's duty ceases with such notification; he is not bound further to tell or teach the bailee how to avoid the danger. Moreover, as to a defective or dangerous condition of the chattel at the time of the bailment, of which condition the bailor has no actual knowledge, his only duty to the bailee is to exercise ordinary care, and where it does not appear that he failed in this duty, he is not liable for injuries resulting from such condition."

There are annotations more or less in point in 12 A. L. R. 789; 61 A. L. R. 1337; 122 A. L. R. 1023; and 131 A. L. R. 849. Whether an automobile owner is under such a strict duty when he takes his car to a garageman for mechanical repairs, is not necessary to decide. In the case here, we are only dealing with a situation where an automobile owner took his car to a filling station to have a puncture repaired and the rim replaced on the car.

Even applying the above-stated rule from American Jurisprudence to the case at bar, I deduce that:

A. Appellant owed Shoptaw the duty to warn him of any defects in the rim which were known to appellant and which were unknown to Shoptaw.

B. Appellant owed Shoptaw the duty to exercise ordinary care to discover any unknown defects in the rim.

I proceed to consider these two points:

A. What were the defects alleged and proved as known to appellant and unknown to Shoptaw? Appellee claimed that there were two defects in the rim before the explosion:

(1) It was wrenched and warped, and such condition kept the lock rim from fitting in the groove on the large rim.

(2) It was greasy and dirty, and such condition kept the lock rim from fitting in the groove on the large rim.

As to (1)—*i.e.,* the wrenched and warped condition—there is no proof that either the large rim, the flange rim, or the lock rim was wrenched or warped *before the explosion.* There were only two witnesses who testified as to the condition before the explosion. These were the witness Jordan (called by the appellee), and the witness Kincade (called by the appellant). Jordan testified that, when he returned to the filling station after lunch, Shoptaw had already replaced the repaired tube in the casing and had replaced the casing on the large rim; and was engaged in putting the removable flange and lock rim on the large rim. Jordan noticed the grease and dirt on the rim; but nowhere in his testimony (of 22 pages) did Jordan ever say that either the large rim, the removable flange, or the lock rim was wrenched or warped *before the explosion.* In fact, he said that there was nothing out of the ordinary about the repair job. Kincade testified positively that neither the large rim, the removable flange, nor the lock rim, was wrenched or warped before the explosion; so the allegation about the wrenched and warped condition is without any evidence to support it.

I come then to allegation (2)—*i.e.,* that the rim was greasy and dirty, and that such condition kept the lock rim from fitting into the groove on the large rim. There is an abundance of evidence to sustain this allegation, and there is no evidence that the appellant, or anyone for him, warned Shoptaw of this greasy and dirty condition. But the rule, as above stated, is, that appellant was under no duty to warn Shoptaw of defects of which Shoptaw

already knew; and the greasy and dirty condition of the rim was certainly known to Shoptaw because he had handled it personally in all of his work on it. The greasy and dirty condition of the rim was as well known to Shoptaw as to appellant's agent, Kincade, or to appellee's witness, Jordan. Shoptaw was neither a novice nor an inexperienced youth. He was a man 46 years of age, and for more than a year had been doing filling station work like the kind here involved. With the greasy and dirty rim before him, Shoptaw knew its condition as well as anyone. Therefore, appellant was not guilty of negligence in failing to warn Shoptaw of the greasy and dirty condition; and no negligence can be predicated on the greasy and dirty condition of the rim.

B. The appellant owed Shoptaw the duty to exercise ordinary care to discover any unknown defects. I do not find in the record any evidence that appellant, or anyone for him, failed to exercise such care to discover any such unknown defect in the rim. In fact, there is no evidence of any other defect, *prior to the explosion,* except the greasy and dirty condition of the rim; and this has been discussed already.

So I conclude that there is no evidence of any negligence on the part of the appellant; and, in the absence of proof of negligence, there can be no recovery in this case.

BEASLEY *v.* BOREN.

4-7968 197 S. W. 2d 287

Opinion delivered October 28, 1946.

Rehearing denied December 2, 1946.

Robert D. Lee, House, Moses & Holmes and *Horace Jewell,* for appellant.

Rose, Dobyns, Meek & House, for appellee.

ROBINS, J. This suit was instituted on July 9, 1945, by appellees, a partnership, to obtain possession of a storeroom at 810 Main street in the city of Little Rock, Arkansas, which appellees alleged was being unlawfully held by appellant, and to recover damages for the alleged unlawful detention thereof. Bond for appellees, as required by law in "unlawful detainer" proceedings, having been filed, cross-bond, to enable him to retain possession pending trial, was made by appellant.

The substance of appellant's answer was that on August 6, 1941, he entered into a written contract with the owner (at that time) of the property, by which the building was leased to him for a term of two years, expiring on September 1, 1943; that this contract contained a provision which entitled appellant to have this lease renewed for three additional years, and that, in accordance with this provision, the said lease had been so renewed at an agreed rental of $85 per month, which sum had thereafter, up to July 1, 1945, been regularly

paid by appellant and accepted by the lessor, and also by appellees after they had purchased the property.

By an amendment to their complaint appellees asked damages in the sum of $10,350, alleged to have been suffered by them as a result of appellant's detention of the property. An answer denying the allegations of this amendment was filed by appellant.

The lower court directed a verdict in favor of appellees for possession of the building and submitted the question of amount of damages and rent due appellees to the jury, who returned a verdict in favor of appellees for a total of $7,943.31. From judgment entered on these verdicts appellant prosecutes this appeal.

Appellant's principal grounds for reversal are: First, that the trial court erred in refusing to admit testimony offered by appellant tending to establish his contention that the term of the lease had been extended by the agreement for renewal; and, second, that the verdict for damages was not supported by substantial testimony.

I.

The written lease entered into by the former owner of the property and appellant set forth that it was for a term of two years, ending on September 1, 1943, provided for payment by lessee of $50 per month rent and contained the following clauses:

"9. This lease is not subject to any renewal or extension of the term hereof, except such as may be created or recognized by the acceptance by the lessor of a rental or rentals extending beyond the said term, the tenancy so created or recognized in favor of the lessee after the said term being, however, limited to, and deemed to be a tenancy only for the respective periods of time for which rentals have been so accepted. Upon the expiration of the term fixed in this lease, or upon the expiration of the most recent tenancy by acceptance of rental, the lessee will, without notice, quit and surrender the possession of said premises, and in as good condition as reasonable use and natural wear and decay thereof will permit.

"12. It is hereby understood and agreed that this lease shall be subject to a renewal of three years, the rate of rent to be agreed upon by the lessor and the lessee at least 90 days prior to the expiration of this lease. Clause No. 9 of this lease shall remain in full effect with the exception of that portion which states that this lease shall not be subject to any renewal or extension of the term thereof."

Appellant offered to show by the testimony of himself and other witnesses that, after he learned he was to be called into military service and more than ninety days before the expiration of the term fixed in the written lease, appellant made an oral agreement with the authorized agent of the owner of the building to the effect that the lease should be renewed for three years at a monthly rental of $85; that this agent promised to give him a letter to evidence the extension, and that after this agreement was made, and after September 1, 1943, appellant, relying on it, expended $823 for repairs on the building, which he would not have done had the term of the lease not been thus extended, and further, that in accordance with the agreement, appellant, and appellant's wife, after appellant entered the army, paid the agreed rental of $85 each month to Fidelity Realty Company, agent of appellees' vendor, which also acted as agent of appellees after they bought the property on October 2, 1944. Appellees did not deny payment of the increased rental after September 1, 1943, up until July 1, 1945, but insisted that during this period the renting was on a month to month basis.

The lower court, proceeding on the theory that the provision in the contract for an extension was meaningless and ineffective, and that the proffered testimony was an attempt to establish a new oral lease for a term of more than one year, in violation of the statute of frauds (§ 6059, Pope's Digest), refused to permit its introduction.

At the threshold of a consideration of the rights of the parties to this litigation, it must be recognized that appellees, who purchased the property while appellant

was in possession, were bound by the provisions of any valid agreement as to lease which appellant had with appellees' vendor. 32 Am. Jur. 41; *Sisk* v. *Almon,* 34 Ark. 391; *Atkinson* v. *Ward,* 47 Ark. 533, 2 S. W. 77; *Sproull* v. *Miles,* 82 Ark. 455, 102 S. W. 204; *Temple* v. *Tobias,* 186 Ark. 851, 56 S. W. 2d 585; *Prince* v. *Alford,* 173 Ark. 633, 293 S. W. 36; *Churchill* v. *Herrington,* 198 Ark. 22. 127 S. W. 2d 123; *Cline* v. *Smith,* 205 Ark. 136, 167 S. W. 2d 872.

The provision in the lease for its renewal was indefinite because it failed to fix the rental to be paid during the additional term. But, because a contract is uncertain in its terms, it does not necessarily follow that it is a nullity. The parties to a contract may, by their mutual actions in carrying it out, furnish an index to its meaning, which the language thereof fails to do. After all, the written instrument is but an evidence of what the signers thereof propose to bind themselves to do, and when, by their conduct in carrying out the agreement, both of the parties to the contract demonstrate an intention to heal an uncertainty in the contract, the courts will generally adopt this practical construction. *Kahn* v. *Metz,* 88 Ark. 363, 114 S. W. 911; *Edgar Lumber Company* v. *Cornie Stave Co.,* 95 Ark. 449, 130 S. W. 452; *Keopple* v. *National Wagonstock Co.,* 104 Ark. 466, 149 S. W. 75; *Hastings Industrial Co.* v. *Copeland,* 114 Ark. 415, 169 S. W. 1185; *Webster* v. *Telle,* 176 Ark. 1149, 6 S. W. 2d 28; *Sydeman Bros., Inc.,* v. *Whitlow,* 186 Ark. 937, 56 S. W. 2d 1020; *Continental Insurance Company* v. *Harris,* 190 Ark. 1110, 83 S. W. 2d 841; *Stephens* v. *Cherry Hill Special School District No.* 10, 206 Ark. 832, 177 S. W. 2d 722.

"An uncertain agreement may be so supplemented by subsequent acts, agreements, or declarations of the parties as to make it certain and valid. The acts of practical construction placed upon a contract by the parties thereto are binding and may be resorted to to relieve it from doubt and uncertainty. *The objection of indefiniteness may be* obviated by performance and acceptance of performance." (Emphasis ours.) 12 Am. Jur. 558.

In the lease involved here, the parties stipulated that it might be renewed for an additional three years at a rental to be agreed upon by the parties. The terms of this stipulation did not call for the execution of a new lease, nor was there any provision therein as to how the agreement for the new rental should be evidenced. Dealing with a question somewhat similar to that here involved, Judge HART, in the case of *Neal* v. *Harris,* 140 Ark. 619, 216 S. W. 6, said: "So in the present case no new contract was provided for in the lease itself. The formal covenant of renewal usually provides specifically for the execution of a new lease. The extended term in the lease under consideration was fixed by and was a part of the original lease. When the lessee exercised his option and gave the required notice the parties were bound for the two additional years. No question as to the application of the statute of frauds arises, and the court was wrong in so holding. If the lessee did not give a notice such as the law would enforce, his estate terminated at the end of the first period of one year; if he did give such a notice, it would continue to the end of the second period of two years. In either event, the lease itself created and defined the term and the statute of frauds had nothing to do with the case. *McClelland* v. *Rush,* 150 Penn. St. 57, 24 Atl. 354, and the authorities above cited. This brings us to a consideration of the character of the notice. The lessee offered proof of the giving of a verbal notice of his intention to extend the lease to the lessor. There was no agreement contained in the lease as to how the lessee should exercise his option of extending the lease, whether orally or by writing. It might therefore be shown either way, the same as any other fact not required to be in writing. This view is supported by the case of *Bluthenthal* v. *Atkinson,* 93 Ark. 252, 124 S. W. 510."

It is argued on behalf of appellees that since the stipulation in the original lease was for a *renewal* rather than an extension of the term it was necessary, in order to entitle appellant to the additional term, that a new lease be executed. In discussing a like contention, the court of appeals of Kentucky, in the case of *Kozy Theater*

Company, et al., v. *Love, et al.,* 191 Ky. 595, 231 S. W. 249, said: "This court uniformly has recognized a technical distinction between a covenant to renew and a covenant to extend a lease, but has been just as consistent in holding that whether the privilege is to renew or extend depends upon the intention of the parties as shown by the entire lease and their interpretation thereof before the controversy arose, and that the mere fact it is called a privilege to renew is not conclusive. . . . The contention that the verbal assent of Utterback to the "renewal" construed and called by them a continuance of the contract for an additional term is within the statute of frauds, and therefore without binding effect, is based upon the theory that there could be no renewal except by the execution of a new lease. But obviously there is no merit in this contention, upon the construction given the contract by the parties, and therefore adopted by us as the true one, that a new lease was not required, since the lessees, by giving notice and holding over, hold under the original contract, and not the notice; and the giving of the notice is not an agreement within the statute of frauds. 16 R. C. L. 885."

We conclude that the effect of the testimony which appellant offered, and which the lower court refused to admit, was to show that the parties to this lease had, by their words and by their actions, interpreted and made certain the indefinite provision as to the renewal. This testimony tended not to establish a new oral lease, but merely to show that the parties to the original lease had mutually invoked its provision for an additional term and that the uncertainty in this provision had been removed by the acts of the parties thereafter.

The lower court should have admitted this testimony and should have instructed the jury that, if appellant's version of the matter was found to be true, appellant was entitled to hold possession of the property for the additional three years after September 1, 1943.

II.

The testimony introduced by appellees as to loss of profits which appellees thought they had suffered and

as to the additional cost of making changes in the building was not sufficiently definite to sustain the verdict of damages to appellees on these grounds, even if it should be held that such damages are recoverable in an action such as this.

There was introduced in evidence no such records or data as would sustain appellees' theory as to their loss of profits, and Mr. Boren's testimony as to what profits appellees would have earned from their business at the new location was at best a mere conjecture on his part.

In *Brockway* v. *Thomas,* 36 Ark. 518, this court held (headnote 4): "Evidence of loss of profits in the defendant's business by being deprived of a business stand by a writ of unlawful detainer is not admissible in proof of his damages sustained by the action." The same question was involved in the case of *Wakin* v. *Morgan,* 165 Ark. 234, 263 S. W. 783, where we said: "The court erred in its instructions in not confining the jury to the actual damages and in not telling the jury that they could not consider net profits as an element of damage."

Appellees' contractor, employed to make alterations in the building, testified that the additional cost of the work, due to appellant's detention of the building, would be $4,048, but in detailing how he arrived at this figure this witness gave items that totaled only $830. How he arrived at the sum of $4,048 as the additional amount the work of making alterations in this building would cost by reason of the delay is not shown by his testimony. This evidence was too indefinite and partook too much of the nature of a guess to furnish a basis for a verdict.

The judgment of the lower court is reversed, and the cause is remanded with directions to the lower court to grant appellant a new trial and for further proceedings not inconsistent with this opinion.

Opinion delivered November 4, 1946.

A. C. Hervey, for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

ROBINS, J. Appellant was charged in an information filed by a deputy prosecuting attorney with the offense of murder in the first degree for the unlawful killing of

one Blackie Foster. The jury found appellant guilty of murder in the second degree and fixed his punishment at confinement in the penitentiary for twenty-one years. From judgment entered on the verdict this appeal is prosecuted.

For reversal appellant urges these grounds:

1. That the prosecuting attorney was allowed to cross-examine appellant improperly as to appellant's past misconduct.

2. That the evidence failed to establish murder in the second degree, in that no malice was proved.

3. That the court erred in refusing to give appellant's requested instruction No. 2.

4. That the court erred in refusing to give appellant's requested instruction No. 4.

5. That the court erred in refusing to give appellant's requested instructions Nos. 1 and 5.

6. That the court erred in refusing to give appellant's requested instruction No. 6.

7. That the lower court was without jurisdiction because the information against appellant was signed by the deputy prosecuting attorney instead of the prosecuting attorney.

1.

The attorney for the State was permitted to ask appellant, while he was testifying, if he had committed certain other offenses, but appellant, in answer to these questions, denied that he had so transgressed. The State, of course, was bound by his answers and made no attempt to contradict them. Therefore, no prejudice to appellant arose from these questions, even if they were improper. *Barton* v. *State,* 175 Ark. 120, 298 S. W. 867; *Bowlin* v. *State,* 175 Ark. 1047, 1 S. W. 2d 546; *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. 2d 527.

2.

There was testimony on behalf of the State tending to show that, after a prolonged drinking spree, engaged in by Foster, Wallin and several others, Foster and appellant engaged in a fight in which Foster apparently was the aggressor; that Foster knocked or threw appellant down in a ditch, where he continued to beat him; that when they got up out of the ditch Foster stood looking at his hands, which had blood on them, and appellant ran a few feet to a truck (in which the party had been traveling), there secured a pistol, came back, saying "no, I ain't whipped," and shot Foster, the bullet entering Foster's body in front near the heart, and that after Foster fell on his face appellant fired another bullet which struck Foster back of the ear.

This evidence was sufficient to prove malice, which may be implied from proof that the slayer used a deadly weapon, as well as from other circumstances. *McAdams* v. *State,* 25 Ark. 405; *Webb* v. *State,* 150 Ark. 75, 233 S. W. 806.

The jury evidently found that the killing was not done in self-defense, as testimony of appellant and his witnesses indicated, and that the beating appellant had just received at the hands of deceased was not sufficient provocation to reduce the crime to manslaughter. We are, of course, bound by this finding of the jury. *Allison* v. *State,* 161 Ark. 304, 256 S. W. 42; *Taylor* v. *State,* 186 Ark. 162, 52 S. W. 2d 961; *Arnett* v. *State,* 188 Ark. 1106, 70 S. W. 2d 38; *Link* v. *State,* 191 Ark. 304, 86 S. W. 2d 15; *Burnett* v. *State,* 197 Ark. 1024, 126 S. W. 2d 277.

3, 4, 5 and 6

Instruction No. 2, requested by appellant, dealt with appellant's right of self-defense. The lower court, in instruction No. 11, fully covered this phase of the case, so that, even if appellant's requested instruction were in proper form, the refusal of it was not error.

By instruction No. 4, requested by appellant, the jury would have been told, in substance, that, if the deceased

attacked appellant on account of appellant's talk about deceased's wife, such an attack was not justified and "the deceased would be the aggressor." This instruction was properly refused, for the reason, if for no other, that a trial court is not required, in its instructions, to single out or call attention to particular phases of the testimony. *Prewitt* v. *State,* 150 Ark. 279, 234 S. W. 35; *Adams* v. *State,* 160 Ark. 405, 254 S. W. 832; *Rhinehart* v. *State,* 175 Ark. 1170, 299 S. W. 755.

Instructions Nos. 1, 5 and 6, requested by appellant, also pertained to appellant's right of self-defense. As heretofore stated, the law as to self-defense was fully covered by instruction No. 11, given by the court. A trial court is not required to multiply its instructions on a particular issue. See *Griffin* v. *State, ante,* p. 388, 196 S. W. 2d 484.

7.

It is finally argued by appellant that the lower court had no jurisdiction because the information was signed by the deputy prosecuting attorney instead of the prosecuting attorney.

The record does not disclose that appellant raised in the lower court any objection to the information before going to trial, nor did he do so after the trial. The objection is raised for the first time in this court.

In the case of *State* v. *Eason and Fletcher,* 200 Ark. 1112, 143 S. W. 2d 22, dealing with this question, we said: "There is, *prima facie,* a presumption that a deputy prosecuting attorney acts under direction of his superior. Until the authority is questioned and there is a failure of the prosecuting attorney to affirm, the information [signed by deputy prosecuting attorney], being voidable only, is sufficient to bring the defendant before the court, and in consequence such court acquires jurisdiction."

No error appearing, the judgment is affirmed.

4-7927 197 S. W. 2d 28

Opinion delivered November 4, 1946.

[redacted]

Jack Machen, for appellant.

Walter L. Brown, for appellee.

MINOR W. MILLWEE, Justice. Appellants, Leon Talbot and W. A. Boyd, are partners doing business as Talbot-Boyd Lumber Co. On January 7, 1941, appellees, A. R. Mullins, Frank Mullins and Edmond Mullins executed a timber deed to appellants conveying all merchantable pine timber "Eight inches diameter and up—on six inch stump" standing upon certain lands in Columbia county for a cash consideration of $3,250. Appellants were allowed two years within which to cut and remove the timber and began cutting the timber soon after execution of the deed.

A controversy arose over the height of stumps left by an employee of appellants, it being insisted by appellees that appellants were obligated by the terms of the deed to cut all trees within 6 inches of the ground. When this employee ceased cutting upon the complaint of Frank Mullins, appellants made a contract with appellee, Edmond Mullins, who agreed to cut the timber six inches from the ground for $1.25 per thousand feet. After Edmond Mullins and his employees had cut between 90,000 and 100,000 feet of timber over a period of four weeks, they quit. Appellee Frank Mullins then began cutting and hauling the timber for appellants and removed about 100,000 feet of logs over a period of months. Appellants then sent in other cutters and further controversy arose.

On July 31, 1942, appellants filed suit in chancery court to restrain appellees from interfering with appellant in the cutting and removal of the timber. A temporary restraining order was issued on August 1, 1942. On August 8, 1942, appellees filed their answer and cross-complaint alleging that under the terms of the timber deed appellants were required to cut the timber within 6 inches of the ground, it being understood that appellees were to place the lands in cultivation by the use of tractors, and that such cultivation would be impossible with stumps over the height of 6 inches; that appellants in disregard of the provisions of the deed were leaving stumps from 18 to 36 inches high. A mandatory injunction was prayed directing appellants to cut the stumps to 6 inches, or in the alternative, that appellees have judgment for damages in the sum of $600 for failure to recut the stumps. Damages were also sought in the cross-complaint for the destruction of a pasture and the additional use of roads, which appellees alleged appellants had agreed to pay for. Appellees also sought a mandatory injunction directing appellants to restore a section of fence which they alleged appellants had destroyed in cutting and removing the timber.

Although all three appellees appear as grantors in the timber deed, and each received one-third of the pur-

chase price, it was developed in trial of the case on September 24, 1945, that Edmond Mullins was the owner of the land when the deed was executed. Trial resulted in the issuance of a mandatory injunction requiring appellants to replace the fences in the condition existing at the time the timber was cut and removed from the land. The claims of appellees for destruction of a pasture and additional use of roads were denied. Damages were awarded in favor of appellee, Edmond Mullins, in the sum of $410.70 for failure of appellants to cut the timber within 6 inches of the ground under the terms of the deed. This appeal follows.

It is the contention of appellant that the language of the timber deed, which conveys all merchantable pine timber "Eight inches diameter and up—on six inch stump," means timber eight inches in diameter and up which is to be measured at a point six inches from the ground. In other words, the term "on six inch stump" indicates the point on the tree where the minimum measurement of eight inches is to be taken, and not the place of cutting. The trial court sustained the contention of appellees that the language of the deed is unambiguous and under its terms appellants were obligated to cut all the timber at a point six inches from the ground.

According to the testimony between 300,000 and 400,000 feet of timber was cut and removed from the land leaving between 3,800 and 4,000 stumps. At least half the timber was cut by appellees, Edmond Mullins and Frank Mullins. Edmond Mullins testified that he did not cut any timber higher than 6 inches under his contract with appellants and never agreed that the timber might be cut at a higher point, although he told Talbot at the time of the contract that he did not know whether he could cut it as low as six inches. L. C. Jones testified on behalf of appellees that only 150 of the 3,800 stumps were cut within six inches of the ground and damages were awarded on the basis of this estimate. He also testified that the timber in the old field where Edmond Mullins cut averaged 80 feet per tree. Now it was clearly

established that Edmond Mullins received payment for cutting at least 90,000 feet of logs under his contract. Thus, according to the estimate of Jones, Edmond Mullins left 1,125 stumps on timber cut by his employees and 975 of these were cut at a height greater than six inches. Edmond Mullins is thus placed in the attitude of insisting upon compliance with an interpretation of the terms of the deed which he failed to adhere to under his contract with appellants.

Frank Mullins testified that he and his employees cut and removed timber after his brother gave up the contract, and that he cut all the timber higher than six inches. There was considerable testimony to the effect that appellants agreed to recut the stumps to a height of six inches and Frank Mullins assigns this as his reason for cutting an average stump. Appellants stoutly denied that they agreed to recut the stumps. If it were established that such subsequent agreement was entered into by the parties, a valid consideration for the new agreement is lacking. In this connection A. R. Mullins, father of Edmond and Frank, testified that he offered to extend the time of removal of the timber 12 months if appellants would recut the stumps, but this offer was refused.

We think a reasonable interpretation of the terms of the deed under all the facts and circumstances is that placed upon it by appellants. Appellees rely upon the case of *Harris* v. *Terhune,* 148 Ark. 445, 230 S. W. 555, where the buyer was held liable for breach of a contract to leave stumps not to exceed a stated height, and the measure of damages was found to be the reasonable cost of cutting the stumps down to the height required by the contract. The conveyance under consideration in that case contained the following provision: "And the said second parties further agree to cut the timber as close to the ground as practicable and in no case to exceed fifteen inches above the level of the ground." There was an express contract, therefore, to cut stumps not exceeding a height of fifteen inches. Such is not the case here. The deed in the case at bar conveys all pine timber eight

inches in diameter and up, and we construe the wording "on six inch stump" as indicating the point on the tree where the timber purchased was to be measured, and that it does not mean that the timber must be cut at this point. "Where reference is made to standing timber of a certain diameter or circumference 'at the stump,' this means having the dimension specified at the point where such timber is usually cut according to the custom of the vicinity." 34 Am. Jur., Logs and Timber, § 23, p. 505. In the instant case the parties simply specified the height at which the measurement must be taken without the necessity of resorting to custom for a determination thereof. Appellants did not purchase the timber on a footage basis. It was to their advantage to cut the timber as low as possible and they were wasting their own timber if they cut it too high. It was further shown that it is extremely difficult to cut large trees six inches from the ground and, unless we profess to be ignorant of matters of common observation, we must know that this is true.

Under our interpretation of the language of the deed, appellants had a right to cut the trees in the usual and customary manner. The testimony shows that this was done, and that the stumps averaged 22 inches in height. It follows that the chancellor erred in awarding appellee, Edmond Mullins, damages in the sum of $410.70 for appellants' failure to cut the trees within six inches of the ground, and to that extent the decree will be modified. As thus modified, the decree is affirmed.

LANGLEY *v.* REAMES.

4-7976 197 S. W. 2d 291

Opinion delivered November 11, 1946.

Spencer & Spencer, for appellant.

Surrey E. Gilliam, for appellee.

HOLT, J. July 14, 1945, appellee brought this action against his granddaughter, Mary Langley, and George W. Langley, Jr., her husband.

He alleged in his complaint that in early April, 1944, appellants applied to him "for financial assistance in the purchase of a lot and home for defendants (appellants), and induced the plaintiff (appellee) to advance the sum of $700 to pay for the house and lot . . .; that the plaintiff did furnish to the defendants for said purpose the sum of $700 cash and the defendant used the sum of $700 so furnished by the plaintiff to purchase the house and lot . . . on April 6, 1944." The property involved is in the town of Felsenthal, Arkansas.

He further alleged "that it was the intention and understanding between the plaintiff and the defendants that the title in and to said property should remain in the plaintiff until said sum of $700 had been repaid, . . . that, in any event, the plaintiff is entitled to have a lien in said sum fixed and declared against said prop-

erty and to have said lien foreclosed and said property ordered sold to satisfy same."

His prayer was that he have judgment against appellants "and that said judgment be fixed and declared as a lien against the aforesaid property," etc.

Appellants answered with a general denial and endeavored to show that the money which they received from appellee was a gift.

The trial court found that appellants were indebted to appellee in the amount claimed, secured by an oral mortgage, and "awarded judgment for $657 against defendants (appellants), together with interest up to date at 6 per cent., and a lien will go against the property if not paid within thirty days," etc.

This appeal followed.

Appellants earnestly argue that the money advanced by appellee to them was a gift and not a loan, was so intended at the time, and that the court erred in holding otherwise.

The essential facts were: Mary Langley was appellee's granddaughter and he was very much attached to her, in fact had practically reared her. About April 1, 1944, appellants came to appellee and requested that he advance $700 to them to be used in the purchase of a home which they had selected in the town of Felsenthal, Arkansas. Appellee went with them to the property, and after looking it over, expressed the opinion that it was well worth the money, advanced the $700 with which appellants bought the property for their home and they have lived in it since its purchase. The deed dated April 6, 1944, was made to appellants. Shortly after the purchase, appellants paid appellee $100 on the money advanced, but made no further payments although requests for payments were made by appellee.

Appellee testified that the money so advanced was a loan and not a gift and that he "didn't have the money to give them or to give anybody," and further that when

he advanced the money, he said to appellants: "I am letting you have this money to pay for that place, and I want the place to stand good for the money," and that Mary's husband said: "All right, Pa, we will pay you back every dollar of it."

May 8, 1945, appellee sent a letter to appellants in which he said: "Dub and Mary, now I am asking you both in a kind way, when are you going to try to pay some on the money that you borrowed from me over a year ago? I think I have been very liberal on you all, and it seems that you still put me off. I did not put you off when you came to me. Now I do not have anyone to help me, so, therefore, I would like to have some pay out of you all for that very hard cash."

The following day, May 9th, Mary answered this letter, using this language: "Dub didn't get that money from you. It was me, not him. . . . We were intending to pay you all of it this summer, but being that you have to listen to someone else, we will just pay you a little when we get ready. As far as you collecting that money, you couldn't get a penny, for you have nothing to even show that I got any from you. And you certainly didn't have any eye-witnesses that you gave me any. . . . I told you I would give you some money. We had some last summer and you wouldn't have it. You said that we might need it. So just keep still a little while longer. I wouldn't beat you out of a penny for nothing, so you needn't be growling about it. But I don't think it is all your fault. I think someone else is meddling where they have no business. Well, I don't care what you decide to do about it, because you can't get it until we get the money to pay you." We think this letter of Mary's clearly shows that appellants are indebted to appellee as he claims. It is significant that nowhere in this letter does she claim that the money advanced was a gift and not a loan.

It appears undisputed that the money which appellee advanced was to be used by appellants specifically as the purchase money for a home, was so used, and appellants have lived in this property since its purchase.

In these circumstances, we think appellee was entitled to a lien on the property involved here for the purchase money which he advanced to appellants.

In *Starr* v. *City National Bank,* 159 Ark. 409, 252 S. W. 356, this court said: "This court is committed to the doctrine that borrowed money for the specific purpose of buying a home and so used is 'purchase money' within exception to art. 9, § 3, of our Constitution, for which a lien may be declared on the property purchased (*Acruman* v. *Barnes,* 66 Ark. 422, 51 S. W. 319, 74 Am. St. Rep. 104), but is not 'purchase money' within the meaning of said section, for which a purchase money lien may be declared on the property purchased, if a general loan," and in the *Acruman* v. *Barnes* case, *supra,* it is said: "Article nine, § three, of the Constitution of 1874 provides that 'the homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens.' . . . In some courts it is held that money loaned to purchase property cannot be considered purchase money as between the lender and borrower, but only between the vendor and purchaser of the property. *Heuisler* v. *Nickum,* 38 Md. 270. But, in our opinion, the weight of authority and the better reason is that money borrowed of a third person with which to purchase a homestead, when it is understood between the lender and the borrower that it is to be used for that purpose, and it is so used, is purchase money, *Allen* v. *Hawley,* 66 Ill. 164; *Hamrick* v. *People's Bank,* 54 Ga. 502; *Carr* v. *Caldwell,* 10 Cal. 385, 70 Am. Dec. 740; *Nichols* v. *Overacker,* 16 Kan. 54. 'Things bought with borrowed money, borrowed with the avowed purpose of buying them, are not exempt as against the lender.' Waples, Hds. & Ex. 911; *Houlehan* v. *Rassler,* 73 Wis. 557, 41 N. W. 720. 'The homestead is liable for money borrowed to pay a balance due on the purchase price.' *White* v. *Wheelan,* 71 Ga. 533; *Middlebrooks* v. *Warren,* 59 Ga. 230. 'One who loans money to enable another to purchase a homestead cannot be defeated in collecting it

by the claim of homestead immunity upon the part of the borrower.' ''

While the chancellor based his decree on what he termed an oral mortgage, since we try the cause *de novo* on the record made below (*Culberhouse* v. *Hawthorne,* 107 Ark. 462, 156 S. W. 421), and the court reached the right result, we prefer to uphold the decree on the ground that the great preponderance, if not the undisputed evidence, shows that appellee advanced the money to appellants for the specific purpose to buy a home, and that it was so used. Accordingly, the decree is affirmed.

GRIFFIN SMITH, C. J., concurs.

RIFE *v.* MOTE.

4-7891 197 S. W. 2d 277

Opinion delivered November 11, 1946.

Lamar Williamson and *Rose, Loughborough, Dobyns & House,* for appellant.

Emil Corenbleth, John Baxter and *E. E. Hopson,* for appellee.

MINOR W. MILLWEE, Justice. This is a suit between contractors growing out of the construction for the Federal government of the Japanese Relocation Center at Jerome, Arkansas. Appellant, A. J. Rife, operates the A. J. Rife Construction Company of Dallas, Texas, which is a partnership composed of A. J. Rife and

Stephen Chandler, trustee for Rife's two daughters. F. A. Mote is also a building contractor residing in Dallas, Texas.

On August 19, 1942, the parties executed the following contract:

"Whereas, F. A. Mote has been instrumental in securing for the partnership known as A. J. Rife Construction Company and Associates, a certain contract for the construction of the Japanese Relocation Center at Jerome, Arkansas, and,

"Whereas, A. J. Rife desires to compensate F. A. Mote for his services for securing this contract, therefore, mutually agreed as follows:

"F. A. Mote is to act as manager of the project, in the name of A. J. Rife Construction Company and Associates; devoting to that work his full time and effort, and bringing to bear all his best knowledge and judgment as conscientiously as though the contract were his own; bearing in mind, however, that all actions taken by him must be such as to reflect credit on the A. J. Rife Construction Company.

"A. J. Rife Construction Company agrees to pay to F. A. Mote as compensation for his management services, twenty-five (25) per cent of the net profits which may accrue on this project, as computed at the close of the project, but, subject to any change in contract price which may be made by the government as the result of the renegotiation clause in the contract, and

"Provided further, that F. A. Mote has carried the job through from beginning to completion in a manner satisfactory to the engineers and to A. J. Rife;

"It is definitely understood and agreed that A. J. Rife will be the sole judge as to the efficiency with which F. A. Mote is carrying on his part of the work, and Mr. Rife reserves the right to, at any time, remove F. A. Mote and/or any of his associates from the project, without prejudice, and without the right of recovery of damages by the said F. A. Mote, or any of his associates,

except that should the management services of F. A. Mote be terminated prior to the completion of the contract, a determination will be made at that date of the value of the services which have been rendered by Mr. Mote to that date, and those services will be paid for by the A. J. Rife Construction Company. This determination will be based on the percentage of work which has been accomplished to the date of cancellation of this contract.

"F. A. Mote will be allowed a drawing account of one hundred ($100) dollars per week, during the progress of construction, which sum is to be charged against his percentage of profits and to be deducted from that percentage before final payment is made by A. J. Rife Construction Company.

"It is particularly understood that this contract in no sense constitutes a partnership agreement, and no action is to be taken at any time by F. A. Mote which would indicate to anyone that a partnership existed. This is strictly a management agreement with a participation in the profits, which may be terminated at any time by A. J. Rife should he become dissatisfied in any manner with the services being rendered by the said F. A. Mote.

"A. J. RIFE CONSTRUCTION COMPANY,
"By (signed) A. J. Rife,
"(signed) F. A. Mote."

Prior to execution of the foregoing contract, Rife and Mote had entered into a verbal agreement whereby the latter would seek out and make bids on some of the many government construction contracts which were being let in connection with the prosecution of the war. The record reflects that both men were experienced contractors, but Mote had been inactive for some time prior to 1942, while the Rife Construction Company was a going concern and had several large projects under construction.

Under the original arrangement, appellee Mote was to prepare estimates and bids at his own expense and

furnish a small amount of equipment. He was also to manage the job on any contracts that might be procured either in his name or the name of the parties jointly. Rife was to furnish most of the equipment and all finances, and profits were to be shared equally. Under this arrangement Mote submitted unsuccessful bids on two government projects at Stuttgart, Arkansas, and Rohwer, Arkansas. It was then decided to submit bids on the Jerome job and there is considerable dispute in the testimony as to the conditions under which this bid was made. According to the testimony on behalf of appellee the bid was to be made under the same partnership arrangement existing under the previous bids. The testimony on behalf of appellants tends to show that Rife was unwilling to bid on this job on the same basis, and that an oral agreement was made prior to submission of the bid embodying substantially the same terms as the contract signed on August 19, 1942.

The bid was made in the name of the Rife Construction Company and Associates with Mote listed as job manager. The contract was awarded on July 27, 1942, but was not formally executed until July 31, 1942. It called for the erection of several hundred buildings at a cost of approximately $3,500,000. On July 31, 1942, the date the contract was formally executed, Rife submitted a memorandum contract to Mote in the form of a letter which contained substantially the same provisions as the written contract of August 19, 1942. This letter purports to confirm a prior oral agreement between the parties and was retained unsigned by Mote until the formal contract was executed on August 19, 1942. The letter and the contract of August 19 were both prepared by the auditor of the Rife Construction Company. Appellee assumed the duties of manager as soon as the contract was let and remained in that capacity until August 24, 1942, when he received a letter from Rife written August 22, 1942, discharging him.

Appellee filed this suit in chancery court on September 2, 1942. In the complaint as amended, appellee alleged that the contract of August 19, 1942, was secured

through duress, coercion, and fraud and that he was entitled to 50 per cent of all profits under a prior oral agreement between the parties. It was also alleged that in the event the court should determine the contract of August 19, 1942, to be binding, appellee should be awarded 25 per cent of the total profits unless it should be found that Rife had the right to discharge appellee, in which event it was asked that Mote be awarded 25 per cent of "the potential profits" existing as of the date of discharge.

Appellants answered admitting the execution of the contract of August 19, 1942, but denying other allegations of the complaint. They also filed a counterclaim for loss of $78,000 allegedly sustained on account of the negligent and inefficient management of the job by appellee.

On May 5, 1944, an order was entered by the chancellor, with the consent of the parties, appointing Hon. D. A. Bradham as special master to hear further testimony and state an account between the parties. This order was made after much of the testimony had been taken and contains the following provision: "When the master makes his final report to the court, either party to this action may file exceptions thereto and will not be bound by the findings of the master unless and until they have been approved by the court, and should an appeal be taken by either party to the Supreme Court of Arkansas, the case will there be tried *de novo* on the entire record as in all ordinary chancery cases."

After a thorough and painstaking consideration of the issues, the master filed his original and supplemental reports which contained exhaustive findings of fact and conclusions of law. The master found: (1) that the written contract of August 19, 1942, is valid; (2) that Rife had a legal right to discharge Mote on August 22, 1942, because of dissatisfaction, as contemplated by the contract; (3) that Mote was entitled to recover, in addition to certain pre-contract expense, $11,602.32 with 6% interest from the date of his discharge, which sum represented 32.525% of 25% of the profits which the master found to be $142,688; (4) that the counterclaim of appel-

lants should be denied; and (5) that appellants should pay all unpaid court costs, including the master's fee. Both parties filed their exceptions to the master's report.

The chancellor in his final decree adopted the report of the master except in the matter of costs, including the master's fee of $2,500, which the court directed should be divided equally between the parties. Both parties have appealed from this decree.

The record is voluminous. The transcript is in seven volumes and contains more than 1,500 pages of pleadings, testimony and reports. Many of the contentions originally urged by both parties seem to have been abandoned in this court. Appellants now insist that the master and trial court erred in: (1) the determination of the amount of Mote's compensation under the terms of the contract of August 19, 1942; and (2) striking certain bonus payments prorated by appellants to the Jerome job as overhead expense and thereby increasing the profits on the project by $1,907.50. The chief contentions of appellee on his cross-appeal are: (1) that he was wrongfully discharged, and (2) that appellant should pay all court costs, including the master's fee.

We shall first consider the question whether Rife had a legal right to discharge Mote on August 22, 1942, as this, in our opinion, presents the most vital question for determination. If this right existed at the time of Mote's discharge, the contract provides that a determination will then be made of the "value of the services which have been rendered by Mote to that date," and this determination "will be based on the percentage of work which has been accomplished to the date of cancellation of this contract." If, however, Mote was wrongfully discharged he is entitled to recover 25 per cent of the entire profits. It is earnestly insisted by appellee that appellants failed to show any valid reason for genuine dissatisfaction on the part of Rife with the managerial services of Mote after the execution of the contract of August 19, 1942, and that Mote's dismissal was the result of a conspiracy between Rife and other key men

on the project and for the purpose of enhancing the amount of Rife's profits under the contract.

The contract provides that Mote shall carry the job through to completion in a manner satisfactory to the government engineers and Rife, and that Rife shall be the sole judge of Mote's efficiency. The right to remove Mote at any time without prejudice and without the right of recovery of damages is also specifically reserved to Rife under the contract. It is further provided that Mote's services might be terminated at any time by Rife should he become dissatisfied in any manner with Mote's services.

The applicable rule is stated in 35 Am. Jur., § 28, pp. 463-4 as follows: "It is generally conceded that a contract by which one agrees to employ another as long as the services are 'satisfactory,' or which is otherwise expressed to be conditional on the satisfactory character of the services rendered, gives the employer the right to terminate the contract and discharge the employee whenever he, the employer, acting in good faith, is actually dissatisfied with the employee's work. . . . However, while it is not essential to the existence of the right to discharge the employee that the employer have any real or substantial ground for dissatisfaction, yet he must act honestly and in good faith. His dissatisfaction, to justify the discharge, must be real and not pretended; it must not be capricious or mercenary or the result of a dishonest design to be dissatisfied in any event. If he feigns dissatisfaction and dismisses the employee, the discharge is wrongful." In an annotation on the question in 6 A. L. R. 1497, it is said: "There are many cases supporting the rule that where a contract of employment is conditional on the satisfactory character of the services rendered, the employer has the right to discharge the employee if the former is actually dissatisfied with the work, irrespective of whether there is reasonable ground for such dissatisfaction, and the jury cannot inquire into the reasonableness of such dissatisfaction, provided it is genuine, and not set up in

bad faith merely to conceal some other insufficient excuse."

Appellee cites the case of *Zitlin* v. *Max Heit Dress Corp.*, 151 Misc. 241, 271 N. Y. Supp. 275, in support of his argument that the burden was upon appellant to show that he was honestly dissatisfied with the services of appellee. In that case the court said: "Upon proof of a valid contract and discharge, the burden is undoubtedly on the defendant of coming forward with evidence that the employee was discharged because of dissatisfaction, and it is true that such dissatisfaction must be genuine; but the burden of proof on the whole case is on the plaintiff, and he must show that the dissatisfaction was not genuine. The state of the employer's mind is a fact to be ascertained by the jury on the evidence introduced The employer's denial of satisfaction would not be conclusive. The state of a man's mind is as much a fact as the state of his digestion."

In passing on the question whether Rife acted in good faith and was genuinely dissatisfied with Mote's services at the time he was discharged, the special master carefully analyzed and weighed the huge volume of testimony on this issue in the light of the above rules. It would unduly prolong this opinion to attempt to set out this testimony in detail. It must suffice to say that there was much evidence from the other three key men on the job, Maddox, Fain and Daniels, as well as the government engineers, critical of Mote's management of the project prior to execution of the written contract on August 19, 1942. In response to these complaints Rife visited the project and assisted Mote in ironing out the managerial problems immediately prior to the execution of the August 19 contract. Rife then returned to Dallas, Texas. On August 20 the complaints were renewed and the key men notified Rife of continued acts of mismanagement on the part of Mote. Rife ordered Mote to come to Dallas and when it was ascertained that Mote failed to promptly comply with this request, the letter of discharge of August 22, 1942, was written by Rife. It is true, as insisted by appellee, that Rife had

no right to discharge Mote for acts of mismanagement committed prior to August, 19, 1942. We agree with the master, however, that he had a right to consider occurrences prior to August 19 in determining the reasonableness of Rife's reaction to events transpiring in the three-day interim between the date of the contract and the time of Mote's dismissal.

The master and trial court ruled against appellee's contention that there was a conspiracy to discharge Mote and thereby increase Rife's profits. The master summarized the testimony on this issue in a finding as follows: "The great burden of the proof is to the effect that Mr. Mote had fallen down as a manager prior to August 19 and if Rife had discharged him at that time, the probability is Mr. Mote would have been in a worse condition, in so far as the proof is concerned, than being discharged under the written contract. Mr. Mote's evidence is to the effect that after August 19, he gave no cause for dissatisfaction. He implies that Maddox, Fain and Daniels conspired against him, to have him removed. One theory being that Maddox wanted his job, another being that Fain did not like him and wanted to get him off of the job. However, Daniels seems to have been the moving cause and there is no connection between what Daniels says he did and the attitude of Maddox or Fain. There is no proof that either Maddox or Fain influenced Daniels to do what he did. Then there is the suspicion that Rife insisted on Mote signing the contract so that he might immediately fire him. However, Rife's statement is to the contrary and his action seems to have been to the contrary; and since the burden of proof is upon one who alleges fraud or double dealing to prove it by clear, convincing and satisfactory evidence, we are not allowed to indulge a suspicion or presumption. However, there seems to be no way to reconcile the evidence of Mote on one part and Daniels, Fain and Maddox on the other as to what happened just after Rife left. There are three to one against Mote, and at least one of them, Daniels, is not

impeached; therefore, the master does not feel justified to indulge a suspicion."

After reviewing all the evidence on Rife's right to discharge Mote, the master concluded as follows:

"The master feels that Mr. Rife has discharged the burden resting upon him to show that he was sincerely dissatisfied at the time of the discharge. The master also feels that Mr. Mote has not discharged the burden resting upon him to show by a preponderance of the evidence, on the whole case, either that he was discharged by reason of fraudulent design or overreaching, or that Rife was not sincere in his expression of dissatisfaction in discharging Mote. For that reason, the master must hold that Mr. Rife had the right, at the time of the discharge, to discharge Mr. Mote." This conclusion was approved by the trial court and we are unable to say that it is against the preponderance of the evidence.

The chief contention of appellants is that there was error in the determination of the amount of Mote's compensation under the terms of his contract with appellants. It is argued that the formula used by the master in arriving at Mote's compensation is fantastic and that, in applying it, the master ignored the language of the contract which provides that the determination of the value of Mote's services should be based on "the percentage of work which has been accomplished" at the date of discharge. The progress report of the project engineer, Roy Earnest, showed construction 5.8 per cent complete at the time Mote was discharged. This percentage, according to the testimony, represents actual construction completed and in place and forms the basis upon which the government will make payments to the contractor as the work progresses. Appellants insist that this percentage of 5.8 per cent represents the sole basis for computation of Mote's compensation under the contract which would amount to one-fourth of 5.8 per cent of the net profits, or $2,068.98. The master rejected this contention and his report contains the following finding, in part, on this issue:

"It is clear to the master that the manager of a job has to do a lot of work before there is ever any construction at all. Whether they started this work on July 27, August 4, or August 6, Mr. Mote and his staff had a lot of work to do before that time and did a lot of work. If they had not, they would not have been ready or able to begin construction on August 6, so that a graph, or progress estimate for government pay, or upon which the government might make an installment payment, of 5.8 per cent on August 23.

"If there were some way to evaluate these daily progress reports whereby to have given the managerial staff any consideration for work accomplished in the managerial end of the job, and which was not tied in with an estimate of construction in place, or completed, which means at least some concrete was poured, then this percentage might be considered the same as work accomplished on the contract. In using the words 'Work Accomplished' the only legal or equitable meaning that could be placed upon words like that in hiring a manager for a building job would be the whole work accomplished in completing construction, the managerial work as well as the construction work."

We agree with the master's interpretation of the contract as approved by the trial court holding that the percentage of the work "accomplished" on the date of discharge means the percentage of managerial work accomplished. As pointed out by the master, if Mote had been discharged on August 6 he would then have been entitled to nothing under appellants' contention because there was no actual construction in place on that date. This would be true in spite of the fact that a good portion of the managerial duties had already been performed on August 6, 1942.

The master in devising the formula for computing the amount of compensation due Mote divided the managerial functions into four classifications, based on the evidence as follows: (1) laying out the operation; (2) perfecting the organization; (3) awarding contracts and

subcontracts for materials and jobs; and (4) job management. This formula is set out in the footnote.* While the formula may be complicated, in our opinion it furnishes a fair and reasonable criterion for arriving at a method of computing the value of Mote's services and one that is equitable and just to both parties under the testimony.

In determining the amount of net profits on the Jerome job, appellants charged this project with

* "The evidence fixes with reasonable certainty that there are two big jobs for a manager. Certain definite tasks that go with every job, and then what is termed 'over all' or 'job' management. The evidence makes it reasonably certain that the major portion of these management functions, (b) Perfecting the organization; (c) Awarding contracts; and (d) Getting out orders and getting materials delivered, had been performed before the discharge. As to (d) 'Job Management,' but a slight portion of that had been performed. Assigning to (a), (b), (c), and (d) 50 per cent of the managerial job and giving one-fourth of the 50 per cent, or 12½ per cent, to each; (a) Laying out the job is shown to have been 12 per cent complete. On the showing that this function (a) is 12½ per cent of the management job, we have 12 per cent of 12½ per cent, or 1.5 per cent of the whole task of laying out the operation performed by the date of the discharge. Giving to the other three special functions (b), (c), and (d) their *pro rata* per cent or 12½ per cent each, or 37½ per cent of the managerial job, the evidence shows these three functions to have been completed in a variable degree, and averaging the three, the reasonable inference from the evidence indicates with reasonable certainty that an average of 75 per cent of each of these tasks had been performed. 75 per cent of 37½ per cent would be 28.125 per cent, and if we add the 1.5 per cent of completion of laying out the operation to this 28.125 per cent, we have 29.625 per cent of this portion of the managerial job completed. When it comes to getting the proper per cent of the other 50 per cent of the management job, or 'job management,' completed before the discharge, we have to make a closer scrutiny of the inferences arising out of the evidence. Evidently, we cannot give credit for any effort expended in laying out the operation or contacting and contracting for materials and jobs, or in getting out orders and contracts and seeing to the delivery of materials, for those efforts have already been accounted for. Here is where we fall back on the 5.8 per cent of work accomplished, because that is where 'job management,' as distinguished from these other functions, comes in. Taking 50 per cent of this 5.8 per cent, we have 2.9 per cent of the 'job management' performed. Then, adding this 2.9 per cent to the 29.625 per cent, we have 32.525 per cent of the managerial work accomplished or completed at the time of the discharge. This 32.525 per cent is to be applied to the 25 per cent in which Mr. Mote would share. By applying this per cent to one-fourth of the profits, or taking 25 per cent of this 32.525 per cent, we arrive at Mr. Mote's share of the profits, computed upon the elements entering into the management job, and for which account should be made, according to the argument of plaintiff's attorneys as applied by the master. Figured thus, 32.525 per cent of 25 per cent is 8.13125 per cent; the per cent of the entire profits to which Mr. Mote would be entitled under the holding of the master, or the sum of $11,602.32."

$18,345.93 of their total overhead expense of $73,533.73 for the calendar year of 1942. Included in the "office payroll" item of $29,096.21 was the sum of $7,646 representing bonuses paid to only two of appellants' office employees in the month of December, 1942. The master struck the amount of these bonuses prorated to the Jerome job from the account thereby increasing the amount of net profits in the sum of $1,907.50. In his finding on this issue the master said: "The master holds that these bonuses are not properly chargeable against Mote's interest in the profits. Deducting $7,646 from the $9,927.39, the December payroll, leaves $2,281.39 as the December payroll. It was upon Mr. Rife to justify all of these charges. He justified them, or Mr. Koepcke did for him, by saying, 'That is the method pursued by contractors in this kind of business.' In making that statement he had no reference to contractors doing business like Mr. Rife did on other contracts where he managed them or hired a manager outright. But here he had a different deal with Mr. Mote. Mr. Mote was to get his pay out of the profits, and this job should have been kept separately." Appellants contend that the services under which the bonus payments were made could not be separated from the regular office payroll and that it is never done in actual business practice. Appellees, on the other hand, contend that it was error to charge any part of the $18,345.93 to the profits of the Jerome job. When due consideration is given to the nature of the management contract under which appellee was working for appellants, we think it would be inequitable to charge him with bonuses paid by appellants in December, 1942, and that the master and trial court correctly so held.

The master found that appellants should be held liable for payment of all unpaid court costs, including the master's fee. It seems that the reporting services and witness fees were paid by the respective parties as the trial progressed and these items were not included in the court costs. The trial court set aside this finding of the master and decreed that such costs should be

shared equally by the parties. On this issue the master found:

"Taking into consideration the fact that defendant discharged plaintiff under a contract which provided, if defendant did discharge plaintiff, even rightfully, technically, he would be due him a settlement; and yet, defendant made no offer of settlement; and taking into consideration that the plaintiff had to sue to get anything, and taking into consideration all of the equities involved, the master is of the opinion that the defendant should pay all of the unpaid costs of this suit, including the entire fee awarded to the master."

The conclusion reached by the master is equitable and fully supported by the record. Appellants not only failed to make a tender, but attempted to establish a counterclaim for $78,000 which was found to be without merit. We think the trial court abused its discretion in modifying the master's findings as to the court costs and master's fee.

It follows that decree of the chancery court will be modified to require appellants to pay the unpaid court costs, including the master's fee, as found by the special master. In all other respects the decree is affirmed.

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

4-7973 197 S. W. 2d 284

Opinion delivered November 11, 1946.

[redacted]

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

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

SMITH, J. This suit was brought to recover damages to compensate a personal injury sustained by appellee, when the automobile which he was driving collided with one of appellant railroad company's engines. There was a judgment and verdict in plaintiff's favor, from which is this appeal.

The collision occurred about 1:30 a.m., in a place referred to as Cul-de-sac, and so it was, being a blind alley, three sides of which were inclosed by the buildings of the McCoy-Couch Furniture Company, leaving open only the entrance of the alley.

The engine had just spotted a car in this alley for the furniture company, and the collision occurred as the engine was leaving the alley leading to the main line track, but before reaching that track. The negligence complained of on the part of the railroad company was that the engine moved from the alley, across the public highway, on which appellee was driving, without lights and without signal by bell or whistle. The testimony cannot be reconciled, but its conflicts make a case for the jury whether there was negligence in the respects alleged.

Error is assigned in the action of the court in permitting witnesses to testify that the crossing where the

collision occurred was rough, inasmuch as negligence in this respect was not alleged. This testimony was given by appellee and another witness who approached the crossing from the opposite direction, and whose testimony gave support to the contention that the engine moved into the crossing blocking the road, without lights, and without giving any signal of its approach.

These witnesses approaching the crossing from opposite directions each testified that they reduced speed as they approached the crossing, and gave as their reason for doing so the fact known to each of them that the crossing was rough. We think there was no error in admitting this testimony.

The court gave numerous instructions defining the duties both of appellees and of the operators of the engine. Instructions requested by the railroad company would have told the jury, if given, that appellee could not recover, if by the exercise of ordinary care, he could have seen and heard the approaching train, but these instructions were modified to read that appellee could not recover if his negligence was equal to, or greater than that of the railroad company.

This modification injected the issue of comparative negligence and properly so, as contributory negligence on the part of appellee would not defeat his right to recover, unless his negligence was equal to or greater than that of the railroad company. But the instructions did not tell the jury in the modifications, as should have been done, that appellee's recovery would be reduced in proportion to his negligence.

The court gave, over appellant's objection, an instruction called "No. 1-b," reading as follows: "You are instructed that under the laws of Arkansas no railroad company or corporation owning or operating any yards or terminals in the cities within this state, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one engineer, a fireman, a foreman and three helpers."

This instruction obviously is based upon §§ 11161 and 11162, Pope's Digest, which read as follows:

"Sec. 11161. In Cities. No railroad company or corporation owning or operating any yards or terminals in the cities within this state, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one engineer, a fireman, a foreman and three helpers.

"Sec. 11162. Number of crew. It being the purpose of this act to require all railroad companies or corporations who operate any yards or terminals within this state who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this act."

This instruction will be considered in connection with another instruction on the same question. The fireman on the engine on his cross-examination was asked by appellee's attorney this question about the operating crews: "They require six men?" Objection was sustained to this question, and the witness did not answer, yet the court gave the instruction set out above. Counsel for appellee in his argument to the jury said: "It was the duty of the railroad company to have six men at that crossing." Objection was made to the argument which was overruled by the court, and an exception was saved.

In the case of *Elder* v. *State*, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220, an attorney made a statement as to what the law applicable to the case was, and an objection to the argument was overruled. It was held that this action of the court amounted to giving an instruction that the statement of the attorney was in fact the law, and the judgment was reversed as the statement was not a correct declaration of the law. So here, the court in effect

told the jury that it was the duty of the railroad company to have six men at the crossing.

This is not the law even though §§ 11161 and 11162, Pope's Digest, are applicable to the issues joined. But it is not clear that these sections have any application here whatever. It is obvious that the sections quoted above apply only to crews engaged in switching in the cities of the state, and not to train crews. The act does not mention conductors, who are part of train crews, and not of switching crews. The act does mention "foreman" who are part of switching crews and not of train crews. Witnesses testified that the conductor was at the depot when the collision occurred, and all the witnesses referred to the crew here in question as engineer, fireman, conductor and brakeman, these comprising a train crew, and not a switching crew.

However, the instructions, one given directly, and the other inferentially, should not have been given even though this was a switching crew and not a train crew. The act does not require the presence of six members of the switching crew at the same place at the same time.

Objections were made to certain testimony which we have examined and find to be without merit. It is urged also that the verdict is excessive; but as the case is to be reversed, this question may not again arise.

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

[redacted]

DIXON *v.* DIXON.

4-7974 197 S. W. 2d 43

Opinion delivered November 11, 1946.

[redacted]

Boyd Tackett and *Alfred Featherston,* for appellant.

George E. Steel and *Alston & Woods,* for appellee.

SMITH, J. This suit was filed by the widow and five of the seven children of James A. J. Dixon, against the other two children of Dixon, to have an instrument in form a deed declared a mortgage, securing a debt which had been paid, or if not that it be declared that a constructive trust arose from its execution. The relief prayed was denied, and from that decree is this appeal.

Dixon who died intestate January 10, 1913, survived by his wife and seven children, owned, at the time of his death, two forty-acre tracts of land. His widow owned another forty-acre tract of land. For the benefit of one of their heirs it became necessary to raise the sum of $300, which was done by giving a mortgage on all three forty-acre tracts of land. That sum was borrowed from A. T. Henry, and to secure its repayment the widow and all the heirs joined in a mortgage to Henry, covering all three tracts of land.

This loan by Henry, secured as stated, was made in 1927, and was carried, with only small payments, all, or most of which appeared to have been made by the widow, until 1937, at which time it amounted, with accrued interest, to between six and seven hundred dollars. Henry then demanded payment of his debt, which the heirs were unable to make. He testified that he valued the three tracts at that time at $450, and he proposed to accept that sum in satisfaction of his mortgage. In the meantime he demanded a deed which would have saved foreclosure expenses.

The widow proposed to pay and did pay $150 of the $450 paid Henry. She gave this sum to her son, Andrew, who paid the balance of $450 on the mortgage, which was assigned to him. To secure the repayment to Andrew of the $350 which he advanced, the widow and the other heirs gave Andrew a warranty deed to the three tracts of land. It is undisputed that Andrew agreed when the deed was given to him that the advance might be repaid, in which event he agreed to reconvey the land. The decree from which is this appeal contains the following finding of fact: "There seems to be little doubt that Andrew agreed at the time of the execution of the deed that if anyone of the heirs, or all of them, would refund him his money, he would release the land back to the estate, but he claims that the contract, if any existed, was not in writing subject to the statute of frauds, and if it was given as an original mortgage, the original owners of the land had lost their right to redeem the land by not paying the mortgage at maturity or at any time paying the price paid by him for the land."

Andrew admits the facts stated, but denies that he agreed that repayment might be made at any time, but testified that the advance was to be repaid within a reasonable time. He testified that he made this advance to provide for his mother a home, and that he allowed her to remain in possession and to appropriate to her own use all the rents and profits derived from the land, but upon condition that she pay the taxes, all of which she paid except $45, which he paid. Andrew deeded forty

acres of the land to one of his brothers August 29, 1945, and he and his brother are the defendants in this case.

The deed from the widow and heirs to Andrew was dated January 8, 1936, this being the time when the mortgage to Henry was paid. No offer to redeem from Andrew was made until October 10, 1945, when this suit was filed, in which it was prayed that it be adjudged that the deed to Andrew was in fact a mortgage, and that the debt which it secured had been paid.

The case was tried upon the theory that if the deed to Andrew was not a mortgage, a constructive trust in favor of the plaintiffs arose from the fact that Andrew had obtained his deed by virtue of his false promise to permit a redemption. The chancellor was of the opinion that this contention had not been sustained and dismissed the case as being without equity. We are of the opinion, however, that the deed to Andrew was given as, and in fact was, a mortgage. Many of our cases have announced the law to be that if it is the intention of the parties to an instrument, in form a deed, that it was executed as security for a debt which continued to be owing after the execution of the instrument, it is, regardless of its form, a mortgage. A recent case so holding, citing other cases to the same effect, is that of *Sturgiss* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236.

There is a circumstance which impels our conclusion. On account of the war, timber on the land became valuable, and Andrew sold this timber on June 27, 1945, for $900 cash. There was a computation of the sum then due him on account of the advance he had made to discharge the mortgage to Henry. The testimony is conflicting and uncertain as to who made the computation, but it is certain someone made it. The interest was computed at 10 per cent, compound interest, and amounted to $375.21. This with the principal debt of $300 amounted to $675.21, and the balance of the purchase money, stated to be $225, was paid to the widow. As a matter of fact, this balance lacks something less than one dollar of being $225; but that sum was paid to the widow. Andrew says

that this was a mere gift to his mother, but we think the strained relation between him and his mother does not sustain that contention. We think this transaction shows not only that the deed to Andrew was a mortgage, but shows also that the debt which it secured was paid

The heirs insist that Andrew should be charged with the difference between simple interest and compound interest, but we do not think that the equity of the case requires that this be done, as the transaction was had without objection on the part of the widow or the heirs.

On the other hand, we think the equity of the case requires that Andrew be allowed a credit of $300 arising out of these facts. The widow advised Andrew that she wanted to sell her forty-acre tract to a son named Hilry, for a consideration of $300. Andrew refused to consent to this conveyance, and paid his mother $300. He did not take a deed from his mother, as he already had her deed. He said this was a mere gift, given to his mother because she said she needed the money. It appears somewhat incongruous to give any credit for this money which he says was a gift, but we do not think it was any more a gift than was the $225 which he testified he gave his mother. He was at that time claiming title to all three forty-acre tracts, and it would have been inconsistent with this claim to have accepted another deed. But he did pay his mother the exact sum of money for which she proposed to convey the land to her son, Hilry. Holding as we do that the deed to Andrew was in fact a mortgage which was satisfied out of the proceeds of the sale of the timber, the widow will recover her forty-acre tract of said land, but we think there should be imposed upon it a lien in Andrew's favor for the $300 which he paid her, as it does not appear equitable to allow her to recover her land, free of the mortgage, and to keep the $300. A lien will therefore be declared in Andrew's favor for $300.

It appears that Andrew conveyed one of the forty-acre tracts to his brother who was joined as a defendant for the recited consideration of $200. We think it obvious that his brother was not an innocent purchaser, and that

the deed to him was subject to the mortgage. This appeal does not present the question how he may recover the $200 from Andrew, if he in fact paid it.

The decree of the court below will therefore be reversed, and the cause will be remanded with directions to declare that the deed to Andrew from his mother and the heirs was in fact a mortgage, and has been paid and to cancel it as having been satisfied. There will be adjudged in Andrew's favor a lien on the forty-acre tract owned by his mother for the sum of $300 which he paid her.

The entire costs of the case will be divided equally between appellants and appellees.

BATES *v.* STATE.

4-7961 197 S. W. 2d 45

Opinion delivered November 11, 1946.

Elmer Schoggen and *Ross Robley,* for appellant.

Guy E. Williams, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Christopher Bates and his wife, Daisy, are Negroes and publish a weekly newspaper in Little Rock—Arkansas State Press.

Roy Cole, Jesse Bean, and Louis Jones, strikers, were convicted March 19, 1946, under an indictment in which it was charged that ". . . by the use of force and violence they prevented Otha Williams from engaging in a lawful occupation."[1]

March 23 each defendant was sentenced to serve a year in prison. They were remanded to custody of the Sheriff with directions for "speedy transportation" to the penitentiary. At that time there was no move for a new trial, although motion was filed April 3, and overruled.

On March 29—six days after the strikers had been sentenced and five days before the Court was asked to grant a new trial—Arkansas State Press publicized the events, the attending circumstances, and made comment.

April 25 an "Attachment for Contempt of Court"[2] was issued, directing that Christopher and Daisy Bates be "taken and safely kept" until April 29, ". . . to answer to the people of Arkansas for a contempt of court [because they had printed] false accounts" of the Cole, Bates, and Jones trial. It was asserted that the news or editorial items were calculated ". . . to influence, intimidate, impede, embarrass, and obstruct the

[1] See *Cole, Jones and Bean* v. *State, ante,* p. 433, 196 S. W. 2d 582.

[2] The record does not disclose a judicial order authorizing issuance of the attachment, but presumptively such order was omitted from the record through error.

Pulaski Circuit Court and other courts in the due administration of justice, and by further writing contemptuously of the Pulaski Circuit Court and the Jury and Jury Commissioners, and the presiding Judge of the First Division."

Specifically, it was complained of the headline wherein it was said: "Strikers Sentenced to Pen by Hand-Picked Jury."

In the text of the article, first paragraph, this appears: "Three strikers, who by all observation were guilty of no greater crime than walking on a picket line, were sentenced to one year in the penitentiary by a hand-picked grand jury, [*sic*] while a scab who killed a striker is free." And then: "The prosecution was hard-pressed to make a case until Judge Lawrence C. Auten instructed the jury that the pickets could be found guilty if they aided or assisted, or just stood idly by while violence occurred." This statement was attributed to a news report appearing in the Arkansas Gazette.

Other matters excepted to were: (a) The ninth paragraph read, "Motions to quash the indictments were overruled, . . . including protests to the fact that there were no Negroes on the jury in accordance with the law"; (b) "Appeal bonds were fixed at $2,500 each, [when] the usual bail in such cases is $1,000"; (c) Paragraph Eleven: "There can be no doubt that we will win this case when it is appealed to the Arkansas Supreme Court [3] or the Supreme Court of the United States." This statement was attributed to Lindsey Walden, an attorney who assisted in the case. Continuing the quotation from Walden, the newspaper said: "Labor has been a victim of 'fixed' juries before, and we have been able to set the verdicts aside. I have never before tried a case where a Judge and Jury were so prejudiced and committed so many reversible errors."

The petitioners were arrested and lodged in jail. Shortly thereafter they were released on bond. When

[3] The judgments were reversed October 12, 1946, and the causes remanded for new trials.

arraigned each was fined $100 and sentenced to serve ten days in jail.

A Justice of this Court issued temporary *supersedeas*. The following Monday the writ was continued. pending hearing on the merits, suitable bond having been supplied.

Did the article, critical though it obviously was, tend to interfere with orderly conduct of the judiciary? A response was filed, denying a purpose to impugn the Court's integrity or to impair the law's processes. Our iniquity goes to the proposition whether, as the Supreme Court of the United States expressed it,[4] the publication created a clear and present danger to judicial administration.[5]

Whether the strikers' cases were pending when the article was written is a question of construction. The judgments were final, sentences had been pronounced, and the Sheriff had been directed to deliver his prisoners to the penitentiary warden. A maximum term of two years might have been imposed, but the jury in the exercise of its discretion did not assess the limit.

At that point in the proceeding it was possible (though highly improbable) that no motion for a new trial would be filed. In such event the Circuit Court's work was done. We think, however, (in view of the known policy employed by many lawyers of pressing for relief until all reasonable means have been exhausted) a case is pending during the time allowed for filing motion for a new trial. But it does not follow that during *that* time any form of newspaper comment or criticism is anathema. Those elected to office must expect, and they usually receive, approval and disapproval that alternate. A Judge, *per se*, is in no different situation from that occupied by another who undertakes to discharge legally

[4] *Bridges* v. *California*, 314 U. S. 252, 271-278, 62 S. Ct. 190, 86 L. Ed. 192, 159 A. L. R. 1346; *Pennekamp* v. *Florida*, 66 S. Ct. 1029.

[5] The case at bar should not be confused with instances where the act complained of occurs in the presence of the Court, or in its constructive presence; nor is it related to those cases where the service of process is ignored, interfered with, or the judicial machinery otherwise halted.

imposed public responsibilities. Courts are institutions wherein the State's judicial powers repose. Art. VII, § 1, Constitution of 1874.

Heretofore it has been thought that contempt proceedings in instances such as we are dealing with would be pursued only where, by a fair construction of all of the acts complained of and the status existing at a time reasonably proximate to the incident, fair minds would agree that the judicial power was being or would be impaired. The dignity of a particular individual sitting on the bench is not a matter of importance paramount to the institution our system has designated a Court. As Mr. Justice Reed of the United States Supreme Court expressed the thought in *Pennekamp* v. *State of Florida*:

"What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly the criticism of the Judge's inclinations or actions in those pending non-jury proceedings could not directly affect such administration. This criticism of his actions could not affect his ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a Judge has such remedy in damages for libel as do other public servants."

In a concurring opinion in the same case Mr. Justice Frankfurter said: " . . . Criticism, therefore, must not feel cramped, even criticism of the administration of criminal justice. Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process. While the ramparts of reason have been found to be more fragile than the Age of Enlightenment

had supposed, the means for arousing passion and confusing judgment have been reinforced. And since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print."

Although the record before us includes only matters bearing on the contempt proceedings, there is nothing to show that there was, or was not, a "hand-picked" jury in the criminal trial to which the petitioners here referred. There is a presumption in favor of integrity. Every Judge has heard the disappointed lawyer remark that his case was lost because of a "hand-picked" jury—sometimes with, but usually without, reason.

Language that probably irritated the Judge included the assertion that ". . . The prosecution was hard pressed to make a case until Judge Lawrence C. Auten instructed the jury that the pickets could be found guilty if they aided or assisted, or just stood idly by while violence occurred." As previously mentioned, the information upon which this statement rested was attributed to Arkansas Gazette. The Gazette's trial report is not in the record. In libel, slander, or contempt, one is not excused because another originated the objectionable matter or primarily initiated the conduct. A person who maintains either in motion may in fact be the offending party; nor is the quotation State Press attributes to the Gazette faculty correct, as disclosed by the Cole-Jones-Bean transcript.[6] But, as we have already said, the Court gave an incorrect instruction, (although this was mere speculation upon the part of those who made the criticism) and we know of no rule of law permitting jail sentences and contempt fines merely because a newspaper thinks some Judge has mistakenly stated the law. Such comment does not create a present danger to the administration of justice.

When on September 7, 1874, certain distinguished gentlemen subscribed to the proposition set out as Art.

[6] In that case it was held on appeal that an instruction which seemingly was the one commented on by petitioners and copied in the so-called attachment, was erroneous, calling for reversal of the judgments.

II, § 6, of the Constitution, they were not expressing new thought, but reasserted an opinion then common among men: "The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right."

A distinction might be drawn between writing and publishing one's "sentiments," as the term is used in the Constitution, and in printing diatribes where public institutions charged with the administration of justice are singled out. Any arbitrary line we might attempt to draw would be subject to restrictions imposed in the Pennekamp case and others of similar import, by which we are bound. Essence is that unless the writing precipitates a clear and present danger, in consequence of which justice will be affected, recourse of the aggrieved person is prosecution for libel.

The judgments are quashed. The causes are remanded with directions to dismiss the actions.

RIVES *v.* MCGAUGHEY.

4-7977 197 S. W. 2d 49

Opinion delivered November 11, 1946.

Rowell, Rowell & Dickey, for appellant.

Virgil R. Moncrief and *John Moncrief,* for appellee.

ROBINS, J. Appellants, two members of Green River Club, a fishing and hunting club, brought this suit on September 22, 1944, in the lower court, asking for cancellation of a deed executed on September 18, 1940, by appellee, J. W. Holt, as president, and H. A. McMillan, deceased, as secretary, of said organization, by which deed the club conveyed to appellee, H. C. McGaughey, approximately one hundred acres in Arkansas county. An accounting of club funds was also asked by appellants.

During the trial the lower court directed that certain funds, conceded by all concerned to belong to the club, but deposited in the personal bank account of one of the officers, be transferred and deposited in the name of the club. This direction apparently was agreed to, and the request for accounting was not further pressed below; and no contention on this phase of the case is made by appellants here. The lower court found that the deed complained of by appellants was valid, and from a decree refusing cancellation thereof this appeal is prosecuted.

Green River Club was organized as a benevolent or non-profit corporation pursuant to the provisions of §§ 2252 to 2261, inclusive, of Pope's Digest. It has a membership of approximately fifteen. Its constitution provides for the election of a president, vice-president, secretary and treasurer and three trustees. There is no specific provision in the constitution or by-laws as to purchase or conveyance of property, but it is set forth in § 4 of Article II of the by-laws that: "The three trustees shall have charge of the management and operation of said club and its grounds."

Appellants alleged in their complaint that the president and secretary of the club executed the deed to appellee, McGaughey, without the knowledge of appellants, "without authority from the membership of the club and contrary to law," and contrary to the constitution, by-laws and regulations of the club.

The material allegations of the complaint were denied in a separate answer filed by appellee, H. C. McGaughey.

The deed involved herein was in regular form, recited a consideration of $600, paid by execution of three promissory notes, each for $200, and one due on the first day of October during each of the years 1940, 1941, and 1942. As a further consideration, it was stipulated in the deed that appellee, McGaughey, should construct a dam, 20 feet at the base and 12 feet at the top, with spillways, on a twenty-acre tract owned by appellee, McGaughey, which appellee conveyed to the club as additional consideration for the deed obtained by him. The clubhouse tract of twenty acres was not included in the conveyance to appellee, so that the clubhouse property, after the trade, consisted of two twenty-acre tracts, the building being located on one tract and the lake on the other. The deed to appellee also contained a requirement that he should stock the lake to be thus created with bass, crappie and bream, and that "the said H. C. McGaughey will maintain the clubhouse, and a right of way thereto over his property, of the grantor herein,

. . . said maintenance to continue as long as the clubhouse is used by the Green River Club." This deed concludes:

"In witness whereof, the said Green River Club by resolution of its board of directors have caused its president and secretary to execute this deed and to subscribe its name and their names in their respective capacities and affix its seal thereto, this the 18th day of September, 1940.

"GREEN RIVER CLUB, A CORPORATION,

"By J. W. Holt, President,

"H. A. McMillan, Secretary.

"SEAL OF GREEN RIVER CLUB."

Appended to the instrument is an acknowledgment in proper form for a corporate deed.

To maintain the issues in their behalf appellants introduced eight witnesses (including themselves) all of whom testified that they were members of the club, that the conveyance to McGaughey was never discussed in any meeting of club members attended by them, and that they had never authorized the transaction. Some of these witnesses, however, admitted that in 1943 they learned about the construction of the fish pond for the club on the twenty acres obtained from McGaughey.

No minutes of meeting of the club members or of the meetings of the trustees, were introduced in evidence, and it appeared that such minutes were not regularly kept. No authentic list of members of the organization was in existence.

It was not denied that appellee, McGaughey, had paid the entire amount (less certain credits for work) he agreed to pay for the land purchased by him or that he had constructed the dam on the twenty-acre tract, which he conveyed to the club as part of the consideration of the deed to him.

Five witnesses, all members of the club, testified on behalf of appellees. Two of these witnesses were trustees of the club at the time the deed to appellee, McGaughey, was executed, the other trustee having died before the suit was brought. One of the witnesses for appellees was the widow of the deceased trustee, who seemed to have had the privileges of her husband's membership. She testified that her husband was trustee when the trade with appellee, McGaughey, was made, and that, although she did not know about the trade at the time, she now approved of it. The substance of the testimony of appellees' other witnesses was that the club had no place for fishing and no proper location on which a lake could be constructed and for this reason the trustees were authorized to make the trade by which they sold McGaughey, who was a member as well as caretaker, the one hundred acres, and obtained from him the twenty-acre tract, which, being traversed by a ravine that could be dammed up, was a suitable site for an artificial lake. These witnesses also testified that the transaction was properly authorized by all of the trustees and was sanctioned by a meeting of the club members. They were not explicit as to the date of this meeting, nor as to who or how many of the members were present, and, as stated above, no proper minutes or records of the affairs of the organization were made or preserved.

There was no evidence tending to show any dishonesty or fraud on the part of the officers who executed on behalf of the club the deed assailed herein, and it was not shown that the trade was an improvident or disadvantageous one as far as the club was concerned. On the contrary, there was testimony indicating that the trade was beneficial to the club. Nor can the transaction be condemned as such a sale of all of the assets of the club as to require its liquidation, thus causing a diversion of trust property from use to which it was dedicated.

The sole ground on which cancellation of this deed is asked is that the same was not authorized by the club's members.

The affairs of this organization, under its by-laws, were to be conducted by its trustees, no provision being made in its constitution or by-laws for a board of directors, and these trustees therefore had the powers usually vested in directors of a business corporation.

Ordinarily, in the absence of a charter or statutory limitation on its authority (except in case of a sale of all assets), the board of directors of a corporation has the power, when acting in good faith, to authorize the sale and conveyance of the real estate of the corporation. "While a charter or statutory provision as to which officers have power to convey is of course binding, in the absence of any charter or statutory limitation, the board of directors has full power to convey the corporate realty and may authorize the officers to execute a conveyance thereof or make a contract for its sale." 13 Am. Jur. 900; 19 C. J. S., p. 136, § 774.

In Thompson on Corporations, Third Ed., vol. 2, p. 589, it is said: "The governing body of corporations having a capital stock, and generally in business and social organizations, is styled 'directors' or 'board of directors.' The term 'trustees' is usually employed to designate the governing body in eleemosynary corporations, and in institutions and associations whose membership is in a sense general and unlimited, and where the body of trustees practically constitute or compose the corporation. It is a rule of law now generally recognized that the corporate powers, business and property of a corporation must be exercised, conducted and controlled by such managing body. . . . A corporation acts only through its managing officers or agents."

The deed involved in this case contained a recital that its execution was duly authorized, it was signed by the president and secretary of the club and it bore the seal of the club. Under these circumstances there was a presumption that these officers were authorized to execute the instrument. *Sibly* v. *England,* 90 Ark. 420, 119 S. W. 820; *Fidelity & Deposit Company of Maryland* v. *Rieff,* 181 Ark. 798, 27 S. W. 2d 1008; *Oliver* v. *Henry*

Quellmalz Lumber & Manufacturing Company, 170 Ark. 1029, 282 S. W. 355; 19 C. J. S. 662. Furthermore, there was substantial testimony to the effect that the execution of the deed had been duly authorized by the trustees. While action of this kind by directors or trustees of a corporation should always be evidenced by a written record thereof, the absence of such a record is not necessarily fatal to the validity of the act authorized at the meeting. "The fact that no minute of the meeting was made or recorded will not render invalid any act done or authorized at such meeting which is within its corporate powers. Such authority may be made verbally, and proved by parol evidence. *Wolfe* v. *Irwin & Ward Company,* 71 Ark. 438, 75 S. W. 722; *Stiewel* v. *Webb Press Company,* 79 Ark. 45, 94 S. W. 915, 116 Am. St. Rep. 62; 10 Cyc. 1001." *Merchants & Farmers Bank* v. *Harris Lumber Company,* 103 Ark. 283, 146 S. W. 508, Ann. Cas. 1914B, 713.

To establish the invalidity of this deed appellants offered testimony, the effect of which was to establish only that a majority of the members of the club did not know of or authorize the conveyance. Such evidence was not enough to overturn the *prima facie* validity of the deed, or to show that it was not made in pursuance of authority of the trustees, who, in the absence of fraud, were empowered to sell the property and direct its conveyance. This conclusion renders it unnecessary to consider the effect of the failure of appellants to join the club as a party and to offer restoration of the consideration obtained by the club from appellee, McGaughey, for the execution of the deed questioned in this suit.

The decree of the lower court was therefore correct and is affirmed.

HATCH *v.* SCOTT, ADMINISTRATRIX.

4-7975 197 S. W. 2d 559

Opinion delivered November 11, 1946.

Rehearing denied December 16, 1946.

Wendell Utley and *Henry B. Whitley,* for appellant.

Garner & Clegg and *A. A. Thomason,* for appellee.

MCHANEY, Justice. Since the submission of this case, the death of appellee, R. M. Scott, has been suggested and conceded, and, by agreement of both parties, Louise Scott has been appointed special administratrix of his estate, he having died intestate, and the cause has been revived in her name.

January 11, 1943, Henry F. Scott leased to appellant a certain brick building in Magnolia, Arkansas, known

as the Scott Building, at a rental of $50 per month in advance for the year 1943. The lease provides: "The lessee is to take said building as is and is to surrender possession January 31, 1943, in as good condition as now is, natural wear and tear excepted." The date "January 31, 1943," is an obvious error and December 31, 1943, was intended, since another clause provides that "the lessee shall have the use and possession of said building for and during the year 1943." It was signed by both parties on January 11, 1943. Written as a postscript at the bottom of said lease is the following: "With this lease A. F. Hatch is to have refusal of building for 3 or 5 years at same or more or less," and signed by the lessor, Henry Scott. It appears that Henry F. Scott, although not the sole owner of the Scott building, had the authority to make the lease agreement. In the latter part of November, 1943, appellee's intestate, R. M. Scott, who resided at Dermott, Arkansas, became the owner of said building, and, shortly thereafter began negotiations with appellant about the renewal of the lease. He testified that appellant called him over long distance telephone and offered him $75 per month, but witness told him he would take $100 per month. He understood from his brother that the Schlumberger Well Surveying Corporation, a subtenant of appellant, would pay $100 per month for the building. On December 23, 1943, appellant wrote intestate a letter, which acknowledges receipt of a letter from him of the 21st "in regard to the building I have leased from Mr. Henry Scott," in which letter he said: "If you are over in this county I will try to please you with a lease to where each of us can profit by it."

The parties not being able to agree on the amount of the rent for a new lease or a renewal of the old one, intestate, on January 29, 1944, brought an action of unlawful detainer in the circuit court against appellant to recover the possession of said building, in which he alleged his ownership, the lease and its termination, appellant's refusal to quit, and on January 22, 1944, that he gave notice to appellant, as required by law, to quit and deliver up the possession to him, copy thereof being

attached, but that appellant refused to surrender said possession and unlawfully holds and detains same. Damages were alleged of $200. He prayed possession and damages. The answer was a general denial and a specific denial that appellee "notified him according to law to quit and surrender possession of said property and denies that he is now unlawfully holding and detaining said property." As an affirmative defense, he set up the postscript or subjoined clause at the bottom of the lease, above quoted, claiming the "privilege of renewal of said lease for 3 or 5 years at the same rent or such other rent as could be agreed upon between the parties at a greater or lesser amount." Intestate filed a reply to the answer alleging that said renewal provision relied on "is ambiguous, indefinite and uncertain and insufficient to constitute an enforceable contract between the parties." Trial of this circuit court case on April 18, 1944, before the court sitting as a jury, resulted in a "judgment for defendant," and costs were adjudged against the plaintiff, R. M. Scott. No appeal was taken.

Thereafter, on December 12, 1944, Scott brought the present action in the chancery court against appellant, his complaint being captioned, "Bill in Equity for Construction of Instrument, Accounting Thereunder, and, in the Alternative, Cancellation of Instrument." In this action he set up the lease of said property to appellant for 1943 at $50 per month, with the understanding that further occupancy of said building, after 1943, should be at such rental as he could get from third parties or as the parties might mutually agree upon; that he was in a position to obtain $100 per month at all times since January 1, 1944, but that appellant insisted he had the right under said lease to hold said building at a rental of $50, and has in fact so held it without making any rental payments to him; that there exists between them a *bona fide* controversy as to the monthly rental price of said property, in that appellant insists on the right to hold at $50 and refuses to pay more, whereas he says he has the right to $100 per month from January 1, 1944; and that he is entitled to a construction of said lease and

an appropriate order directing appellant to account to him in the sum of $100 per month, and, in default of such accounting, to the cancellation of said lease and a writ of possession. He so prayed. Appellant answered setting up the proceedings in the circuit court and its judgment as *res judicata* and a general denial with a plea that he entered into possession on a one-year lease with the privilege of renewal for three or five years at his option, and expended large sums as a result thereof, and that any misunderstanding or controversy existing is of appellee's own making, of which he cannot take advantage.

On March 29, 1946, the court entered a decree for intestate and against appellant in the sum of $1,200 with 6 per cent. interest from date of the decree and for possession of the building and premises in controversy. The circuit court clerk was ordered to deliver to appellee the $1,200 deposited in his custody during the years 1944 and 1945 by appellant and the clerk of the chancery court was ordered to deliver to appellee all sums deposited with him by Schlumberger Well Surveying Corporation, with all costs to appellee. This appeal followed.

For a reversal of this decree it is first argued that the proceedings and judgment of the circuit court are *res judicata* of the present action. In connection with this plea appellant attached to his answer certified copies of the complaint and its exhibits, the answer with its exhibits, appellee's reply, as filed in the circuit court, and a certified copy of the circuit court judgment as hereinbefore set out. No transcript of the evidence heard by the circuit court was filed, nor was any extrinsic evidence offered to show what the circuit court's judgment was based on. As said by this court in *Cooper* v. *McCoy,* 116 Ark. 501, 173 S. W. 413: "It is well settled that a former judgment in order to be a bar must have been a decision of the merits of the cause. In *Smith* v. *McNeal,* 109 U. S. 426 (3 S. Ct. 319, 27 L. Ed. 986), the court, quoting from *Hughes* v. *U. S.,* 4 Wall. 232, 18 L. Ed. 303, said: 'In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same

parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect in pleadings or parties, or a misconception of the form of the proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.' See, also, *Sauls* v. *Sherrick,* 121 Ark. 594, 182 S. W. 269; *Quisenberry* v. *Davis,* 136 Ark. 115, 206 S. W. 139; *Howard-Sevier Road Imp. Dist.* v. *Hunt,* 166 Ark. 62, 265 S. W. 517."

This language was quoted with approval in *Wallis* v. *Magnet Cove School Dist.,* 179 Ark. 729, 17 S. W. 2d 895, where it was held, to quote headnote: "A judgment of the circuit court dismissing an action contesting an election for consolidation of two school districts because not brought within the 15 days after the election, as required by Crawford & Moses' Dig., § 8878, is conclusive upon that question, but was not conclusive upon the question of the power of the board of education to order the election."

This case cited a number of previous decisions of this court, sustaining the holding above quoted in *Cooper* v. *McCoy.* One of these is *Quisenberry* v. *Davis,* 136 Ark. 115, 206 S. W. 139, where Chief Justice McCulloch used this language: "Now, it has been repeatedly held by this court that, to render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear from the record, or from extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit. That rule was announced by this court and the subject was fully discussed in the case of *Dawson* v. *Parham,* 55 Ark. 286, 18 S. W. 48, where Chief Justice Cockrill, in delivering the opinion of the court, quoted with approval the rule announced by the Supreme Court of the United States, in *Russell* v. *Place,* 94 U. S. 608, 24 L. Ed. 214, as follows: 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment

it must appear either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In the circuit court, the action was one in unlawful detainer, and the principal question involved in that case was the appellee's right to the possession of the property and the court held against that right. True, appellee asked for damages in that action in the sum of $200, but the court made no adjudication of damages in that action or of rents even though appellant admitted in his answer he was holding under a lease which provided for rent at $50 per month and that he had kept up such monthly payments at all times. In the case now at bar, possession was not prayed. The prayer was "for a construction of the lease agreement herein involved and appropriate order and judgment directing defendant (appellant) to account to plaintiff under said construction and, in default to so account that said lease agreement be canceled" and that he have a writ of possession. While the two actions were between the same parties and grew out of the lease of the same building, the relief sought in each was wholly different. The relief sought in the present action was the collection of the accumulated rental undisputedly due appellee in some amount, appellant claiming he owed only $50 per month whereas appellee claimed $100 per month. The judgment for appellant did not adjudicate the damages, as appellant had deposited with the clerk the rents he admittedly owed, and this judgment was not *res judicata* of the

rents accruing subsequent to April 18, 1944. *Blume* v. *Lightle,* 180 Ark. 136, 20 S. W. 2d 630. But the complaint in the circuit court raised issues other than the right to the immediate possession and damages. One of such issues was whether the notice required by law had been legally given. The complaint so alleged and the answer specifically denied such notice. It may be that the proof in the circuit court failed to show that such notice was given, and this would have been sufficient to justify the judgment of the circuit court, without a decision on the merits of the case. There was no extrinsic proof in the chancery court to show that the particular matter sought here to be concluded by the circuit court judgment was in fact decided, and the plea of *res judicata* must fail because, as said in *Quisenberry* v. *Davis, supra,* "it must appear from the record or from extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit." The record does not show it and there was no extrinsic evidence. So, appellant's estoppel plea must fail.

Another argument is that the postscript or added clause at the bottom of the lease, above quoted, should be construed to read "with this lease A. F. Hatch is to have refusal of the building for five years at the same." But courts cannot make contracts for parties. We have held that a covenant to renew upon such terms as may be agreed upon is void for uncertainty. *Keating* v. *Michael,* 154 Ark. 267, 242 S. W. 563. It is nothing more than an agreement to make an agreement. This case is not like or similar to our recent case of *Beasley* v. *Boren, ante,* p. 608, 197 S. W. 2d 287. It also differs from *Nakdimen* v. *Atkinson Imp. Co.,* 149 Ark. 448, 233 S. W. 694, where the contract provided that a board of arbitrators should fix the rental value. Here the parties never did agree upon the rent to be paid after January 1, 1944, or the length of the renewal term, whether three or five years, thus demonstrating the ineffectiveness of the added clause relied on and the matter was in dispute before January 1, 1944.

The only other question argued by appellant is that the judgment dispossessing him is more than intestate asked for in his original complaint in this action, and that he should be given a reasonable time to comply with the judgment before he is ousted. During the years 1944 and 1945, appellant deposited with the clerk of the circuit court $50 per month or a total of $1,200 for rent. The court found the rental value to be $100 per month, about which there is no dispute, because appellant sub-let to Schlumberger at that price, and ordered the circuit clerk, who is also clerk of the chancery court, to pay appellee the $1,200 in his possession and rendered judgment against appellant for the $1,200 still due. We do not understand that there is any question about the rent for 1946, because the sub-tenant Schlumberger has been paying $100 per month into the registry of the chancery court during this time. We do not think appellant is entitled to any additional time to comply with the decree, since he has had possession for nearly three years since his lease expired without right.

The decree is accordingly affirmed.

HODGES *v.* STATE.

4420 197 S. W. 2d 52

Opinion delivered November 11, 1946.

Chas. Jacobson, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Albert Hodges was convicted of rape (§ 3403, Pope's Digest), and sentenced to death. By this appeal he seeks either a reversal of the conviction, or a reduction of the sentence to life imprisonment. This being a capital case, § 4257, Pope's Digest, prescribes the extent of the review.

I. *The Sufficiency of the Evidence.* While the appellant denied the actual rape, he admitted being at the home of the prosecuting witness at about 2:00 a. m., and admitted that he placed his hands on her, but claimed that his motive was robbery and not rape. The prosecuting witness (a married woman, 23 years old, and the mother of three children) testified positively and unequivocally that the appellant had carnal knowledge of her, forcibly and against her will, and that he had actual penetration with resulting incidents. Another witness testified that the appellant told him that appellant had committed rape of the prosecuting witness. There was other evidence corroborating the testimony of the prosecuting witness, even though corroboration was not legally necessary.

We have repeatedly held that the testimony of the prosecuting witness does not have to be corroborated in carnal abuse cases. For cases so holding, see West's Arkansas Digest, "Rape," § 54. In *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813 we said:

"For a reversal of this judgment, appellant first contends that the evidence is insufficient to sustain the verdict and judgment—that 'there is no testimony whatever to sustain the conviction of this man, except the testimony of this little girl herself.' And this quoted statement is true. She testified very positively that appellant did have sexual intercourse with her, stating the approximate time, the place and the circumstances of its occurrence. He, just as positively, denied the truth of her statements. This made a question of fact for the jury. She is not an accomplice within the meaning of § 4017 of Pope's Digest, and corroboration was not necessary. *Bond* v. *State,* 63 Ark. 504, 39 S. W. 554, 58 A. S. R. 129. . . . There was substantial evidence

to support the verdict, and the jury is the judge of the credibility of the witnesses and the weight to be given their testimony."

The rule announced in the above case applies with equal force to the case at bar. The evidence offered by the state was sufficient to present a factual question for the jury; and the verdict will not be disturbed.

II. *The Instructions.* We have examined the instructions, and find them to be correct, and to cover all phases of the case. We mention the one regarding the punishment. (See *Allison* v. *State,* 204 Ark. 609, 164 S. W. 2d 442.) The trial court applied § 4042, Pope's Digest, to § 3405, Pope's Digest, by instructing the jury as follows:

"Gentlemen of the jury, if you wish to return a verdict of guilty and fix the punishment at death, your verdict will be in the following form: 'We, the jury, find the defendant, Albert Hodges, guilty of rape as charged in the information'; and the law automatically fixes the punishment at death. If you wish to return a verdict and fix the punishment at life imprisonment, you will return the following verdict: 'We, the jury, find the defendant, Albert Hodges, guilty of rape as charged in the information and fix his punishment at life imprisonment in the state penitentiary.' If you find the defendant not guilty, you will say: 'We, the jury, find the defendant, Albert Hodges, not guilty of rape.' In any event, you will elect one of your members as a foreman who will sign the verdict, and the verdict must be unanimous."

Under these instructions the jury returned the death verdict, and the court rendered judgment in conformity thereto.

We find no error in the trial, and the judgment is affirmed.

GREEN *v.* GREEN.

DENSON *v.* BIRD.

4-7986 197 S. W. 2d 291

Opinion delivered November 18, 1946.

W. E. Haynie, for appellant.

J. Bruce Streett, for appellee.

SMITH, J. Rule Nine of this court requires an appellant to file an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies for a reversal of the judgment from which the appeal was taken, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision.

In this case no serious attempt was made to comply with this rule, indeed there is a total failure to do so.

The appeal must, therefore, be dismissed for this reason, and it is so ordered.

GREEN *v.* GREEN.

4-7991 197 S. W. 2d 294

Opinion delivered November 18, 1946.

J. G. Moore and E. A. Williams, for appellant.

Charley Eddy, for appellee.

Ed F. McFaddin, Justice. Appellee, John Green, filed suit against appellant, Bamey Green, for divorce and a settlement of property rights. A trial resulted in a decree of divorce and judgment in favor of appellee for $200 fixed as a lien on real estate. The facts necessary to an understanding of the issues here may be summarized as follows:

In 1943, John Green, when 68 years of age, was married to the appellant who was some years younger, and who was then embarking on her third matrimonial venture. The couple lived in Conway county; but Mr. Green worked at Camp Robinson, near Little Rock, six days a week, and was at home only on Sundays. Due to this circumstance he entrusted his wages to his wife; and she was the admitted bookkeeper and purchasing agent of the family. For the three years they lived together, his wages totalled in excess of $4,800. The Greens decided to buy two lots, and build a house. Mrs. Green took the title in her name—whether with her husband's consent or otherwise, is a disputed question. Mrs. Green testified:

"Q. He wanted you to buy the lots in your name and in his both?

"A. What is man's and woman's—that belongs to both of them. . . .

"Q. He turned everything over to you to manage?

"A. Yes, sir.

"Q. You did the managing?

"A. Yes, sir."

And, again, she testified that Mr. Green said, as regards the purchase of the lots and the building of the home:

" 'I am glad you bought it. It will give us a home—maybe a poor home, but we will live in it.' "

A mortgage was executed to obtain additional funds to complete the house, and the mortgagee required a fire insurance policy, which was written in the joint names of the husband and the wife. Finally, the house and lots (all together worth about $1,500) were paid for, and the house was comfortably furnished.

Then—but not until then—the wife's attitude towards the husband changed, and finally became such that the husband was driven from home and forced to file this suit. Several witnesses testified that Mrs. Green, on various occasions, told the witnesses that she was going to live with Mr. Green until the house and furniture were paid for, and then she would not live with him any longer and would divorce him.

On this evidence, and other of a similar nature, the chancery court granted Mr. Green a judgment for $200, and fixed the same as a lien on the house and lots. The wife does not object, in this court, to the divorce decree; but appeals from that part of the decree concerning the judgment and lien. By cross appeal the husband asks a larger judgment, and also a part of the personal property.

The chancellor heard the cause on oral evidence, and had the opportunity to observe the demeanor of the witnesses; and with the evidence in sharp dispute—as it is—we cannot say that the chancellor's decision is against the preponderance of the evidence. This case, in its details, bears a striking similarity to the case of *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867. In the reported case the husband obtained a divorce; the wife had ob-

tained the husband's property in fraud, and equity granted relief. We there said:

"If it be true that she married and started in with the deliberate intention to simulate an affection she did not feel for a man much older than herself in order that she might acquire the title to his property and despoil him of it and drive him from the home he had purchased and conveyed to her in his utter reliance upon her affection, loyalty and faithfulness to him, or if she later formed such a design and pursued it with such intention to the consummation proved herein, we do not see why it was not such a fraud against his rights that equity should relieve against it."

A situation similar to that in the reported case appears to exist here: and the same relief should be granted. Mrs. Green invokes the rule of a presumptive gift, which rule (as stated in *Harbour* v. *Harbour, supra*) is:

" . . . that where the husband purchased and paid for lands, taking the deeds therefor in the name of his wife, the presumption is that his money, thus used, was intended as a gift to her, and the law does not imply a promise or obligation on her part to refund the money or to divide the property purchased or to hold the same in trust for him. His conduct is referrable to his affection for her and his duty to protect her against want, and it will be presumed to be a gift and, so far as he is concerned, becomes absolutely her property. *Wood* v. *Wood,* 100 Ark. 370, 140 S. W. 275; *Womack* v. *Womack,* 73 Ark. 281, 83 S. W. 937; *O'Hair* v. *O'Hair,* 76 Ark. 389, 88 S. W. 945."

But this presumption about the gift is not a conclusive presumption, and may be rebutted by evidence of facts antecedent to and contemporaneous with the conveyance, showing that the conveyance was not a gift. *Chambers* v. *Michael,* 71 Ark. 373, 74 S. W. 516; *Milner* v. *Freeman,* 20 Ark. 62; *Harbour* v. *Harbour, supra.* For a recent case see *Fine* v. *Fine,* 209 Ark. 754, 192 S. W. 2d 212. The rebuttable presumption of a gift was over-

come by the testimony in the case at bar, certainly to the extent of the $200 decreed by the chancery court in favor of the appellee; so we affirm the cause on direct appeal.

On the cross appeal of Mr. Green, we likewise affirm the case because of the insufficiency of the evidence to convince us that any amount in excess of $200 (as fixed by the chancery court) was other than a gift. See *Biddle* v. *Biddle,* 206 Ark. 623, 177 S. W. 2d 32.

Affirmed both on direct appeal and cross appeal.

NORTHWEST ARKANSAS PRODUCTION CREDIT ASSOCIATION *v.* COURTNEY.

4-7997 197 S. W. 2d 296

Opinion delivered November 18, 1946.

Vol T. Lindsey, for appellant.

Smith & Smith, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Northwest Arkansas Production Credit Association, sought a permanent injunction in the chancery court against William Courtney, individually and as constable of Hico Township, Benton county, Arkansas, to restrain the sale of seven hogs levied upon by Courtney under an execution issued by a justice of the peace. The complaint alleges that the hogs were included in a chattel mortgage executed by Johnnie Goforth Palmer to appellant on November 13, 1945, to secure the payment of a note due November 13, 1946. The note and chattel mortgage were attached as exhibits to the complaint.

The complaint further alleges: "That the defendants now have and did have at the time of the levy and seizure of said property knowledge that the plaintiff held a valid chattel mortgage against said property and notwithstanding said fact and knowledge said defendants, either as constable of Hico Township or as an individual, has seized seven head of said hogs as aforesaid, which are a part of the chattel mortgage and has advertised same for sale at public sale and will sell same at public sale on the 19th day of December, at Siloam Springs, Arkansas, unless restrained and enjoined from so doing and will produce great or irreparable injury to the plaintiff in violation of the plaintiff's rights and intefere with the security of plaintiff in said mortgage and in direct violation of the laws as made and provided by the State of Arkansas."

In the absence of the circuit and chancery judges from Benton county, the county court on December 18, 1945, issued a temporary restraining order upon filing of the complaint and execution of a bond in the sum of $100. Appellee filed a demurrer and motion to dismiss, alleging that the complaint shows on its face that appellant has a complete and adequate remedy at law, and that the facts set forth in the complaint were insufficient to entitle appellant to the relief sought. The chancery court sustained the demurrer of appellee. Appellant declined to plead further and the temporary restraining

order was dissolved and the complaint dismissed for want of jurisdiction.

As stated in appellant's brief: "There is only one issue in this case and that is whether, upon the complaint and exhibits thereto, the chancery court had jurisdiction to grant the relief prayed for."

The rule supported by the authorities generally is stated in 33 C. J. S. Executions, § 152, p. 359, as follows: "Ordinarily equity will not enjoin the sale of the personal property of complainant under an execution against another, unless such property has a special value, rendering compensation in damages impossible, or the consequential damages would result in great injustice, or the claim of one party involves or depends on some equitable interest or feature. Complainant should resort to the remedy given him at law by replevin, or detinue, or interpleader, or sue the officer in trespass, or proceed by affidavit and bond to try the right of property."

It seems to be recognized generally that equity will not interfere by injunction to prevent a sale of personal property on execution where there is a plain and adequate remedy at law. 30 L. R. A. 134; 33 C. J. S., Executions, § 151, p. 349. Our own decisions are committed to the rule that an injunction will not lie to restrain the sale of chattels under execution unless it is shown that damage will result to the plaintiff which is not fully remediable at law.

In the case of *Scanland, Ad., et al.* v. *Mixer,* 34 Ark. 354, an execution was issued upon a judgment by a justice of the peace after an appeal had been taken. The execution debtor obtained a temporary order restraining the plaintiff and the constable from proceeding with the execution. A demurrer to the complaint was overruled and upon a hearing the injunction was made perpetual. Although this court on appeal declared the execution unlawful, it was said in the opinion: "Courts of chancery do not sit, however, to correct even the grossest errors of inferior courts. There must be some special element of equity jurisdiction to justify an inter-

ference—some impending mischief otherwise irremediable, some want, or peculiar obstruction, of legal redress."

An injunction to restrain the sale of personal property taken on execution by a sheriff was sought in the case of *Jacks & Company* v. *Bigham,* 36 Ark. 481. The trial court in that case permanently enjoined the sale under the execution. On appeal the decree was reversed and this court said:

"But a court of equity will not interpose to prevent a sale of personal property, where the party may, for the injury done him by it, have an adequate remedy at law. *Lovette and Wife* v. *Longmire,* 14 Ark. 339; *Murphy* v. *Harbison,* 29 Ark. 340; *Oliver* v. *Memphis & Little Rock R. R. Co.,* 30 Ark. 128.

"And, as the court from which the execution issued has control of its processes, it might have quashed the execution; or, after the sale, have set it aside; or possession of the property sold, or damages for its conversion, might have been recovered by an action at law.

"There was for the reason just stated no equity or cause of action shown in the complaint, and the demurrer to it should have been sustained."

The case of *Stillwell, Sheriff, et al.* v. *Oliver,* 35 Ark. 184 involved a suit to restrain the sale of personal property under an execution issued against the mortgagor. It was there held that a bill in equity will not lie to restrain the sale of personal property under execution, unless it shows that some damage will result to the plaintiff not fully remediable at law. The court said:

"Subject to the lien of the mortgage, the property continued to belong to the mortgagor, and whether or not his interest in it, whilst accompanied by possession, was subject to seizure and sale under execution, it is clear that such sale would not divest the mortgagee's title, or *right* of possession; which would be as effective at law against the purchaser as it was against the mortgagor, whose interest the purchaser would take, and there is no

occasion for equitable interference, unless it be shown that some damage would result to the mortgagee, not fully remediable at law." See, also, *Burnside* v. *Union Sawmill Company,* 92 Ark. 118, 122 S. W. 98.

Appellant relies on the cases of *Jennings* v. *McIlroy,* 42 Ark. 236, 48 Am. Rep. 61, and *Erdman* v. *Erdman,* 109 Ark. 151, 159 S. W. 201, where it was held that mortgaged personal property is not subject to attachment or execution for a debt of the mortgagor. The complaint in the instant case does not allege that the execution which is sought to be restrained was issued for a debt of the mortgagor, Johnnie Goforth Palmer. The case of *Jennings* v. *McIlroy, supra,* was an action in replevin and is also authority for the proposition that a mortgagee is in the same position as any other owner of the legal title to property.

The complaint alleges that appellant will suffer irreparable injury unless the execution sale is enjoined, but appellant does not allege, nor do the facts stated in the complaint show, that it did not have a complete and adequate remedy at law. Although appellant's debt was not due, the mortgage contains the usual acceleration clauses which give the mortgagee the right to take possession of the chattels, or foreclose the mortgage, at any time it deems the debt unsafe or the security depreciated. Appellant did not ask for foreclosure of the mortgage in the chancery court and has an adequate remedy at law for possession of the property.

Since appellant had a complete and adequate remedy at law for the relief sought in its complaint, the trial court correctly sustained the demurrer and motion to dismiss.

The decree is **affirmed.**

STOUT *v.* STINNETT.

4-7989 197 S. W. 2d 564

Opinion delivered November 18, 1946.

Rehearing denied December 16, 1946.

[redacted]

Owens, Ehrman & McHaney, for appellant.

Glenn G. Zimmerman and *Charles L. Carpenter,* for appellee.

HOLT, J. The city of North Little Rock, by appropriate procedure, has adopted the provisions of Act 28 of the Acts of the Legislature of 1933, commonly referred to as the Civil Service Commission Act, (now appearing as §§ 9945-9964 in Pope's Digest).

May 27, 1946, the city council of North Little Rock enacted Ordinance No. 1464. Its purpose was, according to the preamble, "An Ordinance Reorganizing the Police Department of the City of North Little Rock, Arkansas: Prescribing Certain Officers' Duties: Fixing the Rate of Pay: and for Other Purposes."

Section 1 of the ordinance provided that the police department of that city should consist of "one day chief

of police," . . . and "one night chief of police." Section 5 provided that "the day chief of police shall be in charge of the police department from the hours of 6 a. m. to 6 p. m., and shall be responsible to the governing body of the city of North Little Rock and to the Civil Service Commission of the police department for the proper conduct of himself and the members of the police department during his hours of duty and for the proper enforcement of the laws of the city of North Little Rock and the State of Arkansas by the members of the police department. The day chief of police shall not engage in any other business or activities which will require any part of his time from his official duties and he shall be subject to call at all times," and § 6 that "the night chief of police shall be in charge of the police department from the hours of 6 p. m. to 6 a. m.," and in all other respects contained the same provisions as § 5.

Following the enactment of this ordinance, the Civil Service Commission of North Little Rock, May 28, 1946, certified Jack Pyle as eligible for appointment to the office of night chief of police and J. H. Anderson, who was the then duly appointed and acting chief of police, as eligible for the appointment to the office of day chief of police. Following this certification from the Civil Service Commission, Jack Pyle was appointed and assumed the duties of night chief of police and J. H. Anderson was appointed and assumed the duties of day chief of police, as set out in the ordinance.

May 29, 1946, appellant filed this action in which he questioned the validity of the ordinance, and sought to enjoin its operation. Upon a hearing, the validity of the ordinance was upheld and injunctive relief denied. This appeal followed.

The primary question presented is: Did the city council of North Little Rock have the power to enact the ordinance in question, which provides for two chiefs of police? We think no such power existed. We are concerned only with the council's power to enact the ordinance and not with the wisdom of its enactment.

Here, a public office is sought to be created and whatever power the city of North Little Rock has in the creation of a public office must be found by express provision or by implication in our constitution or statutes. The general rule is announced in 37 Amer. Jurisprudence, p. 856, § 226, in this language: "Creation of Office.—Since the creation of a public office implies a delegation of a portion of the sovereign power to and the possession of it by the person filling the office, the source of such an office must be found in the sovereign authority speaking through the Constitution or a statute; a municipal corporation cannot create a new public office, as distinguished from a mere employment, without constitutional or statutory authority."

Prior to the passage of Act 28 of 1933, the power to appoint the chief of police reposed in the mayor. Nowhere in our Constitution or statutes, including the Civil Service Commission Act, *supra,* have we been able to find any provision—express or by implication—for the appointment of two chiefs of police or for the provision of two offices of chief of police in any one city. In all of these acts or statutes where reference is made to the police department, reference is made to "The Chief of Police" or "The Chief of the Police Department." Nowhere do we find a reference to more than one Chief.

The Act of 1875 gave the mayor the power to appoint "the chief of the police department" as well as the right to suspend him for cause. This power has now been taken away from the mayor and placed in the hands of the Civil Service Commission by Act 28, *supra.* The following provisions, however, in Act 28, are significant. "Section 1. . . . The city attorney shall act as attorney for the Civil Service Commission in all trials and other legal transactions provided that this Act shall not apply to *the chief of police* in all cities which now have, or may hereafter have, a Commission form of government, and provided further that *the chief of police* in said cities shall be appointed and removed as now provided by law. . . . Section 3. The Board of Civil Service Commissioners herein provided shall prescribe, amend and

enforce rules and regulations governing *the fire and police departments* of their respective cities, and said rules and regulations shall have the same force and effect of law. . . . These rules shall provide: . . . 7th. For a period of probation of not to exceed six months before any appointment or promotion is complete, during which period the probationer may be discharged, in case of an appointment, or reduced, in case of promotion, by *the chief of the police* or of the fire *department*. . . . Section 4. All employees, in any fire or police department, affected by this Act, shall be governed by rules and regulations set out by *the chief of their respective police* or fire *departments* after such rules and regulations have been adopted by the governing bodies of their respective municipalities. . . ."

It thus appears that in every statute enacted by our Legislature, including Act 28, where reference is made to the duties of the head of the police department, that officer is invariably referred to as "*the chief*." The word "chief" implies an executive or directing head. Webster defines "chief" as "the head or leader of any body of men; a commander, as in an army; a headman, as of a tribe, clan, or family; the directing head of a political party, government, bureau, or department, office organization, or the like; also, one's superior in such a body; chief implies hereditary or acquired rank in a tribe or clan (as an Indian chief), or more frequently, superiority in civil, rather than military office or rank, as the chief of police."

We think the word "chief" denotes one single officer and when, as we have pointed out, all through the statutes, including the Civil Service Commission Act, *supra*, the definite article "the" is used preceding the word "chief," we think the intention of the lawmakers to provide for but one office of chief of police becomes clear and certain.

While it is true that statutory power to create the office of the chief of police carries with it the power of the city council to abolish that office, as we held in *Ellis*

v. *Allen,* 202 Ark. 1007, 154 S. W. 2d 815, and *Fiveash* v. *Holderness,* 190 Ark. 264, 78 S. W. 2d 820, it does not follow that the city's lawmaking body had also the power, express or implied, to create two such offices.

While the exact question presented appears to be of first impression in this state, we think the rules of law announced by the Connecticut Supreme Court of Errors in *State of Connecticut ex rel. Otto G. Stage* v. *Robert Mackie, Appt.,* in 82 Conn. 398, 74 Atl. 760, 26 L. R. A., N. S., p. 660, which case is cited in support of the general rule, *supra,* apply with equal force to the question presented in the present case. The facts in that case were similar in effect to those now before us. There, (quoting from the court's statement) "the charter of the city of Waterbury (Conn.) provided that its board of aldermen might, in a manner prescribed, make ordinances 'to provide for the appointment of a building inspector and to prescribe his duties.' . . . Having this authority, the board adopted an ordinance creating the office of building inspector, and defining the powers and duties of its incumbent. It was also provided that there should be a deputy building inspector, that he should act in place of the building inspector and exercise all of his powers during the latter's absence or disability, and in the event of the latter's death perform all of his duties until an appointment should be made to fill the vacancy, etc."

Under this ordinance, the board of aldermen appointed a building inspector and a deputy building inspector. Proceedings were brought to oust the deputy building inspector on the ground that the city aldermen were without authority to create the office. In the body of the opinion, it was said: "The position in question is one to which the ordinance creating it attempted to attach important powers and functions of government belonging to the sovereignty, and therefore was a 'public office,' as distinguished from a mere employment or agency resting on contract, and to which such powers and functions are not attached. . . . 'A public office is the right, authority, and duty created and conferred by law by which . . . an individual is invested with

some portion of the sovereign functions of the government to be exercised by him for the benefit of the public.' It 'implies a delegation of a portion of the sovereign power to and possession of it by the person filling the office.' . . . It is a trust conferred by public authority for a public purpose, and involving the exercise of the powers and duties of some portion of the sovereign power. . . . Such being the nature of a public office, it is apparent that its source must in this country be found in the sovereign authority speaking through Constitution or statute. The creations of the sovereign power cannot, in the absence of a delegated authority, create one. . . . The source of the alleged office here in controversy is a city ordinance. The state had delegated to the city in its charter the power to provide for the appointment of a building inspector, and to prescribe his duties. . . . It had not delegated the power to provide for the appointment of a deputy building inspector, and to prescribe his duties. The city was without inherent power to create such a public position and to endow it with the jurisdiction and authority attempted to be conferred. No such power was impliedly granted by the charter provision referred to. The right to create one office does not imply the right to create two. . . ."

The case of *State* v. *Martin,* 60 Ark. 343, 30 S. W. 431, 28 L. R. A. 153, relied upon by both parties to this litigation, we think, clearly distinguishable and not controlling here.

For the error indicated, the decree is reversed and the cause is remanded with directions to enter a permanent injunction in accordance with the prayer of appellant's complaint.

GRIFFIN SMITH, C. J., dissents.

BAKER *v.* STATE, USE INDEPENDENCE COUNTY.

4-7970 197 S. W. 2d 759

Opinion delivered November 18, 1946.

Rehearing denied December 23, 1946.

R. W. Tucker, for appellant.

Harry L. Ponder, Jr., and *W. M. Thompson,* for appellee.

GRIFFIN SMITH, Chief Justice. Since December 31, 1936, Independence County has operated under an initiated salary act. Edgar Baker was elected Sheriff in 1942 and assumed office the following January. In April, 1945, the State Comptroller's office concluded an audit of the County's financial affairs, including the status of its officials. Copy was duly transmitted under direction of Bruce Fraser, supervisor of the audit division. It showed

that Baker, as Sheriff, owed a balance of $7,387.38. The County Judge demanded that the delinquencies be settled, in consequence of which Baker made response. In July, 1945, the Prosecuting Attorney, with W. M. Thompson as special counsel, instituted an action in Chancery Court, effect being a prayer that irregular accounts be surcharged and falsified, to the end that delinquent sums shown by the audit by realized.

The decree required the defendant to pay a total of $3,093.23, composed of four items: Amount due sheriff's salary fund for 1944, $775.05; aggregate earnings due as transfer to county general revenue fund, $786.68; fines and license items for 1944, $1,381.50; fines and license fees due for 1943, $150. Although the difference between amounts charged in the audit and that for which judgment was rendered is $4,294.15, part of this is represented by a mileage arrangement adopted in lieu of expenses; and while the salary law requires payment into the treasury and authorizes reimbursement within the limitations prescribed, Baker refused to settle under the Act and relied upon an understanding he claims was had with County Judge Adams, (now dead) who in respect of expenses is alleged to have agreed that the Sheriff might charge ten cents per mile.

It is first insisted that the decree is contrary to a preponderance of the evidence. We do not think so. Baker's testimony in his own behalf fails to give a clear picture of essential transactions. His chief insistence is that the salary law was unjust, that if its terms were complied with the Sheriff could not earn a competency, and the Act is unconstitutional because strict compliance would impose hardships. It was also argued that Chancery Court did not have jurisdiction (a) because the subject-matter had been adjudicated in County Court many months before the suit was filed, and (b) County Court first obtained jurisdiction when notice in the form of a demand was made following the Comptroller's report. Still another defense is that the salary law was not legally initiated because an indorsement shows it was filed

October 3, 1936—less than 60 days before the November election.

Finally, it is contended that if appellant is forced to comply with the law, he should be given credit for certain warrants which were unpaid January 1, 1945.

The principal grievance voiced by appellant in respect of the decree goes to the Chancellor's action in requiring payment of an amount into the salary fund, for the benefit of general revenue, equal to ten percent of the gross, and in not allowing credit for the outstanding warrants.

Bruce Fraser testified at length and was carefully cross-examined by appellant's attorney. Referring to page 76 of the audit, Fraser stated that mileage and expenses allowed under the blanket arrangement Baker claimed to have had with County Judge Adams amounted to $4,134.53 for 1944; that "services" represented $3,040.25, while Circuit Court fees and mileage paid to the Sheriff by the Circuit Clerk were $213.65. Other items, including fees from magistrate courts, brought the total to $7,866.83, of which the $3,040.25 in fees was paid to the treasurer. Attention was called to the fact that mileage and expense allowances were paid from the county general revenue fund. Mention should also be made that in dealing with fines collected, a 5% commission was deducted, amounting in one instance to $80.20. The Court correctly held that the commissions belonged to the County rather than to the Sheriff. It is of interest to note that the total charged in the decree as fines is $1,532.20, because appellant, in his so-called "response" (which was nothing more than an explanation to the County Judge by Baker which the latter sought to have adopted) conceded he owed this exact sum, saying: "Respondent admits that he owes the County of Independence the sum of $1,532.20 for fines collected, some of which have been collected since January 1, 1945, [and that] the attached statement of fines and licenses collected is the amount collected and now due the County." Under questioning Baker admitted the collections were made in 1944.

Appellant testified that during 1943 and 1944 he failed to collect $1,500 of his $200 per month salary (which was subject to the Federal withholding tax). Six warrants drawn against the county salary fund for 1943 were exhibited, five for $186 each payable to Baker and one for $97.60 in favor of Lawson Johnson, deputy, aggregating $1,399.60. Baker thinks the amounts admitted to be due the county, or found by the decree to be appropriate charges against him, should be credited with these warrants. What he overlooks is that his own delinquencies and obstinate refusal to comply with the salary law created the condition resulting in the dilemma he now seeks to avoid.[1]

A feature of the salary law is that the Sheriff and his deputies cannot receive in salaries and expenses amounts in excess of ninety percent of the earnings. We have heretofore held that a provision similar to the one

[1] Section 7 of the Salary Act is: "The Sheriff shall receive as compensation and salary the sum of $2,400 per year for performing all duties of the office, in lieu of the fees, commissions and other compensations now allowed by law, and shall receive no other or further compensation, emoluments of perquisites, either directly or indirectly, for services rendered as such Sheriff or as a result of holding the office. In addition thereto he shall be paid actual and necessary expenses of travel of himself and deputies when on business for the County, but in no event shall the salaries and expenses annually exceed ninety percent of the gross receipts of the office, and shall be payable only from such receipts. Said Sheriff shall make and attach to each claim for expenses an itemized statement, *showing the time, place and purpose of each item so expended*; (Italics supplied) and the County Court is hereby charged with the duty of examining and approving all such expense claims, same as other claims against the County, as now provided by law.

Section 12: [In respect of all officers whose salaries are fixed by Initiated Act No. 3, "except those receiving no fees"] the same fees, costs, commissions, perquisites and compensation shall be collected ". . . as [that] now or hereafter required or permitted by law to be charged by such officers for such services. All sums so earned shall be public funds, the property of the County, and the collecting officer shall receive same as trustee for the County. The said fees and other compensation shall be collected in advance of the rendition of the services, and each officer shall be charged in his settlements with all sums so earned by or accruing to the office *whether collected or not*; (Italics supplied) provided, however, . . . [and there are certain exceptions where bond is given]. . . . Each such officer shall, between the first and fifth of each month, render in duplicate a duly verified report of all sums earned by the officer during the preceding month, showing in detail the sources and amounts of said earnings, one copy of which shall be filed with the County Treasurer and the other with the County Clerk, and the reporting officer shall then pay to the County Treasurer all sums so earned and reported."

complained of is not violative of any constitutional provision. *House* v. *Brazil*, 196 Ark. 602, 219 S. W. 2d 397. The Court found that in Independence County Initiated Act No. 3—the one in question—was filed with the County Clerk (who at that time was Edgar Baker, now appellant here) September 3, and that the indorsement "October 3" was a clerical misprision. This is clearly shown by other dates in the document, and by the further fact that it was advertised in the Batesville Guard September 3d. Since October has 31 days and the general election was not held until November 3d, there was ample time for notice, and the Court correctly held that Baker had inadvertently written "October" when September was intended.[2]

We think the Court correctly held that appellant was not required to pay into the salary fund amounts assessed as fines, but not in fact collected, provided failure to collect was not the Sheriff's fault. But even if this had been erroneous, we could not correct the mistake now, because no appeal was taken from that part of the decree. Nor did the County appeal from the Court's action in not requiring appellant to pay in and then permit him to withdraw the expense items that formed a continuing course of irregularity. The law contemplates that these funds be paid into the salary account, and authorizes their withdrawal when itemized claims have been

[2] Indorsements and recitals supporting the trial Court's determination that ". . . the third day of October, 1936" was an error, are: The Salary Law, as disclosed by Independence County Court Record 609, "October Term, November 1936" Sec. 2 shows the following: "That the petition ordering the submission of said proposed Act was sufficient, as is shown by my certificate of sufficiency dated September 3, 1936." . . . Sec. 4. "That said Act was in all respects properly and legally submitted to the voters at said [November 3d] election, and there were 1,971 legal votes cast and counted for its adoption and there were 502 legal votes cast and counted against its adoption, a majority of 1,469 legal votes for adoption." Recital in Sec. 17: . . . Therefore, notice is hereby given that the question of adopting or rejecting said proposed Initiative Act will be referred to the people in the manner provided by law at the next general election to be held on November 3d, 1936, and will appear on the official ballots. . . . Witness my hand and seal of said County, in the City of Batesville, Independence County, Arkansas, on the 2d day of September, 1936. EDGAR BAKER, Clerk." And in conclusion: "That said Act was therefore legally adopted and will become effective the first day of January, 1937. In testimony whereof I have hereunto set my hand and the seal of my office on this [blank] day of November, 1936. EDGAR BAKER, Clerk."

approved by the County Court. Many of the claims are meaningless. On the basis of ten cents per mile Baker turned in demands for travel aggregating 41,315 miles in 1944. The account as filed merely lists, "Mileage for January," or whatever month was intended to be covered. The salary law does not permit blanket allowances of this nature; nor does it specifically authorize "mileage" to be allowed as such. What it does contemplate is that all claims shall be appropriately itemized, to the end that taxpayers may be informed in respect of allowances made by the Court.

The decree is in all respects affirmed.

HARRIS *v.* BYERS.

4-7980 197 S. W. 2d 730

Opinion delivered November 18, 1946.

Rehearing denied December 23, 1946.

[redacted]

W. W. Bandy and *D. K. Hawthorne,* for appellant.

D. G. Beauchamp, for appellee.

McHaney, Justice. Appellants are husband and wife, as are also the appellees, and appellant E. Jane Harris is the sister of appellee M. D. Byers. Appellees brought this action in the circuit court against appellants to recover the possession of southeast northwest 27-19-5 in Greene county and the north one-half southwest northwest of the same section. The first or 40-acre tract was conveyed to appellees by appellants by warranty deed dated January 15, 1937, for a recited consideration of $125 paid, which deed also included the northeast northwest of said section, or the whole of the east one-half northwest thereof. The deed recites that it conveys 80 acres, "more or less said line between E½ of northwest section 27, township 19 N., R. 5 E, and NE¼ SW¼, section 27, township 19 N., R. 5 E., to remain as already established." In other words, that the line between the southeast northwest and the northeast southwest, same section, was to remain as it then was. The 20-acre tract here involved was purchased from the State by appellees on July 5, 1938, and a deed therefor was issued to them by the State Land Commissioner. The State's title was based on a tax forfeiture and sale to it in 1925 for the taxes of 1924, and certified to it in 1927, after the two-year period of redemption had expired. Thereafter the State's title was confirmed by decree of the Greene chancery court on January 9, 1931, under the provisions of Act 296 of 1929. The complaint alleged that appellants had wrongfully and without any authority taken possession of said two tracts and were wrongfully holding same and refusing to deliver the possession thereof. They prayed for possession and damages.

Appellants answered with a general denial, and by way of a cross-complaint further alleged that the State's deed to the 20-acre tract was void for certain reasons set out. As to the deed executed by them to appellees on January 15, 1937, they alleged that the real consideration for the conveyance was $125 cash and a deed from the father of Mrs. Harris and appellee Byers conveying to her the whole of the northeast southwest of said section, and that a deed thereto was tendered her by her brother from her father, now deceased, and accepted by her, but that the deed tendered and accepted conveyed to her only the west one-half of said 40 acres instead of the whole 40-acre tract, and that the deed so tendered and accepted was not signed or executed by her father, and that these representations were false and fraudulent, and that they were relied on by them when they conveyed to appellees the 80-acre tract above described, to their injury, and because thereof they have elected to rescind the transaction and offer to return the $125 received from appellees. They say they did not discover this alleged fraud until November, 1941. They also offer to convey to the heirs of the father the 40-acre tract conveyed to them in his lifetime.

Trial resulted in a decree for appellees and holding that they are the owners in fee of the 80-acre tract conveyed to them by appellants by deed dated January 15, 1937, "except a 7.4-acre tract located in the south, southwest part of the E½ of the NW¼ of said section 27, which is hereinafter set out and described," and further that said deed was not obtained by fraud, as alleged in the cross-complaint. Title to this tract, less the 7.4 acres was confirmed in appellees and that part of the cross-complaint alleging fraud was dismissed for want of equity. The court established the boundary line referred to in said deed as "Said line . . . already established," and described said 7.4 acres by metes and bounds, and held that appellees did not acquire the title thereto by said deed. Title thereto was quieted in appellant, Mrs. Harris. As to the 20-acre tract acquired by appellees from the State, the court dismissed the cross-complaint and quieted the title thereto in appellees. Title to the whole

of the northeast southwest was quieted in appellant, Mrs. Harris, and the deed from the father to appellee, M. D. Byers, to the east half of said quarter section was canceled.

This appeal is from that decree. We think the court correctly solved the family controversy. The appellees have not appealed from that portion of the decree against them. In fact, the principal bone of contention was the south boundary of the tract conveyed by appellants to appellees on January 15, 1937, the 7.4-acre tract awarded to appellants or to Mrs. Harris. Certain questions are argued about the deed of the father to the 40-acre tract described as northeast southwest—that it conveyed only 20 acres, and that the signature on the deed was not that of the deceased father. We think it makes no difference whether it conveyed 20 acres, or was signed by the father or was a forgery, because the decree of the court awards this 40 acres to appellant, Mrs. Harris, and quiets the title thereto in her, and appellees who are the only ones adversely affected by the decree have not appealed, but have all along conceded this 40-acre tract to be her property.

No fraud or misrepresentation was made that resulted in any injury to appellants, and false or fraudulent representations not resulting in injury are not actionable. *Bankers Utilities Co.* v. *Cotton Belt Savings & Trust Co.*, 152 Ark. 135, 237 S. W. 707.

As to the 20-acre tract above described as north one-half, southwest northwest, appellants have made no argument about this part of the decree, and seem to have abandoned any claim thereto, for in the concluding paragraph of their brief they ask for a reversal of the decree only as to the east one-half, northwest of section 27.

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

PRIMM *v.* FARRELL-COOPER LUMBER COMPANY.

4-7990 197 S. W. 2d 557

Opinion delivered November 18, 1946.

Rehearing denied December 16, 1946.

Rowell, Rowell & Dickey, for appellant.

W. W. Sharp and *E. W. Brockman,* for appellee.

ROBINS, J. Appellees, partners doing business as Farrell-Cooper Lumber Company, brought replevin in the lower court against Bob Benford and appellant to recover possession of a Ford truck and trailer and two horses, title to which was asserted by appellees under a mortgage executed to them by Benford. Appellant claimed the property by purchase from Benford. Benford made

no defense. From a judgment, based on a jury's verdict, awarding the chattels to appellees, appellant prosecutes this appeal.

Benford lived at Pine Bluff, but took his truck and horses to Monroe county where he stayed temporarily and worked for appellees. During this time he became indebted to appellees in the sum of $1,132, for which he executed his promissory note, payable to appellees, dated August 24, 1944, due one year after date. In order to secure this note, Benford, on the same day, executed to appellees a mortgage on the property in dispute. This mortgage was mislaid and was not filed for record until February 7, 1945, when it was filed in the office of the circuit clerk of Monroe county. Certain payments were made which reduced the amount due on the note to $858.60.

Some time after the execution of the note and mortgage, Benford returned to his home in Jefferson county, taking along with him the mortgaged property. He then began working for appellant at appellant's filling station and woodyard in Pine Bluff.

Learning that Benford had gone home, appellees sent their representative to see him in an effort to collect the debt or get possession of the mortgaged property. Benford asked appellant, his new employer, for assistance in the matter. Appellant offered to pay the debt off for Benford, provided appellees would draw on appellant with the note, mortgage and a release thereof, attached to the draft. This offer was never acted upon by appellees, apparently for the reason that, at that time, the mortgage, which had not yet been filed for record, had been mislaid and could not be delivered to appellant.

On February 17, 1945, Benford executed a bill of sale to appellant for the property. Appellant's version of this transaction was that he had previously ascertained that no mortgage from Benford to appellees had been filed with the recorder in either Monroe or Jefferson county, and that, needing the equipment, he bought it from Benford. He testified that he gave Benford a check for $667 (which was the amount he said Benford claimed

he owed appellees); that he had Benford indorse the check and paid Benford the amount thereof in cash and then destroyed the check.

Benford testified that when they learned that the agent of appellees was in Pine Bluff appellant suggested that Benford hide the truck and volunteered to help in doing so and that appellant obtained from him the key to the truck for this purpose; that appellant then advised him to sign a bill of sale for the property, saying, "you have got to trust me," and that the bill of sale would be destroyed; that appellant made out the check and Benford indorsed it, but never received any money whatever from appellant.

The lower court correctly instructed the jury that the recording of the mortgage in Monroe county, which was not the county of residence of the mortgagor, was no notice to appellant. Section 9434, Pope's Digest; *Judkins* v. *State,* 123 Ark. 28, 184 S. W. 407; *Combs* v. *Owen,* 182 Ark. 217, 31 S. W. 2d 127. Proper, too, was the instruction given by the court that an unrecorded mortgage is valid between the mortgagor and mortgagee and may be likewise enforced against one who obtains the mortgaged property from the mortgagor without paying value therfor. But the court erroneously instructed the jury that even though the mortgage was improperly recorded and even though appellant paid value for the property, still, if appellant had actual knowledge of the existence of the mortgage, the appellees were entitled to recover the property. In effect the court told the jury that actual knowledge of existence of the mortgage was equivalent to record notice thereof. This portion of the instruction was contrary to the established rule in this state.

In the early case of *Main* v. *Alexander,* 9 Ark. 112, 47 Am. Dec. 732, this court held that, while an unrecorded mortgage is good between the parties, under our registry act such a mortgage is not good as against strangers even though they may have actual knowledge of its existence. This rule is reiterated in the case of *Dodd* v. *Parker,* 40 Ark. 536.

"It is settled law that an unrecorded mortgage constitutes no lien upon the mortgaged property as against strangers, even though they have actual notice of its existence." *Simpson* v. *First National Bank of DeWitt,* 173 Ark. 284, 292 S. W. 138.

"We have often held that an unrecorded mortgage is no lien on the property as against a stranger, although he may have actual knowledge of its existence." *Sims* v. *Petree,* 206 Ark. 1023, 178 S. W. 2d 1016.

So, actual notice to appellant of the existence of the mortgage was not sufficient to give the mortgagees a lien prior to the claim of appellant, provided appellant was a *bona fide* purchaser for value. While appellant's testimony that he did actually buy and pay for the property is contradicted by Benford's testimony, as well as by some circumstances shown, this contradiction was for the jury to resolve.

The lower court, therefore, should have charged the jury that, if they found that appellant did not pay value to Benford for the property, they should return a verdict for appellees, but that, if the alleged sale to appellant was a transaction made in good faith and appellant paid Benford value for the property, their verdict should be for appellant.

The judgment of the lower court is, therefore, reversed and the cause remanded with directions to the lower court to grant appellant a new trial and for further proceedings not inconsistent with this opinion.

PENNEY *v.* LONG.

4-7981 197 S. W. 2d 470

Opinion delivered November 18, 1946.

A. D. Chavis, for appellant.

Mike Danaher and *Palmer Danaher,* for appellee.

HOLT, J. September 4, 1945, appellant, Georgia Penney, brought this action primarily to cancel and set aside a quitclaim deed to a house and lot in the city of Pine Bluff, which she and her daughter, Earthalee Penney, executed in favor of Robert Long and Ester Long on April 1, 1937, which deed she alleged the Longs procured from them through fraud. More specifically, she alleged that her husband, Alonzo Penney, died intestate December 25, 1936, leaving as his sole survivors appellant, his

widow, and Earthalee, his daughter, and that the property, *supra,* was their homestead.

She further alleged (quoting from appellant's brief): "That the plaintiff (appellant) placed the utmost confidence in Robert Long, before and after the death of her husband, and was relying on him as a friend and adviser, and did not know she had deeded her homestead away until she was so advised by her lawyer; that the plaintiff received no consideration for the purported deed, but had been damaged by the fraud perpetrated by Robert Long and his wife; . . . that Robert Long is the administrator of the estate of Alonzo Penney, that there had been no assignment of dower or homestead rights in the property of her deceased husband; that on the 24th day of July, 1945, the Longs conveyed the homestead, by warranty deed, to Curlee Mack and Vee Mack for $550 cash, and the Macks well knew that the Longs had perpetrated a fraud on the plaintiff in procuring said deed."

She prayed for a cancellation of the deed, for a restraining order enjoining the Macks from interfering with possession of the property, for damages and costs.

Appellees answered with a general denial.

The trial court found all issues in favor of appellees and dismissed appellant's complaint for want of equity. This appeal followed.

Appellant earnestly insists that she and her daughter were induced to sign the deed to her property in favor of the Longs by the fraudulent representations and acts of Robert Long and his wife.

The facts were that following the death of appellant's husband in December, 1936, appellant, after having discovered that the property involved had become delinquent for the taxes for the years 1933, '34, '35 and '36 went to the Longs for assistance. According to the testimony of the Longs and appellant's daughter, Earthalee, appellant agreed to sell the property to the Longs for a valuable consideration over and above the taxes due thereon. It was in a bad state of repair, practically

on the ground, and Negro property in the Negro section of the city. Appellees were out approximately $379 on the property. Robert Long testified that as part of the consideration, he bought a stove for appellant for which he paid approximately $40, gave her $75 in cash, and gave her and her daughter groceries and dry goods to the amount of $75, and that he and his wife paid appellant and her daughter approximately $208 in addition to what he paid out for delinquent taxes.

Earthalee testified: "Q. All you got was twenty-five dollars and fifty or sixty dollars worth of different clothes that Robert Long selected and paid for and delivered to you? A. Well, groceries and clothes, because I had a little boy. I didn't have no husband, and they was helping me just like they helped her"; that she was present when Georgia Penney signed the deed at the lawyer's office; that the lawyer explained everything to them—what was going on, and they knew what they were doing; that the deed was written while they were there, and she and Georgia signed it and that it was acknowledged before a notary public. The house was in "real bad shape, just flat on the ground."

While appellant testified that she did not know she was signing a deed, she did not deny that she could read and write. She testified: "Robert Long and Ester (Long's wife) had me to sign the deed." She further testified that appellees paid her nothing for the property.

We think it unnecessary to detail all of the testimony. It suffices to say, as we have indicated, that we find no fraud practiced by appellees in the procurement of the deed from appellant and her daughter.

Here, appellant is in the attitude of impeaching a deed signed and acknowledged by her and her daughter, and this she could do only by clear, cogent and convincing testimony. The evidence introduced by her does not meet this requirement. In *Morris* v. *Cobb,* 147 Ark. 184, 227 S. W. 23, this court said: "Again, appellant is in the attitude of impeaching the deed purported to have been executed and acknowledged by him. He could only do this

by clear, cogent and convincing evidence. *Bell* v. *Castleberry,* 96 Ark. 564, 132 S. W. 649; *Polk* v. *Brown,* 117 Ark. 321, 174 S. W. 562."

Nor do we think the purchase price so inadequate as to establish fraud. "The principle is elemental that mere inadequacy of price is not of itself sufficient to establish fraud." *Ramsey-Milburn Co.* v. *Sevick,* 159 Ark. 358, 252 S. W. 20.

The only testimony on the question of value of the property appears to be that of Ester Long, who testified that, in her opinion, the property was not worth any more than they paid for it.

We are also of the opinion that the preponderance of the testimony shows no trust relationship existing between appellant and appellees.

Appellant's contention that the quitclaim deed executed by her did not convey the land involved to the Longs because it did not contain the words "grant, bargain and sell" is, we think, untenable. The deed is as follows: "Quitclaim Deed—Georgia Penney, *et al.,* to Robert Long, *et al.* Know All Men by These Presents: That for and in consideration of the sum of one dollar, cash in hand paid, receipt of which is hereby acknowledged, and other valuable considerations, not herein mentioned, we, Georgia Penney, widow of Alonzo Penney, and Earthalee Penny, daughter and sole heir at law of Alonzo Penny, hereby release, relinquish and quitclaim unto Robert Long and Ester Long, their heirs and assigns forever, all our right, title and interest in and to the following lands lying in the county of Jefferson and State of Arkansas, described as follows: . . . To Have and to Hold the same unto the said Robert Long and Ester Long, their heirs and assigns, in fee simple forever. Witness our hands and seals this 1st day of April, 1937. (Signed) Georgia Penney, (Signed) Earthalee Penney." (Then follows the acknowledgment.)

"In this country a quitclaim deed is a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim and estate of the grantor, as a

deed with full covenants, although the grantee has no possession of or prior interest in the land. It is almost the only mode in practice where the vendor does not wish to warrant the title." *Bagley* v. *Fletcher,* 44 Ark. 153.

The Supreme Court of the United States in *Spreckels* v. *Brown,* 212 U. S. 208, 29 S. Ct. 256, 53 L. Ed. 476, held that the words in a deed "purporting to 'remise, release and forever quitclaim' . . . 'all right, title and interest in and to' the premises," conveyed "as fully as the words give and grant."

Appellant further contends "in the case at bar, there was no assignment of the widow's dower, and her attempt to transfer it, by conveyance, is void, and passes no estate in the property to the grantee, and appellees, Robert Long and wife."

The rule in this state seems to be well settled that while a widow's dower in real property, before assignment to her, cannot be conveyed by her to a stranger so as to confer upon him any rights which he might enforce in a court of law, courts of equity do not hesitate to uphold such conveyances.

In *Baum* v. *Ingraham,* 141 Ark. 243, 216 S. W. 704, this court said: "The widow had conveyed her unassigned dower in the land to the defendant, Ingraham. It has been held that a conveyance by a widow of her dower in land before it has been assigned to her will be upheld in a court of equity, and her dower interest may be recovered by her alienee."

Appellant also contends that "where the grantor remains in possession, there is a presumption that he does so in subordination to the title granted, unless there is affirmative evidence, as in the case at bar, of a contrary intention, such presumption is overcome by lapse of time." In support of this contention is cited *Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541. In that case, it appears that the grantor remained in possession for approximately thirteen years, but it was there held that he did not regain the title by lapse of time.

We fail to find any evidence in this record showing a contrary intention on the part of appellant, and appellant has pointed to none, nor, as we have already said, do we find any evidence of a relationship of trust or confidence between appellant and her grantees, or undue influence on the part of appellees.

Finally, appellant says that there was a condition subsequent in the deed in question, and "if the testimony of appellee, Robert Long, was true, for the appellant to remain in possession and go on as she was until she made other arrangements, without any limitation of time, and when the appellees, Robert Long and wife, attempted to sell the same to Curlee Mack, and moved the appellant, he violated that condition, and rendered the conveyance invalid, had it been valid to begin with."

We think the great preponderance, if not all, of the testimony, fails to support this contention. The wording of the deed, *supra,* is unconditional.

The testimony of Robert Long to which appellant refers as bearing upon this point was: "And Georgia said if you will make arrangements and buy this property from me and let me stay here until I can make a change to go to my friends, I will appreciate it. And I told her to go on just like she was doing until she could do that. Then we had the papers fixed up and Georgia and Earthalee both signed them, and still Georgia stayed there and we didn't try to bother her or move her out and we didn't charge her any rent. And since that time we have been paying the taxes on the land and all like that, and now we done paid out three hundred and seventy-nine dollars and some odd cents, with the taxes."

This court, in *Bain* v. *Parker,* 77 Ark. 168, 90 S. W. 1000, said: "Conditions subsequent that defeat the estate conveyed by the deed are not favored in law. The words of the deed must clearly show a condition subsequent, or the courts will take it that none was intended; and when the terms of the grant will admit of any other reasonable interpretation, they will not be held to create an estate on condition. Now if we treat the deed as con-

taining the words referred to, there are still no words of condition in the deed and no words indicating that the estate should be forfeited if the road was not completed at the date named.''

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

BOOE *v.* BOOE.

4-7988 197 S. W. 2d 474

Opinion delivered November 18, 1946.

E. Chas. Eichenbaum and *Glenn F. Walther,* for appellant.

W. P. Beard and *John R. Thompson,* for appellee.

McHANEY, Justice. Appellant is the widow of Kelly Booe who died intestate in December, 1944, and he and appellee, John H. Booe, were brothers. They inherited from their mother in equal shares a tract of land containing 41 acres and inherited in equal shares from their grandmother another tract of 80 acres, both tracts being in Lonoke county, and they owned and farmed these two tracts as tenants in common for some years. Some time prior to November 24, 1944, these two brothers began

negotiations for a division of these properties, and on that date they made an agreement by which John H. Booe sold his undivided one-half interest in the 80-acre tract to his brother, and Kelly sold to John his undivided one-half interest in the 41-acre tract and paid to John the sum of $3,250 as the agreed difference in value between a one-half interest in the two tracts. On said date Kelly and his wife, appellant herein, executed and delivered to John H. Booe and his wife, appellee Josephine Gertrude Booe, their warranty deed wherein they conveyed their undivided one-half interest in and to the 41-acre tract for a recited consideration of $1 and the exchange of property. Appellees, on the same date, executed and delivered to Kelly Booe and his wife, appellant, their warranty deed wherein they conveyed their undivided one-half interest in and to the 80-acre tract for a recited consideration of $3,250.

Thereafter, on December 23, 1944, Kelly Booe died intestate and without issue, and on February 14, 1945, appellees brought this action against appellant. On February 26, 1946, appellees filed an amended complaint against appellant, in response to a motion to make the original complaint more definite and certain, wherein the conveyances above mentioned were set out, and it was alleged "that in preparing said deeds the scrivener erroneously described the whole of said respective tracts of land, when same should have been described, in each instance, so as to convey the undivided one-half interest respectively owned by the grantors therein; that it was never the intention by the use of such descriptions in said deeds, and the wording thereof, that any after-acquired title in and to said property should pass thereunder." A mutual mistake was alleged on account of said descriptions, that does not represent the true transaction between the two brothers, and that said deeds should be reformed to show that only a one-half interest was conveyed in each deed of conveyance. It was further alleged that appellant was a tenant by the entirety in and to a one-half interest in said 80-acre tract which she owned as surviving tenant, and that he, appellee, John H. Booe, was the owner of the other one-half interest

therein, subject to appellant's dower rights, by inheritance from his brother, Kelly Booe, he having died intestate and without issue, and that he and appellant were tenants in common in said 80-acre tract. Partition and sale were prayed, it being alleged the land is not susceptible to division in kind, and also that said deeds be reformed to show the description intended by the parties, and for an accounting by appellant of a portion of the rents for 1945.

Appellant demurred to the complaint, which was overruled, and she answered with a general denial and an allegation that she was the owner in fee simple of the property.

Trial resulted in a decree for reformation of the deed from appellees to Kelly Booe and appellant so as to show a conveyance of an undivided one-half interest in said 80-acre tract "and that the warranty clause in said deed therefore applies to the undivided one-half of said land intended to be conveyed." Also that appellee, John H. Booe, is the fee simple owner of an undivided one-half interest in said tract, subject, however, to the dower interest of appellant therein which was declared to be a one-half interest therein for life, and that appellant is the fee simple owner of the other undivided one-half interest in and to said lands. Partition was decreed and commissioners were appointed for this purpose, and judgment was awarded against appellant for $150, with interest in favor of John H. Booe, for his share of the 1945 rents. Future rents were ordered deposited in the registry of the court and costs were adjudged against the parties in accordance with their respective interests in said land. This appeal is from that decree.

This litigation arises under our statute regarding after-acquired title, § 1798 of Pope's Digest, which provides: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee,

and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

The contention is that appellees, having conveyed the whole title to the 80-acre tract to Kelly Booe and his wife, when undisputedly they (appellees) owned only an undivided one-half interest therein, any interest John H. Booe inherited from Kelly on the latter's death immediately passed to appellant by virtue of this statute and the fact that the estate conveyed was one by the entirety.

Assuming without so deciding that said statute is applicable to the situation here presented, we are of the opinion that the trial court correctly held that a mutual mistake was made by the parties when the deeds recited the conveyance of the whole of each tract when the grantor in each owned only an undivided one-half interest in each tract.

The two brothers had owned and operated as farms the two tracts as tenants in common for a number of years. Kelly became dissatisfied with this method of operation and wanted a division and separate ownership. So, he made an offer to buy his brother's one-half interest in the 80-acre tract by a conveyance of his one-half interest in the 41-acre tract and the payment in cash of $3,250 to his brother, John. This offer was accepted and they procured a scrivener to write both deeds, and, instead of writing each of them so as to convey the grantor's undivided one-half interest in the tract conveyed, he so described the tract in each deed as to convey the whole thereof. While the deed executed by Kelly and appellant to the 41-acre tract described the whole interest, as did the deed to the 80-acre tract, this conveyance is not involved in this litigation.

We think all the facts and circumstances support the court's findings and decree. Appellant did not testify although present when the deeds were signed and acknowledged before Mr. W. P. Fletcher, Jr., in Lonoke. Mr. Fletcher did not write the deeds. They were written or dictated by an attorney who was present at the sign-

ing and who was employed by and represented Kelly Booe. He was not called as a witness by appellant, nor was any other witness called by her. The undisputed proof shows that the consideration paid by Kelly Booe to his brother was approximately one-half the value of the 80-acre tract.

The parties are in agreement upon the principles of law involved, which are: 1. Equity will reform a deed or other written instrument upon clear, unequivocal and decisive evidence that a mutual mistake has been made in the drawing of the instrument, or a mistake of one party accompanied by fraud or other inequitable conduct of the other party. 2. Equity will not reform a written instrument for a mistake of law.

Our recent case of *Wood* v. *Wood,* 207 Ark. 518, 181 S. W. 2d 481, is quite similar to the case at bar. It was there held, to quote headnote 5: "If appellees intended to convey only their interest in the land as heirs of their father and appellant intended to buy their interest only, a mutual mistake was made such as equity should correct in executing a deed purporting to convey the dower and homestead interest of their mother." In this Wood case, the court said: "This statement of law is made in 21 C. J. S. Covenants, § 118, p. 988, 'it has also been held that where by mistake land was included in a deed which the grantor did not own, and which the grantee did not intend to buy, such fact was an equitable defense to an action for a breach of the covenant of warranty in the deed.'

"The lower court's decree was necessarily based on a finding that there was a mutual mistake when the appellees executed and the appellants accepted from them a deed conveying an interest in the land—the dower and homestead interest of the widow—which they did not own. While the appellant's knowledge of this outstanding interest in the land which he was buying was not in itself sufficient to bar appellant in a suit on the covenant of warranty in this deed, it was a strong circumstance to support the chancellor's finding that appellant did not in fact buy this interest from appellees."

Appellant contends that there was no mistake, at least no mutual mistake, and cites a number of cases to support her contention, but we think they are not controlling here. The undisputed evidence is that appellees did not intend to convey more than they owned, and we are convinced that under all the facts and circumstances the court was not only justified in finding but was required to find that a mutual mistake was made in the instrument, and the decree is accordingly affirmed.

MEYERS *v.* MEYERS.

4-7982 197 S. W. 2d 477

Opinion delivered November 18, 1946.

Frank C. Douglas, for appellant.

W. Leon Smith, for appellee.

ROBINS, J. This is a controversy between appellees, Max Meyers and Adolph Meyers, children of Joe Meyers, deceased, and their stepmother, Annie Meyers, the appellant, as to liability of appellees for certain shares of corporate stock delivered by appellant to appellees. To appellant's suit for an accounting as to these stocks, which appellant alleged appellees were holding for her as her trustees, appellees answered that appellant and appellees had made a compromise of the liability asserted in this suit and all other matters in dispute between them, said compromise being evidenced by a written agreement. Appellees also pleaded laches and limitation as additional defenses.

The lower court dismissed appellant's complaint for want of equity. She has appealed.

Joe Meyers died in 1930, leaving surviving him the appellant, his widow, and five children now living, as his heirs at law, to-wit: His sons, Max Meyers and Adolph Meyers, appellees herein, and his daughters, Sophia Meyers, Mrs. Goldena Hassel and Mrs. Hannah Simon. No administrator was appointed for his estate until after this controversy arose. On the advice of appellees, appellant invested $5,546.88, proceeds of insurance on the life of Joe Meyers, payable to and collected by her, in certain stocks, and on June 13, 1930, at request of appellees, she indorsed the certificates evidencing her ownership of these stocks and turned same over to appellees and they gave her the following receipt therefor:

"Letterhead of Meyers Bros.,
"Cotton Merchants,
"Blytheville, Arkansas, June 13, 1930.

"We hold in trust and receipt of Mrs. Annie Meyers —the following stocks:

"10 shares Annaconda Copper,
"25 shares Chrysler Corp.,
"25 shares Montgomery Ward,
"50 shares General Motors,
"20 shares Grisby Gruno.

"(Signed) Meyers Bros.

"By Max Meyers."

Appellees were in financial difficulties when they obtained the stock certificates and in 1931 they disposed of all these stocks, belonging to their stepmother, the appellant, and used the proceeds thereof to apply on their own indebtedness. They did not inform appellant that they had sold her stock, but, on the contrary, they continued to pay her every three months, up until about March, 1944, the amount of dividends regularly accruing on these stocks.

Appellees testified that from time to time appellant would ask them for the stock certificates, but that they evaded her requests in different ways. As appellee, Adolph Meyers, put it in his testimony, he "avoided the question one way or the other."

During all the years from 1930 to 1944 relations between appellant and all of her stepchildren were amicable and intimate. In the early part of 1944 one of the daughters of Joe Meyers learned that a diamond ring, that had belonged to her own mother, had been given by appellant to one of appellant's nieces. This discovery led to a serious quarrel between appellant and her stepchildren, who began to insist that the home place and two other parcels of real estate bought by Joe Meyers during his lifetime, title to which was placed in appellant, should go to them as heirs of Meyers, rather than to

kindred of their stepmother. The quarrel led to personal difficulties and to two suits—one brought by a daughter of Joe Meyers against appellant to recover certain furniture, and one, an injunction suit brought by appellant against her stepchildren to restrain them from molesting or threatening her. Appellant's stepchildren also had their attorney appointed administrator of the estate of their father, who had died 14 years before, and had served on appellant an order to make disclosure as to personal property belonging to Joe Meyers at the time of his death.

The respective attorneys for the parties worked out a compromise agreement, which was embodied in the following writing, signed and acknowledged by all parties on July 11, 1944:

"This stipulation and contract is entered into at Blytheville, Arkansas, on the 11th day of July, 1944, among Mrs. Annie Meyers, first party; and Max Meyers, Adolph Meyers, Sophia Meyers, Mrs. Goldena Hassell, and Mrs. Hannah Simon, second parties; and witnesseth:

"Mrs. Annie Meyers is the widow of Joe Meyers, deceased. Max Meyers, Adolph Meyers, Sophia Meyers, Goldena Hassell, and Hannah Simon are the children and the sole heirs at law of the said Joe Meyers, deceased. On May 19, 1944, at the request and direction of the second parties herein, W. Leon Smith filed in the office of the Probate Court clerk for the Chickasawba District of Mississippi county, Arkansas, an application for letters of administration upon the estate of Joe Meyers, deceased; and on said date letters of administration were issued to him by the clerk of said court, subject to the approval of the court. At this writing the court has neither approved nor disapproved the action of the clerk in issuing such letters of administration.

"Recently at least two suits have been filed in different courts of Mississippi county, in which Mrs. Annie Meyers was one party and some of the second parties named herein were adverse parties; and unless the parties succeed in compromising and settling their disputes, further litigation among them will unquestionably result.

The questions in dispute among the parties hereto involve certain real estate and personal property that is in the possession of Mrs. Annie Meyers in which property the second parties herein claim that they own some interest. All of the parties are desirous of compromising and settling their differences, and all of them recognize that such a compromise and settlement is very desirable. The parties do hereby compromise and forever settle all questions in dispute among them upon the following terms and conditions:

"Mrs. Annie Meyers hereby agrees that she will forthwith deposit with the Farmers Bank & Trust Company in the city of Blytheville, Arkansas, the sum of three thousand ($3,000) dollars, in cash to be held by said bank in trust for herself and second parties herein subject to the provision of a trust agreement of even date herewith, a copy of which will be attached to this stipulation and agreement and become a part hereof.

"In consideration of the agreements made and hereinafter made, Mrs. Annie Meyers hereby binds and obligates herself, her heirs, executors, administrators, assigns and successors in title that upon her death the title to the following real property now vested in her shall go to the second parties as tenants in common, owning equal interest with each other; that said property is described as follows:

"Lot one (1) in block three (3) of the Blythe Fourth Addition to the city of Blytheville, Arkansas.

"The west half of lot two and all of lot three in block thirteen (13) of the Chickasawba Addition to the city of Blytheville, Arkansas.

"A triangular lot located in the northeast corner of the southeast quarter (SE¼) of the northeast quarter (NE¼) of section sixteen (16), township fifteen (15) north, range eleven (11) east, which said lot lies south of the main line right-of-way of the Jonesboro, Lake City & Eastern Railroad Company and north and east of the right-of-way of the west leg of wye of Jonesboro, Lake City & Eastern Railroad Company, the land herein con-

veyed contains six hundred fifty-four-one-thousandths of an acre (0.654), more or less, lying in the Chicasawba District of Mississippi county, State of Arkansas.

"In consideration of the above agreements made by Mrs. Meyers, second parties herein consent and agree that the Probate Court for the Chickasawba District of Mississippi county, Arkansas, may and shall enter an order disapproving the issuance by the clerk of that court of letters of administration to W. Leon Smith upon the estate of Joe Meyers, deceased, and shall further order that there shall be no administration of the estate of the said Joe Meyers.

"For the same consideration each of the parties hereto who has filed or instituted any suit or action in any court against any of the other parties hereto now agrees that such suit or action shall be forthwith dismissed with the prejudice at the cost of the plaintiff in such action.

"For the same considerations, second parties hereby forever disclaim for themselves, their heirs, executors, administrators and assigns any right, title, or interest of any nature or kind in or to any property, real or personal, other than that which has heretofore been specifically mentioned that is in the possession of Mrs. Annie Meyers or title to which is vested in her.

"Mrs. Annie Meyers on the one part and second parties herein on the other part mutually covenant and agree with the other that henceforth they will leave each other alone and will never on any occasion attempt to induce or bring about any disposition of any property other than that which is hereby agreed upon and that they will at all times refrain from engaging in any discussion, argument or dispute among themselves to any matters whatever.

"In testimony whereof, the parties hereto have set their hands at Blytheville, Arkansas, on the date first herein written.

"Approved in behalf of Mrs. Annie Meyers
"(s) Marcus Evrard,
"Attorney for Mrs. Annie Meyers.

"Approved in behalf of second parties
"(s) W. Leon Smith,
"Attorney for Second Parties.

"(s) Mrs. Annie Meyers
"(s) Max Meyers
"(s) Adolph Meyers
"(s) Sophia Meyers
"(s) Mrs. Goldina Hassell
"(s) Mrs. Hannah Simon"

Appellees ask us to uphold the decree of the lower court on the ground that the claim herein asserted by appellant was one of the matters embraced in the compromise and that appellant is therefore bound by the terms of the above quoted agreement; and they further urge that any right of appellant, if not precluded by the compromise agreement, is barred by laches and limitations. Appellant argues that there had been no dispute as to her ownership of the stocks, and that her claim relative thereto was not embraced in the compromise agreement.

It is conceded by appellees that the claim, asserted by appellant in this suit is not specifically mentioned in the "stipulation and contract," but they urge that its terms are sufficiently broad to cover any claim that might be made by any of the parties against other signatories to the instrument and that it was so intended by all concerned.

The rule to be followed in construing this contract is thus expressed in 15 C. J. S., "Compromise and Settlement," § 27, p. 745: "A compromise agreement is conclusive only as to those matters which the parties have

fairly intended to include within its term, and the necessary consequences thereof. . . ."

Now this agreement, at its beginning, recites the application for letters of administration on the estate of Joe Meyers, and the two suits (one by one of the heirs against appellant to recover certain furniture and the other by appellant against her stepchildren to restrain them from molesting her, etc.), and sets forth the matters in dispute between the parties in the following language: "The questions in dispute among the parties hereto involve certain real estate and personal property that is in the possession of Mrs. Annie Meyers in which property the second parties herein claim that they own some interest." Following this recital of the matters to be settled, the contract sets forth the terms of the compromise agreement which were in substance: (1) That appellant would create the $3,000 trust fund in the bank; (2) that appellant would waive in favor of her stepchildren all interest in the real estate which had been conveyed to her in the lifetime of her husband except a life estate; (3) that the stepchildren would withdraw the proceedings in probate court for administration; (4) that any of the parties who had instituted a suit against other parties to the compromise would dismiss same; (5) that the stepchildren would disclaim any right, title or interest in any property "other than that which has heretofore been specifically mentioned that is in the possession of Mrs. Annie Meyers or title to which is vested in her; (6) that the parties would in the future 'leave each other alone.' "

Appellees in their testimony admitted the conversion of the stocks by them and the concealment from appellant of the fact of this conversion, as well as the payment to her of dividends on the stocks for thirteen years after they had disposed of the stocks. They attempted to justify their breach of trust by saying that their father owed appellee, Max Meyers, $6,000 and that for this reason they did not feel obligated to account to their stepmother for the securities which they held in trust for her.

Appellees sought to show that the claim of appellant for the stocks or their value was in dispute between the

parties at the time the agreement was signed by proof that appellant had asked for the stock at different times, but it was not shown that at any time before the filing of this suit they had ever asserted to her that they were entitled to the stocks or the proceeds of same. Nor did they, up to that time, inform her that her stocks had been sold.

Appellant in her testimony denied that there had ever been any dispute as to her ownership of the stocks, and the attorney who drafted the compromise agreement testified as to this phase of the matter: "Something had been said about the stock, but at the time I prepared the stipulation, the stock was not one of the matters in dispute."

Whether, in view of the unambiguous language of the contract, testimony tending to show that any controversy not specifically set forth therein was in contemplation of the parties when they executed it was competent and admissible we do not find necessary to decide. It may be said, however, that the preponderance of the testimony did not establish that prior to execution of the "stipulation and contract" there was any dispute between the parties as to appellant's right to the stocks or that such a dispute was contemplated by the parties in executing the compromise agreement.

A fair interpretation of this agreement, we think, is that, by it the parties meant to compose only the differences between them that had resulted in the lawsuits, and these differences all arose from and centered around the feeling on the part of appllant's stepchildren that in justice the property of appellant, bought by their father, should, on appellant's death, descend to them, rather than to appellant's kindred. This feeling engendered the vociferous demands made on her by them and these demands led to the injunction suit instituted by appellant as well as to the replevin suit and the proceedings in probate court begun by the stepchildren against appellant.

It appears from the record that at no time during the quarrels that provoked the litigation preceding the

compromise did any of the parties mention the liability of appellees to appellant on these stocks. She did not, in upholding her side of the quarrel, call for a restoration of these stocks. The appellees, in maintaining their side of the dispute, made no mention of the stocks or of the $6,000 liability of their deceased father to them. In none of the litigation that led to the compromise was there any mention made of these stocks or of any controversy pertaining to them.

We conclude that the claim of appellant against her trustees for an accounting as to the trust property was not in the contemplation of the parties when they composed their differences and disputes by the compromise, and that it cannot be held that this claim was in terms or by implication barred by the compromise agreement.

Nor was appellant's right of action barred by laches or limitation. By appellees' own admission they did not at any time, before the institution of this suit, apprise appellant that they were asserting an adverse claim to these stocks or the proceeds thereof. On the contrary, they admitted paying her dividends thereon until March, 1944, and admitted that they had always evaded her inquiries about the stocks. Appellant was not required to act in the matter until she knew that her trustees were disavowing the trusteeship. She therefore could not be held guilty of laches; and limitation would not begin to run against her until such disavowal. "The doctrine of laches applies to the enforcement of an express trust when, and only when, there has been an open and unequivocal breach or repudiation of the trust, assertion of an adverse right, title or interest, or other act of hostility to the trust, by the trustee, which has been so brought home to the actual or constructive knowledge of the *cestui que trust* as to require him to assert his rights promptly, and, with such knowledge, he has inexcusably and unreasonably delayed asserting his rights to the injury or prejudice of defendant. . . ." 65 C. J. 1024; *Walker-Lucas-Hudson Oil Company* v. *Hudson,* 168 Ark. 1098, 272 S. W. 836; *Lasker-Morris Bank & Trust Company* v. *Gans,,* 132 Ark. 402, 200 S. W. 1029.

It follows that appellant is entitled to a decree against appellees for the value of the stocks at the time they were converted by appellees, with interest at the legal rate from date of the conversion, less credits by way of dividends paid by appellees to appellant from time to time. Since some of the items necessary to a proper computation of the amount of the decree are not clearly shown by the proof, we reverse the decree of the lower court and remand the cause with directions to the court below to enter a decree in favor of appellant in accordance with this opinion, and, if necessary to do so, to take additional testimony as to any items entering into a calculation of the amount due to appellant from appellees; and all costs to be adjudged against appellees.

McHaney, J. I dissent because in my opinion the settlement agreement was a family settlement and should be liberally construed to cover all matters then in dispute, or which should have been in dispute. I think the decree should be affirmed.

Cates *v.* Wunderlich.

4-7978 197 S. W. 2d 477

Opinion delivered November 18, 1946.

[redacted]

Holland & Taylor, for appellant.

Wils Davis and *Taylor & Taylor,* for appellee.

ED. F. MCFADDIN, Justice. The question for decision is the validity of a decree rendered by a special chancellor.

Hon. Francis Cherry is, and was at all times herein involved, the regularly elected and commissioned chancellor of the 12th Chancery Circuit, of which the Chickasawba District of Mississippi county is a part. In 1944, Hon. Francis Cherry entered the Armed Forces of the United States. He did not resign as chancellor; and on December 1, 1945, he returned from the Armed Forces and reassumed his duties as chancellor. During the absence of Hon. Francis Cherry, Hon. E. L. Westbrooke, Jr., acted as chancellor. The regular terms of the Chickasawba District Chancery Court are fixed by statute to begin on the fourth Monday in February and the first Monday in September of each year. (§ 2798, Pope's Digest.) Consequently, on the second day of the September, 1945, term the court record shows the following proceedings:

"BE IT REMEMBERED that on this 4th day of September, 1945, being the second day of the convening for the regular September term of the Chancery Court for the Chickasawba District of Mississippi county, Arkansas, and at 10 o'clock on said date, it appeared that for good and sufficient reasons the regular judge of said court will not be able to attend and hold said court, thereupon the Honorable Edward L. Westbrooke, Jr., presided as Special Chancellor, pursuant to an election held under Act 247 of 1943, as certified by Francis Cherry, regular chancellor; and with said regular chancellor absent and unable to continue to hold said court, the regular practicing

attorneys in attendance on said court, upon notice from the clerk, proceeded to then elect Edward L. Westbrooke, Jr., as special chancellor; and after taking the oath required by law, the said Edward L. Westbrooke, Jr., presided as special chancellor, assisted by Harvey Morris, clerk, and Hale Jackson, sheriff. After proclamation being duly made by the sheriff, the said court was opened and the following business had and done. . . ."

Judge Westbrooke held court on September 4, 1945. Then on November 9th he also held court. Judge Cherry resumed his duties as regular chancellor on December 1, 1945, and held court on December 19, 1945. There were no more sittings of the court until the February, 1946, term.

The case of *Cates* v. *Wunderlich* had been pending for some time prior to September, 1945; but all the evidence was not completed in the case until September 6, 1945, when Judge Westbrooke took the case under submission. All parties knew that the case was under submission by Judge Westbrooke at the September, 1945, term, with a decree to be rendered when he decided the issues. A few days prior to Novmber 30, 1945, Judge Westbrooke reached a mental conclusion as to what the decree should be, and advised the attorney for Cates (either by phone or letter) to draw and present to Judge Westbrooke a decree favorable to Cates. On December 20, 1945, Judge Westbrooke received from Cates' attorney the requested decree, which he signed in triplicate, and mailed one copy to the clerk and one copy to each side in the litigation. This decree was dated November 30, 1945, instead of December 20, 1945; and this date of November 30th will be discussed later. The decree was received by the clerk of the court, and entered on December 26, 1945.

When the attorneys for Wunderlich received the decree (on December 22nd) they questioned the right of Judge Westbrooke to render a decree after December 1st; and on January 17, 1946, they filed a motion to have the decree set aside and expunged, because it was not rendered by the regular chancellor. On March 29, 1946, in open court, Hon. Francis Cherry heard the said motion

by Wunderlich. Both sides were represented; and evidence was presented. Judge Westbrooke was in the courtroom at the time, and made a statement which is incorporated in the evidence. At the conclusion of the hearing, on March 29th, the chancery court set aside the decree rendered by Judge Westbrooke. This is the language of the court:

"I think the decree will have to be vacated and set aside, for the specific reason—and I wish the order would show this—that the special chancellor's decree is effective as of the date he signs it, and the date he signed the decree was after he had ceased to be chancellor and I had taken over the office. . . . The decree will be expunged from the record. . . ."

Cates has appealed from the order of March 29, 1946, expunging the Westbrooke decree. Out of an abundance of precaution, Wunderlich has also filed in this court a petition for writ of certiorari, praying that the chancery record be brought to this court, and the Westbrooke decree be expunged as *coram non judice* and void. So, whether we consider the case on the appeal of Cates or the certiorari petition of Wunderlich, there is presented to us for decision the validity of the decree rendered by Judge Westbrooke in this case.

We reach the conclusion that the Westbrooke decree was *coram non judice* and void. We, therefore, affirm the case on the appeal of Cates, and grant the certiorari, and quash the Westbrooke decree on the petition of Wunderlich.

Our process of reasoning to the conclusion above announced is as follows:

1. *The purported decree by Judge Westbrooke was not rendered until December 20, 1945, which was the date that Judge Westbrooke signed the decree and sent it to the clerk and to opposing counsel.* Judge Westbrooke stated that, after September 6, 1945, (when the evidence was completed) he reviewed the entire record in vacation, and in November, 1945, he notified Cates' attorney by letter or phone to prepare a precedent. This com-

munication to the attorney for Cates was not from the bench of the court, but from the special chancellor in vacation. The evidence is uncontradicted, to the effect that no attorney for Wunderlich received any notice at any time that Judge Westbrooke had reached any mental conclusion in the case, until receipt of the decree dated December 20th. The communication, by letter or phone, to Cates' attorney to prepare a precedent, was in no sense a decree. It was nothing more than a request to prepare a precedent for Judge Westbrooke to consider. The date of November 30th in the said decree seems to have escaped Judge Westbrooke's attention. It was probably placed in the decree by Cates' attorney to correspond with the date of the receipt of the communication from Judge Westbrooke as previously mentioned. We emphatically state that there was no attempt to "back date" the paper to circumvent the return of Judge Cherry. The utmost of good faith and professional ethics prevails in all respects.

Attorneys for Cates cite, *inter alia*, *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44, as authority for the argument that Judge Westbrooke's mental determination in November was equivalent to a decree. But the cited case is no authority to sustain such argument. In the Bourland case the chancellor announced the decree from the bench while the court was in session, and the notation of the decree appeared on the judgment docket. Of course, it was then a decree even though the precedent was prepared and filed later. But in the case at bar there was never a pronouncement by the chancellor from the bench, because the court was in vacation; and there was never any notation on the judgment docket until December 26th. Counsel for Wunderlich call attention to such cases as *Goodbar Shoe Co.* v. *Stewart,* 70 Ark. 407, 68 S. W. 250, and *Redbud Realty Co.* v. *South,* 145 Ark. 604, 224 S. W. 964, to support their argument that a special chancellor cannot render a decree in vacation. We find it unnecessary to discuss this contention, because the facts are clear in this case, to-wit: that the decree of Judge Westbrooke was not rendered until he signed it on December 20, 1945; and, even if otherwise valid, the

decree was not effective until December 26, 1945 (the date it was entered by the clerk). Each of these dates was after Judge Cherry had resumed his duties as regular chancellor.

2. *Judge Westbrooke's power to act in this case ceased on December 1, 1945.* In the court order previously copied, there was the effort to have a special chancellor to act both under said Act 247 of 1943, and also under Article VII, § 21, of the Constitution.

If Judge Westbrooke, in serving as special chancellor, was acting under Act 247 of 1943, then his powers ceased on the return of the regular chancellor, because § 7 of said Act 247 says, in part:

". . . such special chancellor so elected shall hold and discharge the duties of the office until such time as the regularly elected chancellor shall reassume the office, . . ."

In quoting from Act 247 of 1943, we make no pronouncement as to its constitutionality. Counsel for Cates have urged a distinction between the case of *State* v. *Green,* 206 Ark. 361, 176 S. W. 2d 577, and the case at bar—pointing out: that the Green case involved a *circuit* judge; that the method for selecting a special circuit judge is fixed by the Constitution; and that the term of office and manner of selection of a chancery judge is left to the Legislature. We find it unnecessary to discuss this argument, because, if Judge Westbrooke was acting under Act 247 of 1943 and had all the power which that act gave him, and if that act be constitutional, still by the plain terms of the act, Judge Westbrooke's authority ceased when Judge Cherry returned on December 1, 1945.

If Judge Westbrooke, in serving as special chancellor, was acting under the provisions of Article VII, § 21 of the Constitution, likewise, his powers to act as special chancellor, in this case, ceased on December 1, 1945, when Judge Cherry reassumed the duties of the office. The case of *Hyllis* v. *State,* 45 Ark. 478 is clearly in point and decisive. Judge William W. Smith, speaking for

the court in that case, quoted Article VII, § 21 of the Constitution, and then elucidated in the following language:

"Here two distinct classes of cases are contemplated, in which a special judge may be elected:

"1. Where there is no judge of that circuit in commission, or where the commissioned judge is absent, the special judge elected presides during that term, or until the regular judge appears.

"2. The second class of cases is where the regular incumbent is disqualified to sit, or after the commencement of the term falls ill, or dies, or is unable from any cause to hold the court. Here the authority of the special judge continues for the remainder of the term of his election.

"The present case falls under the first class, and the judicial power of the special judge terminated when 'the regular judge' took the bench. If the latter was disqualified to try any causes that remained undisposed of upon the docket, another election was necessary. . . .

"The proceedings subsequent to 'the return of the regular judge' were *coram non judice,* and the judgment was void. The appeal is dismissed, and the case will stand for trial in the court below as it did before the supposed trial took place."

Another case likewise in point is *Fernwood Mining Co.* v. *Pluna,* 136 Ark. 107, 205 S. W. 822.

We, therefore, conclude that the decree rendered by Judge Westbrooke on December 20, 1945, was *coram non judice* and void; and the case of *Cates* v. *Wunderlich* is still pending in the Chickaswaba District of the Mississippi Chancery Court.

BAKER *v.* THE NATIONAL SURETY CORPORATION.

4-7985 197 S. W. 2d 752

Opinion delivered November 25, 1946.

Rehearing denied December 23, 1946.

R. W. Tucker, for appellant.

W. M. Thompson and *Barber, Henry & Thurman,* for appellee.

GRIFFIN SMITH, Chief Justice. Edgar Baker, Sheriff for Independence County, sued Forrest Jeffery and National Surety Corporation for $6,671.23 covering a group of alleged irregularities, and in addition sought judgment for $922. Jeffery was Collector during 1941, 1942, 1943 and 1944. He was then elected County Judge. The claim of $922 is based upon Baker's assertion that the amount was wrongfully collected.[1] National was Jeffery's surety from 1941 to 1944, inclusive. By the same action it was sought to restrain Robert Stroud, Collector when the suit was filed, from collecting commissions in excess of those allowed by Act 48 of 1917, and to require repayment of excesses. Ernest Stroud, Treasurer, was also made a defendant for the same purpose. Demurrers filed by the two Strouds were sustained. Appellant insists that this action decided that part of the complaint whereunder it was sought to compel Jeffery as Collector during the 1941-'44 period to account, "except as set out hereafter in the brief." It appears, however, that Jeffery answered separately.

The complaint first alleges that Jeffery should be required to repay the County $922 representing salary warrants drawn against general revenue. Section two of the initiated Act provides that the County and Probate Judge[2] shall receive a salary of $2,400 per year for all

[1] Jeffery was Collector during 1939 and 1940, but his accounts for those years are not questioned. While appellant's complaint, as expressed in the prayer for relief, asks that Jeffery and National be held jointly and severally "in the sum of $6,671.23, . . . and also judgment for $922 salary drawn unlawfully", in a Statement of the Case appellant says he ". . . . sought to recover $5,554.89 from Forrest Jeffery . . . and the National Surety Corporation, his bondsman". The difference of $1,116.34 has reference to alleged overcharge of commissions by Jeffery as Collector during the 1941-'44 period.

[2] By Amendment No. 24 to the Constitution, approved in the general election of 1938, County Judges were relieved of probate duties and such responsibilities imposed upon Chancellors.

of his services, and nothing more, "payable out of the County Salary Fund." Section twelve is: "All county officers whose salaries are fixed by this Act, except those receiving no fees, shall charge and collect, for the benefit of the County, the same fees, costs, commissions, perquisites, and compensation" as the law now or hereafter may require.

The County Judge and Assessor do not receive fees, commissions, etc. Half of the Assessor's salary is paid by the State, but in the salary Act with which we are dealing no provision is made for payment of the remaining fifty per cent.

As to the County Judge appellant thinks no compensation can be paid until by factual disclosure at the end of each year it is shown a sufficient surplus has accumulated above the legal demands of other participants. But the question is, Who is a participant and what is the Salary Fund? Section twelve of the Act denominates as a class all County officers "except those receiving fees," and makes them trustees in respect of commissions and other collections; but they are, by express words of the Act, trustees for the County during the brief interim allowed for withholding funds. Section thirteen requires the Treasurer to keep a *separate* account of moneys, and prohibits a transfer of credits from one officer's account to another's ". . . unless the sums credited thereto shall in the aggregate exceed the annual salary of said officer and his deputies, [together] with such expenses as are herein fixed and authorized for the current fiscal year."

Appellant contends that the Salary Fund is composed of the combined excess earnings when all of the offices are considered, and that the County Judge can be paid only from such. In other words, he is relegated to the remainder after others have been satisfied.

Initiated Act No. 3 appears to have intended (a) that a general Salary Fund be established, into which all earnings of fee- or commission-collecting officers should go, each being credited with deposits, and charged; or

(b) that separate Salary Funds or accounts be set up on the Treasurer's books and that each eligible participant be charged or credited as the circumstance warrants. If the intention was to create one fund, then the language of Sec. 12 is in conflict with Sec. 2, for under one alternative there would be no County Salary Fund, as such, but only an aggregate of entries representing earnings of officers who are paid fees or commissions, or who have other incomes of a public nature which they must account for. Intention of the Act must be ascertained from the purpose to be served, as expressed by the terms employed.

Our view is that money accumulating in the Sheriff's Salary Fund may be used in an amount not exceeding ninety percent in the payment of properly approved obligations incident to that office. The County Judge and Assessor would finally receive their salaries from excess earnings, notwithstanding they do not collect commissions or fees. But this does not mean, as appellant contends, that in respect of the ten percent earned by the Sheriff above the ninety percent, the County Judge and Assessor must wait until the end of the year to ascertain if others have been paid; nor is there anything in the Act justifying a collecting officer in retaining funds beyond the time limit so definitely fixed. We think the ten percent margin denied the Sheriff, although ultimately a supplement to general revenue, is, *pro tem,* a Salary Fund, and that at the close of a particular month, or monthly period for settlement, it is temporarily available to pay warrants drawn in favor of the County Judge or Assessor.

A perplexing situation, from a practical standpoint, arises when it is considered that expenses (we have reference to the Sheriff because supplies, etc., are furnished others by the County) vary from year to year, and from month to month, and it is impossible to tell at the close of a designated month what the annual requirements will be. An example of the status that may be created through accumulations to the credit of different funds,

is shown in the footnote, reflecting income and possible outgo for an annual period.[3]

A County Court order of December 31, 1945, was introduced, showing the following balances: Circuit Clerk, $1,424.74; County Clerk, $703.31; Assessor, $5.08; Collector, $2,596.05; Treasurer, $1,625.30—total, $6,354.49. On the same day, however, the Court found that the Initiated Act, by express terms, provided that the County Judge's compensation of $2,400 per year was payable from the Salary Fund. It was then held that inasmuch as fees and commissions were denied the County Judge, it had been necessary to make payments from general revenue. An order transferring $1,000 from the Collector's account, $1,150 from the Treasurer's account, and $250 from the Assessor's account was entered. The three items aggregate $2,400, and presumptively were subtracted from balances before the transfers of $6,354.49 were made. The various amounts would reflect a surplus of $8,756.49.

On final hearing February 5, 1946, the causes were dismissed for want of equity. At that time Baker contended the salary judgment against Jeffery should be $2,112.80 instead of $922, the increase being supplementary accumulations, as disclosed by the proof and representing payments made during 1945. (After deducting Federal withholding taxes, warrants were for $187.20.)

First.—We think that part of the decree refusing to enjoin future payments from the County's general revenue fund was erroneous, and in that respect it is reversed. But this does not mean that because a preventive remedy was available to a complaining party, (who as to money going into this account was a taxpayer) the County Judge

[3] For 1944: Income from Sheriff's office, $7,947.03; salary, including authorized deputy hire, $3,600; expenses, $3,552.33; excess, $794.70. County Clerk: Income, $4,095.27; salaries, $3,600; excess, $495.27. Circuit Clerk: Income, $3,726.65; salaries, $3,300; excess, $426.65. Collector: Income, $6,567.66; salaries, $3,000; excess, $3,567.66. Treasurer: Income, $5,394.02; salaries, $1,800; excess, $3,594.02. Assessor: Income, (half paid by State) $1,200; salaries, $2,400; deficit, $1,200. County Judge: No income; salary, $2,400; deficit, $2,400. [Salaries mentioned are based upon the maximum payable in any year. Expenses, of course, are variable. Initiated Act No. 3 was amended in 1942, effective January 1, 1943. By the

should be required to repay amounts already received. It will be presumed that at the time monthly payments were made there were apparent surpluses in the various officers' funds, and transfers were subsequently made. There the injury ended because there had been repayment.

Second.—Appellant insists that the defending Collector improperly credited himself with commissions during the 1941-'44 period. He contends that Special Act No. 48 of the Fifty-First General Assembly (1917) was not repealed by any subsequent legislation, and that under Sec. 1 of that measure the Collector is entitled to charge one and a fourth percent, ". . . and out of said sum shall pay his deputies and assistants," and himself. By Act of March 31, 1883 (Pope's Digest, Sec. 13832) certain commissions were allowed collectors under a graduated scale. Act 120, approved March 6, 1941, amends the Digest section.[4]

Act 78, approved February 20, 1941, fixes Treasurers' fees generally on a percentage basis. Section twelve of Independence County's Initiated Act directs that all officers whose salaries are fixed by the people's legislation, except public servants who do not receive fees, ". . . shall charge and collect, for the use and benefit of the County, the same fees, costs, commissions, perquisites and compensation as are now or hereafter required or permitted by law to be charged by such officer for such services."

Appellant seeks to make the point that because the Collector and Treasurer were operating under special

amendment deputy hire was increased in the offices of County Clerk, Circuit Clerk, and Assessor. Provision was also made for a deputy Collector. Based upon information disclosed by the audit, the excess accumulation from offices receiving incomes from fees, commissions, etc., is indicated to be $8,800 annually. After payment of salaries and expenses chargeable against the Salary Fund, including Assessor and County Judge, excess fees appear to amount to approximately $5,200].

[4] Act 120 of 1941 provides: "Said Collector shall be allowed a commission for collecting the revenue in the year 1941 and thereafter as follows: For the first $10,000 collected, 5% in kind; for all sums over $10,000 and under $20,000 collected, 4% in kind; for all sums over $20,000 collected, 3% in kind".

laws when the salary measure of 1936 was enacted, subsequent general legislation did not work a repeal of the Act of 1917. What appellant misconstrues is the intention of Initiated Act No. 3. Fees and commissions were not established, nor was there an effort in that respect. The purpose was to require those charged with collection duties to adopt the fixed rates *now or hereafter permitted.* Since the Initiated Act contemplated that laws affecting fees and commissions might be changed, provision was made for just such a contingency. It follows that the Collector and Treasurer were performing an express duty when they charged under the revised schedules. It was known when the Initiated Act was adopted that special and local legislation by the General Assembly had been prohibited by constitutional amendment; hence the term "now or hereafter permitted by law" could only have reference to a general Act, or to a locally initiated measure.

Third.—This brings us to consideration of appellant's claim that Jeffery, as Collector, withheld from his settlements money due different funds in 1941, 1942, 1943, and 1944. Bookkeeping and office equipment necessary to modernize accounting was needed, but funds were not immediately available with which to make payment. An order in the form of a judgment was made incident to the purchases in question. It is, in part, as follows: "To the Collector of Independence County. It appearing that the County was in dire need of a new tax-collecting system, . . . [therefore] after talking with the Auditor, Deputy State Comptroller, the county officials of Independence County, and the newly-elected governing bodies for the schools, it was decided to secure the system recommended by the Auditorial Department, . . . [costing] $4,387.44. . . . The Collector is hereby ordered to pay to the [various parties who sold the equipment, specified sums]. The above is to be deducted pro rata from said collection, as each account benefits alike from the new system." The arrangement provided for partial payments, and these were made by the Collector annually as the installments fell due, with individual County Court

orders covering each. The Collector paid from public funds, and in his settlement took credit.

The method employed was highly irregular; and certainly the Collector could have been stopped by injunction before making the payments. The question now is, May Baker, under authority of Art. 16, Sec. 13, of the Constitution, maintain this suit for restitution?

In actions somewhat similar to the case at bar we have given the constitutional provision an exceedingly liberal construction. *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43; *McCarroll, Commissioner of Revenues,* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977; *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. 2d 485; *Baker* v. *Allen,* 204 Ark. 818, 164 S. W. 2d 1004; *Eddy* v. *Schuman,* 206 Ark. 849, 177 S. W. 2d 918; *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875. In the Baker-Allen decision it was held that the statute of limitation applied to mileage fees collected more than three years before the suit was instituted.

While in his complaint Baker alleged that he was a citizen, resident, and taxpayer *of* Independence County, he testified that he was a taxpayer *in* Independence County. Assuming that what appellant intended to say was that he was a citizen and taxpayer *of* Independence County, residing in Batesville, still the constitutional provision is being subjected to a long, tedious, and circuitous journey if we go the added distance to find by implication the missing allegation that the plaintiff below (who is obviously more interested in punishment than repayment) has shown such a financial interest in the school districts (or in any account over which the County Judge would not have jurisdiction) as to justify judgment against an officer who admittedly is not an intentional default, who co-operated with the State Auditorial Department to procure a workable equipment for the purpose of collecting taxes and accounting, and in obeying a County Court order in circumstances devoid of a purpose to defraud. Limitation was pleaded for the payments made in 1941 and 1942.

Except for the injunctive relief heretofore mentioned, we think there is prima facie a showing through court orders that the school districts, (perhaps in an irregular or informal way) authorized that purchases be made, the idea being to increase income; and while the equipment is not in actual possession of any identified district, it is constructively at the disposal of all of them. They are not complaining, and presumptively have profited. Since appellant has not identified himself as a payer of school taxes in any of the districts, we think that in view of all the circumstances it would be inequitable to permit Baker's complaint to speak for those who may be satisfied, and to impose upon Judge Jeffery the burden of personally paying, at this late date, for public property—the purchase of which appellant might have circumvented by appropriate procedure at a time when obligation, if imposed upon Jeffery, would have been only the initial payment, now barred by limitation. Certainly Baker knew of the transactions when they occurred, or shortly thereafter.

That part of the decree refusing to enjoin the County Judge from collecting his salary from the general revenue and the Treasurer from paying the warrants is reversed. In other respects it is affirmed.

SLOAN *v.* STATE.

4431 197 S. W. 2d 757

Opinion delivered November 25, 1946.

Rehearing denied December 23, 1946.

Roy Gean and *Finis Batchelor,* for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Bill Mondier, Orville Wayne Sloan and Jerry McCabe were jointly charged with having murdered Gerald Bradley. Sloan was granted severance and has appealed from an adverse verdict and judgment that he serve five years in penitentiary. This is the minimum fixed for murder in the second degree, the maximum being twenty-one years. Pope's Digest, Sec. 2979.

Although the motion for a new trial lists thirty-four alleged errors, only two are seriously argued: (a) There was insufficient evidence to support the verdict; (b) incompetent testimony was admitted.

The "Spot" is a place of entertainment where beer is sold. It was managed by T. C. Barker, who with his wife and son were preparing to close at eleven o'clock the night of March 18, 1946. James, Vernon, and Gerald Bradley were Spot patrons, drinking beer, when Sloan, with Mondier and McCabe, came to or near the main door and virtually demanded admittance, and service. They were told by Jack—son of T. C. Barker—that the place was closed, and no more drinks would be sold. When the trio became insistent Jack called his father. The record is not clear regarding immediate conduct of the opposing factions, but T. C. Barker testified that as the Bradley boys started to leave, ". . . one of the fellows outside kicked at one [of the Bradleys] and it looked like a fight started on the sidewalk."

James Bradley testified that during the difficulty he encountered Sloan, McCabe, and Mondier "in the middle of the street." Sloan stabbed James, but the latter did not see a knife. The injured man was cut in the abdomen and as a result had to spend sixty-three days in a hospital. Gerald (who twenty-four hours later died from effect of an abdominal knife wound) was standing within "about" four steps of James when the cutting took place, and the two transactions—that is, the wounding of Gerald and James—occurred "almost simultaneously." Vernon was cut "in the jaw and neck, and behind the ear."

In an effort to show the belligerent state of mind entertained by Sloan, McCabe, and Mondier, proof was offered that soon after the cutting the three, still seeking revelry, went to a restaurant in Van Buren—the "Dinery." When appellant, on cross-examination, was asked what happened there, an objection was interposed. The Court held that the question was not improper. The witness then replied, as shown in the footnote.[1]

Sloan was asked if he, McCabe, and Mondier, were fined "In the Mayor's Court over there for assault and battery," to which the answer was, "Yes, sir."

In response to the defendant's motion for a bill of particulars, the Prosecuting Attorney alleged that Sloan, Mondier, and McCabe provoke a difficulty for the deliberate purpose of assaulting Gerald Bradley and the other two; that, although the fatal stabbing was done by McCabe, Sloan and Mondier were present and engaged in the transaction as part of a common plan. The bill of particulars closed with this sentence: "That the said Orville Wayne Sloan, in assaulting James Bradley, did aid, abet, and assist the said Jerry McCabe in assaulting and killing Gerald Bradley."

[1] "We ordered a sandwich. Some girls were sitting in a booth with a soldier and a sailor. [The soldier and sailor] went back to the rest room and McCabe went over there and was talking with the girls. He had made a few slight remarks the girls did not like when the soldier and sailor came back and asked about it. Somebody said 'not to have any trouble,' and McCabe struck the soldier and they went outside and had a fight."

Initiated Act No. 3, adopted in 1936, (Acts 1937, p. 1384) abolishes the distinction between accessories before the fact, and principals. Pope's Digest, § 3276. It is immaterial, therefore, that the information charged Sloan with murder in the first degree. McCabe, likewise charged, was convicted and sentenced to serve twenty-one years in prison. The fact that James and Gerald Bradley were standing within about four steps of each other when Sloan cut James, and the further testimony given by James that Gerald was stabbed virtually at the same time—this evidence, considered in connection with circumstances attending the hostile conduct of Sloan, McCabe, and Mondier, was sufficient to justify the jury's belief that there was a concerted plan; or, if no particular plan had been formed, then all three assailants simultaneously undertook (each in aid of the others) to inflict punishment irrespective of consequences to those who were the objects of their deadly aggression. The testimony was sufficient.

Was it competent to introduce evidence of what occurred in Van Buren? Appellant, after saying that McCabe struck the soldier, was asked if he (Sloan) took part in the fight. The reply was, "No, sir, I didn't know any trouble occurred." The Prosecuting Attorney then said he was prepared to prove that Sloan, McCabe, and Mondier engaged in an assault at the Dinery shortly after the Bradleys were cut, and that the evidence was intended to sustain contentions that the three men were engaged in a common plan or scheme [of violence] and answers to the questions would show Sloan's mental condition and that of the other two. Although the Court ruled these allegations might be proved, the Prosecuting Attorney confined his questions concerning Sloan's conduct to matters of record: that is, to admissions that he, with the others, had been fined.

While the rule is that acts constituting an offense other than the crime for which an accused is being tried may not be shown if such acts occurred after the chief transaction had been consummated, (unless so closely related as to form a part of the *res gestae*) yet where,

as here, the defendant is being tried as a principal and is being cross-examined, his admissions are competent for the purpose of testing credibility. Appellant did not ask that this limitation be placed upon the evidence, but insisted it was incompetent—which means, of course, that it could not be used for *any* purpose. This being an erroneous view, it cannot be maintained now that appellant suffered prejudice; hence, it is unnecessary to decide whether the separate physical engagements for which fines were assessed came about by reason of a planned objective, or because of a purpose to "take on" all comers.

Affirmed.

VANNDALE SPECIAL SCHOOL DISTRICT No. 6 *v.* FELTNER.

4-8001 197 S. W. 2d 731

Opinion delivered November 25, 1946.

Rehearing denied December 23, 1946.

[redacted]

J. L. Shaver, for appellant.

Giles Dearing, for appellee.

ED. F. MCFADDIN, Justice. This appeal involves a school building and the land on which the building is situated.

The appellant filed suit against appellee in the chancery court, alleging: (1) that in 1914 Mary Lee Mann and her husband executed a deed to School District No. 3 for one acre of ground; (2) that the school building was constructed in 1914 and is still standing; (3) that School District No. 3 was duly and legally consolidated with the appellant district in 1944, appellant thereby becoming the owner of the building and land here involved; (4) that the said schoolhouse has been used as a bus station by the plaintiff ever since the consolidation; and (5) that the defendant unlawfully took possession of the school building and land, and refused to surrender possession to the plaintiff. The prayer of the complaint was for a decree, adjudging plaintiff's title and for possession and for damages. A copy of the deed from Mary Lee Mann to School District No. 3 (attached to the complaint as the plaintiff's muniment of title) stated that the land therein described was conveyed to School District No. 3

"so long as said land is used for school purposes and no longer."

On defendant's motion, the cause was transferred to the circuit court, and defendant there answered: (1) alleging that the appellant district "had completely abandoned said school building" after the consolidation with District No. 3 in 1944; (2) denying that the school building had been used for school purposes since 1943; (3) alleging purchase of the land from the State of Arkansas for delinquent taxes; and (4) claiming also under a deed from T. E. Lines and wife to Feltner in January, 1945.

The cause was tried to a jury, with each party introducing evidence tending to sustain its pleadings. The result was a verdict and consequent judgment in favor of Feltner; and the school district has duly appealed, presenting the points now discussed.

I. *Appellant Claims That It Was Entitled to an Instructed Verdict.* The appellant argues that the school building was not located on the acre of ground described in the Mann deed, but located on an adjoining 40-acre tract; and that the school district acquired title to the actual location by adverse possession rather than by reason of the deed from Mary Lee Mann to School District No. 3. From this, the school district contends that it held title to the actual location by adverse possession, and that there was no reversion, and that the school district could maintain ejectment against Feltner at any time within seven years of Feltner's possession (which began in 1945).

The vice of appellant's argument lies in the fact that the appellant claimed title to the building and land, under and through the deed from Mary Lee Mann to School District No. 3, and could not also claim adversely to that title. Appellant not only attached a copy of the deed to its complaint, but also introduced the deed in evidence as its muniment of title. It is clear that the school building is not located on the acre of ground described in the Mann deed. But the proof shows that the

change of location was agreed to by the parties before the school building was constructed. There was never any prayer for reformation of the deed. If reformation had been sought, then a motion to transfer to equity, if made, might have been sustained. Appellant relied on its deed from Mary Lee Mann, and cannot at the same time claim adversely to its grantor.

The trial court covered this point in instruction No. 2, worded as follows: "You are instructed in this case that it is not material whether the plaintiff district occupied the land in question for school purposes under the deed from Mary Lee Mann or under a verbal agreement between the School Directors and Mary Lee Mann and that in either case the district would have a right to keep and maintain the land in question as long as it was used for school purposes."

The trial court could—and doubtless would—have gone further, had the appellant so requested, and defined what was meant by the expression, "for school purposes." In the recent case of *Rose* v. *Marshall School District, ante,* p. 211, 195 S. W. 2d 49, we discussed that expression. But, even if the court had fully defined the expression, still the testimony was in sharp dispute as to whether the district had ceased to use the building as a bus stop.

II. *The Appellant Argues That the Trial Court Was in Error in Giving Instruction No. Three.* This instruction, given over the general and special objections of the appellant, reads as follows: "You are instructed that if you find by a preponderance of the testimony that the property in question was no longer used for school purposes prior to and at the time the defendant took possession of said property, then you are told that the school district lost its right to said property and your verdict will be for the defendant."

This instruction was erroneous. Even if the appellant district had ceased to use the building for school purposes, still there is nothing in the evidence to show

that Feltner was entitled to the building and land because of such non-user.

Appellee introduced two deeds as his only claim of title. The first of these was a donation deed from the State of Arkansas to appellee for 160 acres of land, which included both the acre of land contained in the Mann deed, and also the ground on which the school building is actually situated. But this State deed cannot support the appellee's claim in this case, because the State deed was based on a forfeiture of the entire 160 acres for the taxes of 1930, with the subsequent donation certificate, occupancy and improvement by appellee. The proof in this case is uncontroverted to the effect that School District No. 3 occupied the ground on which the school building was located continuously from 1914 to 1944. Public schoolhouses and grounds are not subject to state taxation. (§ 13603, Pope's Digest.) So, in 1930, when the alleged tax forfeiture occurred, the school land here involved was not subject to state taxation. The deed from the State to Feltner was dated 1938, and even at that time School District No. 3 was still occupying the land.

The other deed introduced by appellee to support his title was a quitclaim deed from T. E. Lines and wife to appellee, dated January 20, 1945, and containing the same 160 acres of land described in the State deed. The appellee testified that he made no effort to enter on the school land until after he obtained this deed from T. E. Lines and wife. But there is nothing in the record to show that T. E. Lines and wife were the heirs or grantees of Mary Lee Mann, who held the right of reversion to the school land. It will be recalled that she conveyed the property to School District No. 3 "so long as used for school purposes, and no longer." In 26 C. J. S. 483, in discussing conditions subsequent in deeds, the rule is stated: "As a general rule nonperformance of a condition can be taken advantage of only by the grantor or his heirs, or by the grantor and his legal representatives. The benefit of a condition or breach cannot be availed of by a stranger . . . or by a mere naked trespasser."

In 33 Am. Juris., 689, in discussing reversions and remainders, the rule is stated: "A breach of a condition subsequent can be taken advantage of only by the grantor, his heirs, and, some authorities add, his devisees, although, of course, the right can be exercised by devisees only in jurisdictions in which it is devisable. The general rule at common law is well settled that the right of re-entry is not alienable or assignable. No stranger can take advantage of a breach of the condition."

Our own case of *Moore* v. *Sharpe*, 91 Ark. 407, 126 S. W. 341, 23 L. R. A., N. S., 937, discusses the conveyance of the right of re-entry.

The said instruction No. 3 was tantamount to telling the jury that, if the appellant had ceased to use the property for school purposes, then Feltner, or a mere trespasser, could seize possession and hold the same, and thereby raise the question of whether the district had lost its title by non-user. That is the error in the instruction, because so far as the record now before us reflects, Feltner was a mere trespasser. He never showed any title to himself from Mary Lee Mann or her heirs.

To overcome this fault in the instruction, appellee argues that this was a suit in ejectment, and that the appellant district, as the plaintiff, had the burden of recovering on its own title, rather than the weakness of the title of appellee. The general rule in ejectment cases is that the plaintiff must recover on the strength of his own title, but in *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116, we stated:

"While it is a general rule that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's, this rule has no application where the defendant is a mere trespasser invading the actual possession of plaintiff, in which case plaintiff can recover on prior peaceable possession alone. 15 Cyc. 22; *Green* v. *Jordan,* 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711; *Horton* v. *Murden,* 117 Ga. 72, 43 S. E. 786; *Rhule* v. *Seaboard Air Line Ry. Co.,* 102 Va. 343, 43 S. E. 331; Newell on Ejectment, p. 434; War-

velle on Ejectment, § 237; *John Henry Shoe Co.* v. *Williamson,* 64 Ark. 100, 40 S. W. 703; *Price* v. *Greer,* 76 Ark. 426, 88 S. W. 985.

"The rule requiring the plaintiff, in actions of this character, to recover on the strength of his own title, is based upon the presumption that a defendant in possession is rightfully in possession. No such presumption obtains in favor of a mere trespasser."

The above quotation is applicable to the case at bar, because, so far as the record here shows, Feltner was a mere trespasser, since he never showed any title to himself from Mary Lee Mann or her heirs. It is possible that the deed from Lines and wife was from the heirs of Mary Lee Mann, so we think justice is best served by remanding the cause.

For the error in giving instruction No. 3, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ARKANSAS NATIONAL BANK OF HOT SPRINGS, EXECUTOR, *v.* AUGHENBAUGH.

4-7979 197 S. W. 2d 463

Opinion delivered November 25, 1946.

[redacted]

Wootton, Land & Matthews, for appellant.

Leland F. Leatherman and *Scott Wood,* for appellee.

SMITH, J. Mrs. Della B. Singer executed her last will and testament on June 2, 1944, wherein she devised to a trustee her large and valuable estate. She devised her home and its furnishings to her husband, and directed the trustee to pay her husband the sum of $100,000, and also to pay the medical bills of her husband during the remainder of his life. After making bequests totaling many thousands of dollars, she directed that the income from the residuary estate be paid to her husband for the balance of his life. Among other devises was one of $3,000 to Bessie Aughenbaugh, who was referred to as a "devoted, obedient companion and servant to me."

The will was duly probated and Miss Aughenbaugh filed as a claim against the estate two checks payable to her order, given to her by the testatrix. One of these checks, dated September 27, 1944, was for $1,500. The other, dated October 3, 1944, was for $2,500, and on the face of each check was written the words, "In case of death." This claim was disallowed by the trustee, who had also been appointed executor, and does not appear to have been further prosecuted.

There was also filed with the executor a claim reading as follows:

"To:

Amount due under specific agreement made by decedent, Della B. Singer, in consideration of the agreement

of claimant not to leave the decedent and to remain in decedent's home and serve and care for her during the remainder of decedent's life. $4,000."

The probate court allowed this claim after it had been disallowed by the executor, and from that order is this appeal.

Mrs. Singer was an invalid for many years, and during the last twenty years of her life she was constantly attended by Miss Aughenbaugh, who was a practical nurse. Miss Aughenbaugh lived in the home of Mrs. Singer, and attended Mrs. Singer both night and day, being assisted by a professional nurse when Mrs. Singer required that attention. Mrs. Singer died October 11, 1944, and it is said that after the allowance of the claim by the probate court, Mr. Singer, her husband, married Miss Aughenbaugh. There is no competent evidence of this marriage, but that fact, which is not denied, is largely relied upon to discredit Singer's testimony. The case rests largely upon the testimony of Singer, as the claimant is disqualified as a witness under § 5154, Pope's Digest, which provides that ". . . . in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."

Singer testified that his wife told him that Miss Aughenbaugh was about to quit her service for the reason that she could otherwise secure a larger wage, and his wife directed him to offer Miss Aughenbaugh a compensation of $4,000 to continue in service for the remainder of Mrs. Singer's life. He made this offer at the direction, and under the authority of his wife, and the offer was accepted. It is urged that this agreement is unreasonable and improbable inasmuch as Mrs. Singer lived for only a short time thereafter. But she had already lived for many years under the care of Miss Aughenbaugh, and it was not known how much longer the service would be

continued. It is undisputed, however, that it did continue, and that Miss Aughenbaugh remained in service until Mrs. Singer died.

It is argued that Singer's testimony was discredited and should not be believed because it is in conflict with testimony given by him in a suit brought against him by the trustee, to recover $500,000 for the benefit of the estate, in which he testified that Miss Aughenbaugh's salary was $125 per month. The outcome of this suit is not shown. This statement does conflict with the testimony given by Singer at the trial from which is this appeal, but he explained that he did not attend to his wife's business, and that he was not certain what the salary was.

Mrs. Singer lived fifteen days after the date when the contract here sued on was alleged to have been made. After Mrs. Singer's death, Miss Aughenbaugh presented to the bank for payment, the last check given her by Mrs. Singer for services, and she presented at the same time, for payment, the two checks above referred to, totaling $4,000. Importance is attached to the fact that she did not tell the trust officer when she presented the checks for payment that she had the $4,000 contract. This officer was asked: "Was there any statement made to you or information furnished that there was any other additional salary due or owing for compensation to Bessie Aughenbaugh?" And he answered, "No." As a matter of fact there was not, nor is it claimed that there was. Miss Aughenbaugh does not seek to recover $8,000, but only $4,000, and she presented these checks for payment, which, if paid, would have satisfied her contract.

Other circumstances tend in some measure to contradict Mr. Singer. It is argued that the testimony of Mr. Singer that the allowance of this claim would be against his interest, shows his lack of candor, as he was no doubt contemplating marrying the claimant. But even so, the statement is not necessarily false, inasmuch as payment of the claim would reduce the residuary value of the estate, and the will provides that the net income of the

estate "shall be paid to him (Singer) either monthly, semi-annually or quarterly as he desires," for the remainder of his life, the trust to terminate upon his death.

We need not decide whether Miss Aughenbaugh could enforce payment of the checks, as she is not now attempting to do so, but even so the checks strongly, and we think sufficiently, corroborate and sustain the testimony of Singer that his wife agreed to pay Miss Aughenbaugh $4,000 if she would remain in her service until her death, which Miss Aughenbaugh did.

It is insisted that if the claim for wages is allowed, there should be deducted from it the $3,000 devised to Miss Aughenbaugh in the will, but this does not follow, as the legacy to a creditor is not deemed to be in satisfaction of the debt unless such intention clearly appears, especially where the debt was contracted after the date of the will, as occurred here. See § 2140, 69 C. J., "Wills," and cases there cited. At § 2145 of the same article, it is said: "In determining whether or not the testator intended a donation to be in satisfaction of a claim against him, regard may be had to the quantum of the testator's estate and his general intention in disposing of it so that where there is a sufficiency of assets to pay both debts and legacies a legacy will not be deemed to have been intended as a satisfaction."

We conclude the finding of the Chancellor, sitting in probate, is not contrary to a preponderance of the evidence, and the judgment is therefore affirmed.

GRIFFIN SMITH, C. J., dissents.

JOHNSON *v.* BUCKNER.

4-8003 197 S. W. 2d 465

Opinion delivered November 25, 1946.

Rowell, Rowell & Dickey, for appellant.

Hooker & Hooker, for appellee.

McHaney, Justice. The title to lot 19 in block 59, Packingtown Addition to Pine Bluff, Arkansas, is here involved. At the time of her death in 1936, intestate, Lula Cooper, owned said lot. Appellants who are the only heirs at law of Lula Cooper inherited it from her. Said lot was forfeited and sold to the State in 1934 for the 1933 taxes, and was purchased from the State on December 22, 1937, by Pearl Johnson Cobb and a deed from the State was issued to her on said date. Pearl Johnson Cobb was a sister of appellants, Thomas Johnson and Freddie Johnson Jones, who owned said lot by inheritance from their mother, Lula Cooper, as tenants in common, but in 1940, Pearl J. Cobb died intestate and without issue, and only appellants survived her as her heirs at law. The lot again forfeited and was sold to the State in 1938 for the 1937 taxes, and on January 22, 1941, the State sold and conveyed same to appellee Buckner, and thereafter on April 14, 1941, the State confirmed its title thereto by proceeding in the Jefferson Chancery Court.

This action was begun in the chancery court. The complaint alleged that the forfeiture and sale to the State and the deed of the State to Buckner were void because of an alleged 10 cent overcharge of costs included in the amount for which the sale was made and that the notice of sale was not published as required by

law, and it was prayed that the forfeiture and sale to the State and its deed to Buckner be canceled, and all his title be divested out of Buckner and vested in them, and for immediate possession.

On the motion of appellees the cause was transferred to the circuit court where it proceeded as one in ejectment. Appellees answered with a general denial and alleged the matters aforesaid and especially the confirmation decree and the provisions of Act 119 of 1935 on which it was based, as a bar to this action. They also set out a prior judgment in ejectment of the circuit court for the possession of said lot in which appellee Buckner was plaintiff and appellant, Thomas Johnson, was defendant, in bar of the latter's cause of action in this case. Trial before the Court sitting as a jury resulted in a judgment of dismissal of the complaint with costs and in the vesting of the title to said lot in appellees. This appeal followed.

Only one question is argued by appellants for a reversal of this judgment and that is that the forfeiture and sale for the 1937 taxes assessed against this property are void because the land was redeemed from the 1933 forfeiture and the redemption deed from the State was dated December 22, 1937, and was not certified by the State Land Commissioner to the County Clerk until January 6, 1938, too late for the assessor of Jefferson county to assess the lot for the 1937 taxes. It is pointed out that, under § 8618 of Pope's Digest, the Commissioner of State Land is required each year, "at least thirty days prior to the time fixed by law for the annual assessment of personal property," to certify to the County Clerks a list of the lands in the respective counties that the State has sold or otherwise parted with its title to the end that said lands will get back on the tax books. And it is argued that, by § 13683 of the Digest, the assessors are required to assess personal property "annually between the first Monday in January and third Monday in August," and since the certificate of the Commissioner was not filed until January 6, 1938, it was less than thirty days before

the first Monday in January and that no assessment could be made on said lot for the year 1937. We think appellants' contention in this matter is unsound. The last clause in said § 8618 provides: ". . . the assessors shall assess such lands for taxation, and the same shall be taxed, beginning with the year certified by the Commissioner of State Lands—as having been disposed of by the State." It is stipulated that the land was "disposed of by the State" on December 22, 1937, and under the plain and mandatory provision of the statute the assessor was required to assess the lot for 1937 taxes. See *Tedford* v. *Vaulx,* 183 Ark. 240, 25 S. W. 2d 346, where it was held that land purchased from the State became subject to taxation when the State's deed was executed, not when the Commissioner certified same to the County Clerk.

The judgment is correct and is, accordingly, affirmed.

CHRISTY, COMMISSIONER, *v.* SPEER, JUDGE.

4-8125. 197 S. W. 2d 466

Opinion delivered November 25, 1946.

Guy E. Williams, Attorney General, and *Carl Langston,* Assistant Attorney General, for petitioner.

Claude E. Love, C. B. Crumpler, Floyd Stein, S. E. Gilliam, W. L. Jean, T. P. Oliver, Wayne Jewell, Mahony & Yocum, Silas W. Rogers and *J. G. Ragsdale,* for respondent.

ROBINS, J. By petition for writ of certiorari the Commissioner of the State Department of Public Welfare asks us to bring up for review and to quash the following order entered by the respondent, Hon. W. A. Speer, Judge of the Union Probate Court:

"Now on this the 19th day of September, 1946, for the promotion of justice, to avoid confusion in the administration of law and justice and to prevent undue interference with the orderly process of the court, upon the Court's own motion, and being well and sufficiently advised as to the law, the Court doth find and order:

"That § 4, Act 137, Acts of Arkansas, 1935, pertaining to investigation of adoption petitions by the State Juvenile Department, or its authorized agents, be and the same is hereby declared and held to be unconstitutional and void and an undue interference with the orderly process of the Courts and all such investigations by the said State Juvenile Court Department, or its authorized agents are hereby held to be null and void and of no force and effect.

"That the said State Juvenile Court Department, or its authorized agents are hereby ordered to desist and cease from making investigations of any petition and reporting hereon in any adoption petitions now pending, or hereafter filed in this Court.

"That the Probate Clerk of Union county is ordered and directed to discontinue furnishing the said State Juvenile Court Department with copies of said petitions of adoption as provided in said § 4 of said Act 137 of the Acts of 1935."

It is argued by petitioner that the lower court had no right, in the absence of some actual proceeding before the lower court, to enter the order complained of, and further, that the order was erroneous because § 4 of Act

137 of the General Assembly of Arkansas of 1935 (§ 257, Pope's Digest) is not unconstitutional.

While the order is not so designated, it was in effect a rule adopted by the court for the guidance of the clerk, the court's ministerial officer. Even in the absence of statutory authority for so doing, courts have the inherent power to make such rules, not in conflict with the Constitution or any valid statute, as the court may deem necessary for the prompt and efficient handling of matters before it. *Hixon* v. *Weaver,* 9 Ark. 133; 14 Am. Jur. 355.

In this state, courts are not authorized to render declaratory judgments, and they deal only with actual controversies. *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617; *Micklish* v. *Grand Lodge of the Loyal Star,* 162 Ark. 71, 257 S. W. 353. "In general, the courts do not determine speculative and abstract questions of law, . . . ; they are confined in their judicial action to real controversies wherein the legal rights of parties are necessarily involved and can be conclusively determined." 1 Am. Jur. 417.

Hence we do not pass upon the propriety of any rule promulgated by a lower court until some party to litigation deems himself aggrieved by the application of such rule in his case; and, therefore, we may not consider the correctness of the order herein complained of, unless and until, in some proceeding for adoption instituted in the court below, the Welfare Commisisoner or some other party shall make the contention that this order operates to his disadvantage or to the impairment of proper administration of the law. The petition filed herein presents no justiciable controversy and is therefore dismissed and the writ discharged.

Opinion delivered November 25, 1946.

O. H. Hargraves and *Ward & Ward,* for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Jeff Henley, Jr., prosecutes this appeal to reverse a judgment of conviction against him in the circuit court of Lee county, Arkansas, for murder in the first degree for killing his 19-year-old wife, Mabel Henley, on February 23, 1946. A jury fixed his punishment at death.

The defendant and Mabel Williams were married in 1940 and separated two or three times prior to December,

1945, when Mabel, with their three children, left defendant and went to the home of her parents, John Williams and wife. After the last separation, defendant made several visits to the home of his father-in-law in unsuccessful attempts to effect a reconciliation and persuade his wife to live with him.

On Saturday night, February 23, 1946, defendant was in Marianna, Arkansas, where he saw his wife's mother and decided to visit his wife in the John Williams home which was located about 8 miles southwest of Marianna on the highway between that city and the village of Aubrey. He engaged a friend, James Otis, to drive him to the Williams home about 10:30 p. m. When they arrived at the Williams home, Mabel was called to the door by James Otis and, after some discussion between defendant and his wife, she promised to go home with him. On the pretense of getting her coat, she closed and fastened the door from the inside, ran into an adjoining room, and told her 11-year-old brother, Donzell Williams, to get the gun, that defendant was there. Defendant forced the door open and Donzell attempted to shoot defendant with a 12-gauge pump shotgun belonging to John Williams, but the gun "snapped" and did not fire when Donzell pulled the trigger. Donzell Williams testified that there were shells in the magazine, but none in the barrel of the gun, when he attempted to shoot defendant. Defendant took the gun from Donzell and started in quest of Mabel who had fled to the home of a neighbor, Jessie Day, who lived about 200 yards from the Williams home. James Otis left the scene in the meantime and drove his car back to Marianna.

John Williams and his wife returned to their home from Marianna with John Ratcliff and his wife in a truck which Ratcliff was driving. They arrived about midnight and entered the Williams home. After learning what had happened, John Williams sent Ratcliff to the home of Jessie Day in search of Mabel. Defendant had remained in the neighborhood with the shotgun and recognizing Ratcliff, whom he suspected of having an affair with Mabel, followed the truck. Ratcliff parked his truck

in front of the house and informed Jessie Day of his mission. Mabel and Ratcliff started toward the truck. As they approached a wagon bridge which traverses a ditch adjacent to the highway, the defendant stepped from behind the truck and commanded them to halt. Defendant then ordered Mabel to come to him. Mabel commenced crying and proceeded toward defendant to a point about halfway between Ratcliff and defendant when she stopped and said: "This is far enough." Defendant cursed and made a motion as if to strike his wife with the shotgun. Mabel turned and started to run when defendant shot her in the back about the lumbar region at the hips.

After Mabel fell to the ground, she called for her father, and defendant ran to her and admonished her to cease "hollering." Defendant then left the scene and reported the incident to his employer who called the sheriff. Mabel was taken to the home of Jessie Day and a physician was called who testified that the wound severed all blood vessels in Mabel's back and that the size and nature of the wound made it apparent that the shot was fired at short range. Mabel died within a few hours.

At the conclusion of all the testimony, defendant moved to dismiss the charge on the ground that the venue had not been proven. Defendant's first contention for reversal is that the trial court erred in overruling this motion. This contention cannot be sustained. Section 26 of Initiated Act No. 3 of 1936, Acts of Arkansas, 1937, p. 1384, provides: "It shall be presumed upon trial that the offense charged in the indictment was committed within the jurisdiction of the court, and the court may pronounce the proper judgment accordingly, unless the evidence affirmatively shows otherwise."

In the case of *Trotter* v. *State,* 206 Ark. 690, 177 S. W. 2d 173, it was held that § 26, *supra,* creates a legal presumption that a crime charged by information or indictment was committed within the jurisdiction of the court where the accused was tried unless the contrary is shown by the evidence. See, also, *Meador* v. *State,* 201

Ark. 1083, 148 S. W. 2d 653; *Ward* v. *State,* 203 Ark. 1024, 160 S. W. 2d 864. The evidence in the case at bar does not affirmatively show that the crime was committed "otherwise" than in the jurisdiction of the court where defendant was tried. On the contrary, we think the evidence does show affirmatively that the offense charged in the information was committed in Lee county. Several witnesses testified that the home of Jessie Day, where the killing occurred, was located on the state highway between Marianna and the village of Aubrey. We judicially know that the village of Aubrey is in Lee county and an inspection of the maps of the county discloses that any point on the public highway between Marianna and Aubrey is well within the territorial limits of Lee county. *Atwood* v. *State,* 184 Ark. 469, 43 S. W. 2d 70; *Harris* v. *State,* 186 Ark. 10, 52 S. W. 2d 631; *Bender* v. *State,* 202 Ark. 606, 151 S. W. 2d 668. There is, therefore, sufficient proof of venue, which may be shown by a mere preponderance of the evidence, without indulging in the presumption created by § 26 of Initiated Act No. 3, *supra.*

The defendant's second contention for reversal of the judgment is that the evidence is insufficient to support a verdict inflicting the death penalty. There is little, if any, material conflict in the testimony as to events transpiring up to the time the fatal shooting occurred. Defendant testified in his own behalf that he suspected Ratcliff of having an affair with defendant's wife; that when he stopped Mabel and Ratcliff and told his wife to come to him, Ratcliff also advanced toward him, walking behind Mabel, with his hands in his pockets; that Ratcliff told Mabel she did not have to go with defendant and Mabel turned and ran; and that he intended to shoot Ratcliff, but Mabel was in the line of fire between them. Ratcliff denied having any conversation with Mabel as they walked toward the truck and denied that he advanced toward defendant, after he was told to stop.

If the defendant had no intention of killing his wife but intended, as he testified, to shoot Ratcliff, this would

have been no defense unless he would in fact have been justified under the circumstances in killing Ratcliff. A similar question was presented in the case of *Clingham* v. *State,* 207 Ark. 686, 182 S. W. 2d 472, where this court said: "The fact that appellant may have believed that he was firing at Webber, or may not have known that he was firing at an officer, does not excuse or mitigate his offense. Where one, in an attempt to murder, slays by mistake a person other than the intended victim, he is nevertheless guilty of murder. *Ringer* v. *State,* 74 Ark. 262, 85 S. W. 410; *Brooks* v. *State,* 141 Ark. 57, 216 S. W. 705; *Daniels* v. *State,* 182 Ark. 564, 32 S. W. 2d 169; 26 Am. Jur. 179." See, also, Annotation, 18 A. L. R. 917; 40 C. J. S., Homicide, § 18, pp. 864-5; *Gaines* v. *State,* 208 Ark. 293, 186 S. W. 2d 154.

The evidence adduced on behalf of the State was substantial and sufficient to warrant a finding by the jury that defendant shot and killed his wife, and did so without sufficient provocation, with malice aforethought and after deliberation. This evidence was sufficient to sustain the verdict for murder in the first degree.

We have carefully examined the instructions given by the trial court. The matters embraced therein have been approved by this court in many similar cases. No objections were made to the instructions, and the only objections interposed by defendant to the admissibility of testimony were sustained by the trial court.

The right of the jury to fix the punishment at life imprisonment under § 4042 of Pope's Digest, in the event defendant should be found guilty of murder in the first degree, was clearly defined by the trial court. The jury's determination that the higher degree of punishment should be imposed to meet the ends of public justice will not be disturbed.

We find no error, and the judgment is affirmed.

PARAGOULD LAUNDRY & DRY CLEANING COMPANY
v. ROGERS.

4-7995 197 S. W. 2d 567

Opinion delivered November 25, 1946.

Phil Herget and *Kirsch & Cathey,* for appellant.

Denver Dudley and *W. W. Bandy,* for appellee.

SMITH, J. On April 16, 1942, while employed by the appellant laundry company, appellee, Rogers, hereinafter referred to as claimant, stepped on a small box to turn off a ceiling fan. The box tilted and claimant fell, striking the edge of the box in a sitting position. Medical attention revealed that claimant had sustained a fracture of his coccyx or tail bone. Claimant was earn-

ing, at the time of his injury, a wage of $15 per week, with a bonus of $10 per month.

A surgical operation was performed, removing the coccyx. Upon claimant's contention that the operation had not restored him to the condition where he could perform labor similar to that in which he was engaged when injured, he was given the most extensive treatment by a number of doctors of the highest reputation, whose testimony would support the finding that claimant now suffered only from a pathological condition, which would be relieved if he returned to the performance of the ordinary labor of which he was capable.

At his own request, claimant was sent for examination and treatment to the Ochsner Clinic in New Orleans. A member of this clinic reported that claimant's symptoms were so numerous and bizarre that he suspected that claimant was grossly exaggerating his troubles, and witness felt certain that claimant would be able to work if there were no compensation aspect. Had the Commission so found, the testimony of this witness, and that of a number of other doctors, would support that finding, which finding, had it been made, would have warranted the dismissal of the claim. But there was some testimony that the claimant had not fully recovered, and that he was still suffering from a partial disability which affected his earning capacity.

Upon reeiving the reports of the numerous doctors the laundry company suspended disability payments. A report adverse to claimant was made by the Commission's referee, which was reviewed and modified by the Commission. The effect of the Commission's holding was to direct that disability payments be continued, but that claimant should seek employment in industry, gradually increasing the extent of the work performed by him in an attempt to regain his preinjury working capacity. Claimant did not obey this order to resume work. He did seek employment at another laundry, where he was paid a wage of $25 per week, but he quit that employment at the end of two weeks for the reason, stated by him, that

he was unable to do the work, or to perform any other gainful work.

Claimant moved to California, taking his wife and two daughters with him. They secured employment there, in which they are now engaged. He secured employment as manager of an apartment house, at a salary of $15 per month, with allowance of rooms for himself and family, the worth of which was estimated to be approximately $25 per month.

While in California claimant was examined by two physicians whose reports induced the Commission to hear the matter further.

The very voluminous record in this case recites the extended hearings before two referees, and the holdings of the Commission thereon, which we find it unnecessary to recite in detail to reach a decision upon the point presented by this appeal.

John C. Linthicum was the second referee who heard the case. He found that claimant had made no effort to secure employment as directed in the first award of the Commission, and he concludes his report to the Commission as follows: "Having concluded as above, the referee is of the opinion claimant's claim for additional compensation subsequent to August 22, 1944, must be, and the same is hereby denied and dismissed."

From this order the claimant appealed to the full Commission which, on December 14, 1945, after a further hearing, rendered a decision affirming the order of the referee, and in that connection made the following findings of fact. "(1) That Claimant is not now and has not been since August 22, 1944, disabled to such an extent as would prevent him from accepting reasonably light work. (2) That the claimant has evidenced no effort to cooperate with the Commission according to their directions to him, in an effort to rehabilitate himself into industry." Upon these findings of fact the following conclusions of law are announced.

"Upon consideration of all the evidence the Commission finds that these respondents are justified in

discontinuance of compensation payments to this claimant on August 22, 1944, in view of the claimant's refusal to follow the direction of this Commission and attempt to rehabilitate himself by performing such light work as his physical condition would permit and the referee's opinion of December 5, 1944, denying further compensation to this claimant is hereby affirmed in all things. It is so ordered."

This order of the Commission was set aside on the appeal to the Circuit Court, and in the judgment of the court it was recited:

"This court further finds that in said order, judgment or opinion of said Commission the finding is made that claimant is still laboring under some disability, but that compensation is denied because of claimant's failure to seek employment in industry, although its opinion of April 5, 1944, required only that he 'Perform such work as he is physically capable of performing, generally increasing the extent of work performed by him in an attempt to regain his preinjury working capacity.'

"For the reasons aforesaid the court reverses the order, judgment or opinion of the referee, John C. Linthicum, of date November 9, 1944, and also the order, judgment or opinion of the Commission of date December 14, 1945, and remands this cause to the said Commission with directions to proceed to make a definite finding of fact as to the claimant's disability. It is so ordered." From that judgment is this appeal.

For the reversal of the judgment of the circuit court it is insisted that the court erred in finding that the effect of the Commission's opinion was to indicate the existence of some partial disability on the part of the claimant. There was no attempt on the part of the circuit court to modify any findings of fact made by the Commission. On the contrary, the effect of the judgment of the circuit court is that it was error to dismiss the claim entirely, inasmuch as there was apparently a finding of partial disability, and further that if there is partial disability the claim should not be dismissed so long as the disability

continues and the court directed the Commission "to make a definite finding of fact as to the claimant's disability."

This definite finding should be made before the claim is dismissed. In the recent case of *Conatser* v. *Hoskins Truck Service, ante,* p. 141, 194 S. W. 2d 680, we said: " 'Disability,' as defined in the statute, 'means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.' Section 2 (e) of Act 319 of 1939."

Paragraph (g) of § 13 of the Workmen's Compensation Law (Act 319 of the Acts of 1939) provides that: "If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of such refusal, unless, at any time, in the opinion, of the Commission, such refusal is justifiable."

The Commission is authorized under this statute to order the suspension of compensation payments, so long as the Commission's order is being violated, but it does not authorize the Commission to dismiss the claim on that account. If there exists a disability which reduces the claimant's ability to work, he is entitled when and if he complies with the law, to compensation proportionate to this diminution.

The circuit court judgment ordered the Commission to make a definite finding on this question of temporary disability, and we think the opinion in the case of *Long-Bell Lbr. Co.* v. *Mitchell,* 206 Ark. 854, 177 S. W. 2d, 920 warranted that action. In the case cited the Commission made no finding on temporary partial disability, but the award indicated such a disability. We there said: "The finding of fact about temporary partial disability should be definitely made by the Commission." This is the direction of the circuit court judgment in the instant case. When that finding has been made, all payments of compensation will be discontinued, if it is found that there is no temporary disability. On the other hand,

if the finding is made that there is temporary disability, the claim should not be dismissed so long as that disability continues, although disability payments may be discontinued during the period of time the injured claimant refuses employment, suitable to his capacity, offered to or procured for him.

The judgment of the circuit court will, therefore, be affirmed pursuant to which the Commission will make the definite finding which the circuit court judgment requires.

GODARD *v.* GODARD.

4-7998 197 S. W. 2d 554

Opinion delivered November 25, 1946.

John W. Nance, for appellant.

Sullins & Perkins, for appellee.

HOLT, J. January 14, 1935, J. M. Godard died testate. He had been twice married. His first wife had borne him four children, one of whom, Clem, appellee, now 55 years of age, had been an incompetent since childhood. Appellant, Fannie Godard, was his second wife, and to this union were born two children, Albert Ray and Joe Edward Godard, who were minors at the time of the testator's death.

The will provided: "I, J. M. Godard, of Clifty, Madison county, Arkansas, declare the following to be my last will and testament, made this 5th day of May, 1933: I give to each of my children, I. B. Godard, Geretty B. Godard Cook, Lenora A. Godard Bone, Clem Godard, Albert Ray Godard and Joe Edward Godard One Dollar ($1.00) each. Reposing full confidence in the love, affections and respect that my beloved wife Fannie Godard has for me and my children, I give to her all of my real and personal estate, after paying all of my debts and funeral expenses, absolutely to do as she sees fit, except the real property at her death is to go to Albert Ray Godard and Joe Edward Godard, with the understanding that my wife Fannie Godard, Albert Ray Godard and Joe Edward Godard are to see after and support Clem Godard as long as he lives."

At the time of his death, the testator possessed personal property of the value of less than $300 and a homestead of 33 acres, upon which he and his family resided.

Following his death, his widow, Fannie Godard, paid all funeral and medical bills and filed the will for pro-

bate, and thereafter took no further steps toward administering the estate except as noted.

For approximately ten years following the testator's death, Clem continued to live in the home with his stepmother and her two minor children, Albert Ray and Joe Edward, as a member of the family and was supported during this time by them.

Some time in 1943, Albert Ray went into the armed forces and Joe Edward followed him into the service about one year later. After they left the home, their widowed mother was left alone to care for Clem whose mental condition had grown steadily worse and had become so bad that it was dangerous and unsafe for Mrs. Godard to remain alone with him.

About this time the farm homestead of 33 acres was sold to Mitchell Van Hook and wife for a cash consideration of $2,750, and the court below, by consent of all parties hereto, entered a consent decree approving the sale and confirming title in the Van Hooks.

Mrs. Godard took possession of $750 of the proceeds from this sale and deposited the remainder, $2,000, in a bank in Huntsville, Arkansas, where it now remains impounded by court order.

Appellee, Lenora A. Bone, filed the present suit March 10, 1945, in which, as Clem's guardian, she alleged that the homestead property was willed in trust for the benefit of Clem; that under the will appellants are trustees of the estate; that this property is chargeable with Clem's support for the remainder of his life, and prayed accordingly. Appellants interposed, in effect, a general denial.

The trial court found that the $2,750 derived from the sale of the homestead, *supra,* "is subject to such disbursement and adjudication between and among the parties hereto as would have been applied to the lands involved if same had not been sold . . . ; that defendant, Fannie Godard, has received and applied to her own uses $750 of said $2,750; that said $2,750 is subject to

such uses and enjoyment as would have been enjoyed by said Fannie Godard in said real estate in the event same had not been sold; that said $2,750 is subject to such burden as would have rested upon said real estate and the title thereto for the support of plaintiff, Clem Godard, for and during his lifetime . . . ; that the interest of defendant, Fannie Godard, in said $2,750 is $1,191.-54; that interest of plaintiff, Clem Godard, therein is all of the remainder of said amount, being $1,558.46 . . . ; that defendant, Albert Godard, and defendant, Joe Edward Godard, are entitled to such residue or remainder of said $1,558.46, as may exist, if any there be, at the death of plaintiff, Clem Godard . . . ; that by reason of the incompetency of said Clem Godard, that such fund inuring to his benefit should be administered by a trustee," with directions to administer said sum of $1,558.46 for the support of Clem during the remainder of his life or until the fund is exhausted.

This appeal followed.

For reversal, appellants argue: (1) That the essential elements of a trust are lacking in the will, *supra,* that the essentials of a precatory or implied trust do not appear. (2) That "appellee's (Clem's) equity, if any he had in the property, is exhausted, . . . if proper credit is allowed to appellants for the ten years support previously furnished" Clem. (3) That the court failed to consider Mrs. Godard's homestead right in the 33 acre farm property, and (4) that Mrs. Godard had the right, under the will, to sell the homestead and reinvest the proceeds in a home near her brother and sister in Rogers, and quoting from appellants' brief: "The only obligation imposed upon them, if any at all, is to provide support to Clem. Therefore, we insist that the Court erred in its judgment in taking the proceeds of the sale of the farm from the possession of appellants."

(1)

At the outset, it becomes necessary to construe the language used by the testator in the will, *supra,* to arrive at his intention, and this we must do as of the date of its

execution. In *Webb* v. *Webb,* 111 Ark. 54, 163 S. W. 1167, this court said: "As to the effect and operation of a will, as a general rule, in the absence of language showing a contrary intention, it speaks from the death of the testator. But when the purpose is to ascertain what the intention of the testator was from the construction of the language used by him in the will, then the will should be construed as of the date of its execution," and in *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20, this court, through Mr. Justice HART, again announced the general rule of construction and interpretation of wills in this language: "The primary rule of construction in the interpretation of a will is to accertain the intention of the testator, according to the meaning of the words he has used, deduced from a consideration of the whole will and a comparison of its various clauses in the light of the situation and circumstances which surrounded the testator when the instrument was executed. *Bloom* v. *Strauss,* 73 Ark. 56, 84 S. W. 511; and *Colton* v. *Colton,* 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 138.

"No hard and fast rule can be laid down to determine when precatory words will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument. Whether precatory words impose an imperative obligation on legatees, or are but the expression of a hope or recommendation, the carrying out of which is left to the discretion of such legatees, must now, according to the weight of authority, be determined by the language actually used, the context, and the consideration of the will as a whole."

We think it clear by the language used that the testator intended at the time he wrote the will, *supra,* that his widow, Fannie Godard, should have a life estate in the property here involved, with the remainder at her death to his two sons, Albert Ray and Joe Edward, but that when he made the further provision that this property should go to his wife and two sons "with the understanding that my wife, Fannie Godard, Albert Ray Godard and Joe Edward Godard are to see after and support

Clem Godard as long as he lives," he used precatory words, creating a trust, imposing a burden on this property for Clem's benefit and protection during his life, and, therefore, that they became trustees for this purpose. It seems to us that it would be difficult to reach any other interpretation or conclusion from the above language which the testator used in the circumstances presented by this record.

All agree that at the time the will was written, and until the testator's death, Clem was incompetent, had been since infancy, and had had the care and protection of a good father.

No one knew Clem's needs better than his own father and it occurs to us that this father's intention to provide after his death, for a continuation of the protection he had so long given to his unfortunate son, whom he knew, in all probability, must stumble through life with a crippled mind, was clearly and unmistakably expressed in precatory words creating the trust charging the property for this purpose.

The principles of law announced in the very early case of *Cockrill* v. *Armstrong,* 31 Ark. 580, we think, apply with equal force here. There, the will provided: "I hereby bequeath and devise all of my estate, real and personal, including all my effects of every description whatever, subject to the limitations herein set forth, to my sons James Trooper Armstrong, David I. Armstrong and Frank Will. Armstrong, whom I constitute and appoint as my sole executors." The testator also left three daughters whom he mentioned in the will, but to whom he gave nothing, and in the third paragraph of the will appears this language: "Having full confidence in my sons aforesaid, and in their disposition to deal justly and liberally, I leave to them to make proper and suitable provision for their sisters, Susan, Margaret and Nancy."

This court, in construing the meaning of the words in the third paragraph, *supra,* held (headnote 4): "That it was the intention of the testator to charge the estate

in the hands of the sons with the maintenance and suitable provision for the daughters," and in the body of the opinion said: "It is not necessary to use the word trust, or to direct property to be held in trust. But if, from the language used, in view of the whole disposition of the estate, an intent and purpose may be reached which implies a trust, a trust will be implied. Perry says: 'Implied trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction, and the words used, imply or infer that it was the intention of the parties to create a trust. Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used, as to the intention of the parties, the intention will be executed, through the medium of the trust.' "

We consider the other three points together. The great preponderance, if not the uncontradicted evidence, shows that Mrs. Godard elected to claim, and did take or claim, under the will. She not only filed the will for probate, but proceeded to act under its provisions for approximately ten years thereafter without complaint. She testified: "Q. You took charge of all the other property—that is what the will said? A. Yes, sir. Q. In other words, you were trying to carry out the will—a part of that was to keep up Clem—you and the boys were trying to carry it out? A. Yes, sir. Q. I believe you got $2,750 for the place—$2,000 in the bank and you have the other $750? A. Yes, sir, I got it."

Having so elected, Mrs. Godard is bound by its provisions which, as we have indicated, gave her a life estate in the 33 acre tract of land, and since by agreement of the parties and the court's approval, this land has been sold and converted into cash in the amount of $2,750, she would be entitled, as the trial court found, to a life estate in the proceeds of this sale, which when reduced to its present value, in accordance with the rule announced by this court in the recent case of *Dowell* v. *Dowell,* 209 Ark. 175, 189 S. W. 2d 797, amounted to $1,191.54.

Under the terms of the will, Albert Ray and Joe Edward Godard were to receive no interest in the land until their mother's death, and before and after the death of Fannie Godard, a burden was imposed upon this real estate for the care of Clem during his lifetime. The finding of the trial court that the interest of Clem Godard in the proceeds from the sale of the land amounted to $1,558.46 after deducting the value of Mrs. Godard's life estate, *supra*, and that Albert Ray and Joe Edward Godard were entitled to whatever might remain of the $1,558.46 allotted to Clem at his death, was correct.

Appellants' contention that whatever equity Clem might have had in the property had been exhausted is untenable for the reason that the will, having created a trust and thereby imposed a charge on the property for Clem's support, that trust and charge are continuous and remain so long as there is any property out of which Clem's support may be maintained.

On the whole case, we find no error, and accordingly. the decree is in all things affirmed.

GOWERS *v.* CITY OF VAN BUREN.

4433 197 S. W. 2d 741

Opinion delivered December 2, 1946.

Howell & Howell, for appellant.

Clyman E. Izard, for appellee.

HOLT, J. Henry Gowers, appellant, was charged with having violated an ordinance of the City of Van Buren by erecting or placing a fence across a street in said city. There was a trial to a jury and at the conclusion of all of the testimony introduced by the parties, the court instructed the jury to return a verdict of guilty, whereupon the jury returned a verdict of guilty and imposed a fine of $5. This appeal followed.

For reversal, appellant says: "The first question to be settled is whether or not the city had authority

to exercise control over the land described as Dunlap Street. In this connection, we admit that during the year 1910 the then property owners dedicated a portion of the land in question to the City of Van Buren and the County Court, after hearing the property owners' petition, made an order to the effect that said lands may be incorporated in the City of Van Buren, but to this good day the city has neglected and failed to accept the said dedication of the property in question in the manner provided by law."

He relies primarily on § 9499 of Pope's Digest which provides: "If no such notice shall be given within thirty days from the making of the order of annexation by the county court, the proceeding before said court shall in all things be confirmed. Provided, the city or town council shall, by ordinance or resolution, accept said territory. If the council accepts the same, two copies of the entire proceedings and plats shall be made out by the county clerk, and, by him duly certified, shall forward one to the city or town council, and the other to the Secretary of State, who shall file and preserve the same."

As we read the record, the material facts in this case appear to be undisputed. Appellant admitted that Dunlap Street, involved here, was included in the annexation order of the county court in 1910, but his argument is that the trial court was without jurisdiction because the City of Van Buren had never accepted this territory by ordinance or resolution, as required by § 9499, *supra*. He admitted that he built the fence that obstructed the street in question.

Appellee, City, admits that it has "been unable to find any ordinance or resolution of the city accepting this annexation." The record reflects, however, that a copy of the proceedings and orders of the county court relating to the annexation of the property involved here, including plat and map of same, was duly filed with the Secretary of State.

We take judicial notice of these records on file in the office of Secretary of State. We said in *Riggs* v.

Brock, 208 Ark. 1050, 189 S. W. 2d 367, "We take judicial cognizance of those records required by law to be maintained in the office of the Secretary of State."

Upon our own investigation, we find that the final order of the County Court, relating to the annexation proceedings here involved, does not appear in the record before us. That order contains, among others, the following provision: "And it further appearing to the court that the City Council of the said City of Van Buren, Arkansas, has duly accepted said territory by proper resolution as a part of the incorporated city of Van Buren, and annexed the same thereto, extending its limits to correspond with those described above. It is therefore considered, ordered and adjudged by the Court, that the order of annexation heretofore made of said territory to the City of Van Buren, and all proceedings had in relation thereto, are in all things ratified and confirmed."

This order of the county court, a court of record, wherein the finding was made that "Van Buren, Arkansas, has duly accepted said territory by proper resolution as a part of the incorporated city of Van Buren, and annexed the same thereto," is *prima facie* proof of the city's acceptance by resolution of the annexation of the property involved here.

The facts further disclose that taxes have been assessed and collected by the city against property in the addition involved and lots have been bought and sold in accordance with the plat or map, *supra,* and the City has improved streets in this addition. We hold, therefore, that annexation of the property involved here to the City of Van Buren has been properly established by undisputed testimony.

Appellant next argues that the proof shows that Dunlap Street, the one involved here, even though within the annexed territory and duly platted on the map, was not subject to the control of the city for the reason that it had never been opened up, used and maintained as a street.

We think this contention untenable for the reason that the facts disclose, as indicated, that the lots were sold in this territory in accordance with the recorded plat thereof and streets improved and used by the city. While the city had not opened and used, the particular street here involved as a street, any delay in this regard did not affect its right to assert control and open it as necessities or resources demanded.

In *Paragould* v. *Lawson,* 88 Ark. 478, 115 S. W. 379, this court said: "The equitable doctrine of laches can not be successfully invoked to defeat the right of the city to open the street which was dedicated to that use. . . . Nor is the city estopped, on account of the inaction of its officers for a long period of time, to proceed to open the street. The city had no power to vacate the street (*Texarkana* v. *Leach,* 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68), and it could not do indirectly through mere inaction on the part of its officers that which it was without power to do directly. *Beebe* v. *Little Rock,* 68 Ark. 39, 56 S. W. 69. The owners of lots abutting on the platted street had notice of the dedication, and are presumed to have had knowledge of the city's legal right to proceed in its own time to open the street. *Brewer* v. *Pine Bluff, supra,* (80 Ark. 489, 97 S. W. 1034). They could, therefore, build up no right to continued occupancy of the dedicated strip on account of delay in opening the street to public use," and in *Little Rock* v. *Wright,* 58 Ark. 142, 23 S. W. 876, it is said: "The city had the right to postpone the removal of the obstructions, and the opening of the streets, until such time as its resources permitted, and the public necessities demanded."

"Where lots have been sold with reference to the plat, no formal acceptance by the city or town is necessary, as by that act the dedication becomes irrevocable, and the municipality may accept at any time and assume control over the streets and alleys," *Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541. See, also, *State ex rel. Latta* v. *Marianna,* 183 Ark. 927, 39 S. W. 2d 301.

Finally, appellant "suggests" that the trial court erred in "withdrawing the case from the jury's consideration and instructing it to find for the plaintiff." We think this contention without merit for the reason that this is a misdemeanor case and, as indicated, the material facts are undisputed and since the punishment for a violation of the ordinance in question as fixed by it is "in any sum not less than $5 nor more than $25," with no provision for a jail sentence, the court had the power to instruct the jury to return a verdict of guilty and to assess the amount of the fine.

We said in *Collins* v. *State,* 183 Ark. 425, 36 S. W. 2d 75 that "In misdeameanor cases, where the punishment is by fine only, the circuit judge would have the power to direct a verdict of guilty where the facts were undisputed and where guilt from all the evidence was the only inference that could be drawn. But where the punishment may be imprisonment or where the law provides that it may be fine or imprisonment, the trial judge has no power to direct a verdict." (Citing many cases).

Finding no error, the judgment is affirmed.

TOLLETT. *v.* KNOD.

4-8132 197 S. W. 2d 744

Opinion delivered December 2, 1946.

Byron Goodson, for appellant.

F. B. Clement, for appellee.

Ed. F. McFaddin, Justice. This appeal challenges a circuit court judgment approving a county court order which called a local option election in Sevier county, Arkansas, under the provisions of Initiated Act No. 1 of 1942 (Acts 1943, p. 998). This act has been before this court in the following cases: *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884; *Yarbrough* v. *Beardon,* 206 Ark. 553, 177 S. W. 2d 38; *Van Gundy* v. *Caudle,* 206 Ark. 781, 177 S. W. 2d 740; *Lienhart* v. *Bruton,* 207 Ark. 536, 181 S. W. 2d 468; *Mondier* v. *Medlock,* 207 Ark. 790, 182 S. W. 2d 869; *Scaramuzza* v. *McLeod,* 207 Ark. 855, 183 S. W. 2d 55; *Winfrey* v. *Smith,* 209 Ark. 63, 189 S. W. 2d 615;

Evans v. *Hunter,* 209 Ark. 234, 189 S. W. 2d 913; *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713; *Shay* v. *Welch,* 209 Ark. 519, 191 S. W. 2d 253; *Samuels* v. *Robins,* 209 Ark. 614, 192 S. W. 2d 109; *Shoop* v. *State,* 209 Ark. 498, 192 S. W. 2d 122.

In the case at bar, on September 16, 1946, the appellees (sometimes herein referred to as "petitioners") filed in the Sevier County Court a petition, purporting to contain more than 15 per cent of the qualified electors in said county, and praying that a county-wide local option election be called as provided by said Initiated Act No. 1. After notice and appearance of remonstrants (appellants here) and hearing, the county court granted the petition, and called the election (which seems to have been postponed pending the outcome of this appeal). The remonstrants appealed to the circuit court, and the cause was tried there *de novo,* beginning on October 12, 1946, and concluding on October 19th.

The petition of the appellees consisted of 41 separate divisions or parts, each numbered for identification, but altogether making one petition. We shall refer to these parts as "divisions." The circuit court found: that there were 2,875 valid poll tax receipts issued as shown by the records of the county; that 15 per cent. of that number was 432; that the petition contained 868 valid signatures; and on these findings, the circuit court held the petition to be sufficient, and affirmed the county court order calling the election.

From an unavailing motion for new trial, the remonstrants have appealed to this court, and present here these seven contentions as alleged reversible errors:

1. The circuit court allowed the appellees to present additional testimony after they had rested their case.

2. The circuit court refused appellants' motion for continuance.

3. Nine divisions of the petition (which nine contained a total of 231 names) were held by the circuit

court to be sufficiently verified by the canvasser, even though appellants claimed otherwise.

4. Five divisions of the petition (which five contained a total of 155 names) were held by the circuit court to be valid, even though no legal voting precinct appeared opposite each name.

5. Three divisions of the petition (which three contained a total of 41 names) were held by the circuit court to be valid, even though these three divisions were filed after the giving of the statutory notice for hearing in the county court.

6. Seven divisions of the petition (which seven contained a total of 145 names) were held by the circuit court to be valid, even though no canvasser personally appeared in the circuit court to testify as to the circulation and signing of the divisions.

7. If all of appellants' said contentions, numbered three to six, be sustained, then the remaining signatures unchallenged are less than the 15 per cent. required by law.

We have listed all of appellants' contentions, but we find it necessary on this appeal to consider only contentions 1, 2, 3 and 7, as above listed.

Appellants' Contention No. 1

The hearing in the circuit court began on October 12th. On that day the appellees introduced the 41 divisions of the petition, and the count as to the total number of signatures on the petition, and the poll tax records showing the total number of legal voters of the county. Thereupon the appellees rested. Then the remonstrants, after an unavailing motion to dismiss, began their attacks on the various divisions of the petition, and on the poll tax records, and on the signatures and qualifications of some of the individual signers. When the remonstrants rested, the record shows the following to have occurred:

"At this time, the Court stated that he would check the signers of the petitions against the poll tax records

that had been offered in evidence to determine the number of qualified electors signing the petition; that it would take several days for the Court to complete that investigation, but that he would decide the case and render judgment on the 19th day of October, 1946, to which date this cause was continued.

"On this the 19th day of October, 1946, the Court being in session and both parties being present in court, the petitioners asked permission to introduce further testimony in support of their petition, which the Court granted over the objection of respondents, . . ."

It is thus clear from the record that on October 19th, when the court reconvened, the appellees asked—and received—permission to reopen the case and introduce additional testimony. This request was made and granted before the circuit court had announced any decision in the case. The appellants contend that the circuit court committed fatal and reversible error in thus allowing the appellees to introduce additional evidence on October 19th. We hold that the trial court acted within its discretion in reopening the case. See *Turner* v. *Tapscott,* 30 Ark. 312; *Evans* v. *Rudy,* 34 Ark. 383; *L. R. & F. S. R. Co.* v. *Finley,* 37 Ark. 562; *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79, 146 S. W. 130; *National Life & Accident Co.* v. *Alexander,* 193 Ark. 185, 98 S. W. 2d 316. In 53 Am. Juris. 109 there are these statements apropos the situation here:

". . . it is within the sound discretion of the trial court in the furtherance of the interests of justice after the parties have rested to permit either party to reopen a case, for the purpose of receiving further evidence. . . . An appellate court will interfere only where there has been a clear abuse of discretion. Even where a case tried before the court has been continued to the next term after the evidence has been closed, the court has been held entitled to receive evidence at the next term to supply the deficiency."

There is no showing that the trial court abused its discretion in the case at bar; so appellants' contention No. 1 is denied.

Appellants' Contention No. 2

When the circuit court granted the appellees' request for permission to introduce additional testimony (as just discussed above), the appellants not only objected, but immediately—and before such evidence was introduced—asked for a continuance on the grounds of surprise. The court overruled the motion for continuance. The petitioners then had 19 of the canvassers testify that each such canvasser had circulated the division or divisions of the petition sworn to by such canvasser; and that the signing had been in the presence of the canvasser, and that the signer was the holder of a valid poll tax receipt. See *Winfrey* v. *Smith, infra.* Then several witnesses testified as to the identity of certain signers: for instance, as where one lady signed her name as "Mrs. J. E. Mize," and it was shown that she was the same person as "Mrs. Stella Mize," to whom a poll tax receipt had been issued. There were less than 20 efforts at such identification. Then the appellees rested; and appellants proceeded with the trial, and offered witnesses, and never renewed their motion. Even if the motion had been renewed, there is no showing that the appellants were surprised. The calling of the canvassers and the proof of identity of signers could not have been an angle of the case in which the respondents could have been surprised. Under the issues stated, the trial court did not abuse its discretion in denying the motion for continuance. In *Banks* v. *State,* 185 Ark. 539, 48 S. W. 2d 847, 82 A. L. R. 1051, Chief Justice HART cited many cases to sustain this statement:

"The granting or refusing of continuance, is within the sound legal discretion of the (trial) court, and this court will not interfere where there has been no abuse of that discretion."

Appellants' Contention No. 3

Nine divisions or parts of the petition (being divisions numbered 8, 19, 24, 26, 34, 39, 45 and 59) contained a total of 231 names. Appellants claim that each of these nine divisions is fatally defective, because of improper

verification by the canvasser. In discussing this contention, we are not now deciding that the petition under Initiated Act No. 1 of 1942 has to be verified as is required for the usual initiative and referendum petitions. Written verification by the canvasser is not the only way of establishing the fact of signing. See *Winfrey* v. *Smith, infra.* Each of the nine divisions was circulated by a canvasser; and in each division, following the signatures of the purported poll tax holders, there is a page on which the canvasser made an affidavit. Division No. 45, purporting to be signed by ten voters, is typical; so, we copy in full the affidavit of division 45:

"State of Arkansas
"County of Sevier

"I, of being first duly sworn, state that

1. Mrs. A. L. Brown
2. A. L. Brown
3. J. W. Cherry
4. T. Lawson
5. C. E. Hendrix
6. Mrs. C. E. Hendrix
7. Mr. E. P. Casteel
8. Lula M. Cason
9. Grady Cason
10. H. B. Crews

signed the foregoing petition, and each of them signed his or her name thereto in my presence. I believe that each one has stated his or her name, residence, postoffice address and voting precinct correctly, and that each of them is a legal voter of Sevier county, Arkansas.

"Subscribed and sworn to before me this 10th day of September, 1946.

"Lilla S. Hendrix, Russell Armer
Notary Public Canvasser.

"SEAL"

This particular affidavit was executed before a notary public, but one of the others attacked in the case at bar was executed before a justice of the peace, who did not affix any seal.

A. Appellants say that the failure of the justice of the peace to affix a seal rendered the entire affidavit a nullity; and they cite § 2 of Act 182 of 1939, which provides:

"The seal, herein provided for justices, shall be affixed to each acknowledgment to any and every instrument for the conveyance of land or an estate therein, which the justice is by law authorized to execute or sign."

Assuming—but not deciding—that Act 182 of 1939 is constitutional, still we point out that it cannot benefit the appellants here, because the act only requires the seal to be affixed to a conveyance affecting land, and the affidavit here is not such a conveyance.

B. The appellants say that the name and address of the canvasser does not appear in the affidavit in the blanks of the first line preceding the words "first duly sworn . . ." It is evident that the canvasser failed to insert his name and address; but the affidavit is fully complete, even with the name and address omitted from the designated place. Furthermore, what we say in paragraph (C) below will apply likewise to this point.

C. Appellants contend that the canvasser signed in the wrong place: that is, he should have signed *before* the line beginning "subscribed and sworn . . ." rather than on the line after the quoted words. This contention has given us serious concern in view of § 5215, Pope's Digest, which says:

"Every affidavit shall be subscribed by the affiant, and the certificate of the officer before whom it is made shall be written separately, *following the signature of the affiant.*" (Italics our own.)

But we have reached the conclusion that, even if the statute is mandatory instead of directory, and even if

this statute applies to a case like this, and even if verification of the petition under Initiated Act No. 1 of 1942 is required—none of which contentions we decide—nevertheless, only 76 of the 231 names should be taken from the petition on this objection. This result is reached here because in *Winfrey* v. *Smith,* 209 Ark. 63, 189 S. W. 2d 615, we held that the canvasser could verify the petition in open court. Such verification in open court was made in the case at bar by the canvassers who circulated six of the nine divisions here challenged, and these six divisions (being all the nine challenged except 19, 23 and 59) contained a total of 155 names, which would remain valid even if appellants' third contention was good against the remaining 76 names. The effect of this holding is to make 155 names good against appellants' challenge, and such result makes it unnecessary for us to consider appellants' fourth, fifth and sixth contentions.

Appellants' Contention No. 7

This deals with the arithmetic in the case; and to dispose of appellants' entire contention, we list the figures as the appellants claim the circuit court should have found and decided. These figures do not agree with those of the circuit court, but they do reflect appellants' argument. Say the appellants:

"It is shown by the record that a total of 3,109 persons have paid their poll taxes in Sevier county for the year 1945. 15 per cent. of that number would be a total of 466. A total of 1,016 names appear on the petition and the various divisions thereof. Of that number it is submitted that on the record made by the respondents, without taking into consideration the additional number stricken by the court, 539 names have not been properly proven and verified. Deducting that number from the number originally appearing, there remains a total of 477. Of that number, a total of 22 names, not included among the 539 persons otherwise challenged by the respondents in this brief, were stricken by the court. . . . Thus it is clear that 15 per cent. of the qualified electors of Sevier county did not sign and submit the petition. . . ."

In other words, here is the appellants' arithmetic:

Total number of names on appellees' petition	1,016
Total number of names that would be removed if appellants were correct in their contentions 3, 4, 5 and 6	539
Total number of names remaining	477
Less names actually removed by the court	22
Final remainder	455
Necessary to have required 15 per cent	466
Appellees are minus	11

Now, when we hold—as we did in disposing of appellants' third contention—that 155 of the challenged names were good, such holding changes the numerical result of the above tabulation from a minus eleven to a plus 144 for appellees. This results in an affirmance of the judgment of the circuit court without considering appellants' contentions 4, 5 and 6.

It is made to appear to this court that there is a good cause for an immediate mandate in this case (see § 2777, Pope's Digest), so it is ordered issued.

Affirmed, and immediate mandate ordered issued.

BYLER *v.* STATE.

4418 197 S. W. 2d 748

Opinion delivered December 2, 1946.

R. W. Tucker, for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

SMITH, J. Appellant was tried under an indictment charging him with the crime of murder in the first degree, alleged to have been committed by killing Lawrence Harber, who was the sheriff of Izard county, where both appellant and deceased lived. He was found guilty of the crime charged, and the death sentence was pronounced upon the verdict of the jury from which is this appeal.

Appellant discovered, after the trial, that the presiding judge was related within the fourth degree of affinity to the deceased, who was his wife's second cousin. There was no lack of diligence on appellant's part in making the discovery. If appellant had been aware of this fact before his trial, he could not thereafter raise the question, as the law would not allow one to speculate on the outcome of the trial, and thereafter take advantage of a fact known to, but not raised by him until after an adverse verdict had been returned. *Morrow* v. *Watts,* 80 Ark. 57, 95 S. W. 988.

Affidavits were filed in support of this allegation in the motion for a new trial, the truth of which was promptly conceded by the presiding judge when the question was raised. The judge was asked to recuse

himself from hearing the motion for a new trial, which he declined to do for the reason stated by him that a new judge would not understand the many assignments of error contained in the motion. The high character of the judge is such that his explanation of his failure to recuse himself after having presided at the trial without objection, is fully credited. It was to the following effect: His wife has seven brothers, and many relatives with whom he had but little personal contact. He never thought about the deceased sheriff being a relative of his wife, as they had no social relations and the deceased had not voted for him when he was elected to office. It may be said also that the judge presided not only with ability, but with absolute impartiality.

It may be asked therefore, what difference it makes that this relationship existed between the presiding judge and the sheriff? The answer is, " 'Twill be recorded for a precedent and many an error by the same example will rush into the state. It cannot be."

Section 20 of Art. VII of the Constitution provides: "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court."

Section 2711 of Pope's Digest provides: "No judge of the circuit court, judge of the court of probate or justice of the peace shall sit on the determination of any cause or proceeding in which he is interested or related to either party within the fourth degree of consanguinity or affinity, or shall have been of counsel, without consent of parties."

We do not ordinarily think of a second cousin of one's wife as being closely related, and we might easily overlook the fact that any relationship existed in such case, as did the judge in the instant case, yet it is a relationship within a degree prohibited by the Constitution, and the statutes, and the prohibition is as clear as would

be the case of father and son. In other words, the degree of the relationship is immaterial, if within the fourth degree.

It was said in the case of *N. A. & W. R. R. Co.* v *Cole,* 71 Ark. 38, 70 S. W. 312, that: "Affinity is the tie which arises from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband."

The case of *Pemiscot Land & Cooperage Co.* v. *Davis,* 147 Mo. App. 194, 126 S. W. 218, involved the competency of a juror who was a second cousin to the wife of one of the defendants in the case. The Supreme Court of Missouri held in the case cited: "That brought him within the degree of affinity, though not of consanguinity, prescribed by the statute."

In Vol. 16 of Standard Encyclopedia of Procedure on page 661, it is said: "Where the judge is related to the person upon whom the crime is charged to have been committed by the defendant, he is disqualified, though there are cases to the contrary, on the ground that such person is not a party to the action."

Two cases are cited in the notes to this text as holding contrary to the text. One of these, *Ingraham* v. *State,* 82 Neb. 553, 118 N. W. 320, held merely that the disqualification of a justice who conducted a preliminary or examining trial, was related to the prosecuting witness within the fourth degree of consanguinity would not abate the prosecution in the district court, which holding is clearly correct and is not an exception to the rule stated in the text from which we have quoted.

But the other case, that of *Newman* v. *State,* 49 Ala. 9, is an exception to the rule. That case was a prosecution for the alleged crime of burglary, and the presiding judge was connected by marriage with the owner of the building charged to have been broken into and entered. The objection to the competency of the presiding judge was disposed of in a single paragraph reading as follows: "The objection made to the competency of the presiding judge was properly overruled. He was not

interested in the cause, nor related to either of the parties. Revised Code, § 635. His relation to the prosecutor did not affect his competency." There was no other discussion of the subject.

But a note to the text above quoted cites a Texas case which does sustain the rule there stated. That is the case of *January* v. *State,* 36 Tex. Cr. Rep. 488, 38 S. W. 179. The case was a prosecution for the malicious killing of a hog, the property of a brother of the presiding judge. After quoting a section of the Constitution of the State of Texas, substantially the same as § 20, Art. VII of our Constitution, and a statute of that state, similar to our § 2711, Pope's Digest, the Court of Criminal Appeals of Texas said: "The statute in our opinion disqualifies the judge, if he be the injured party, or if he be related by consanguinity or affinity within the third degree to the injured party. The proof shows beyond question that the injured party was the brother of the judge who tried the case, and it was not competent for him to entertain jurisdiction of and try said case. When W. E. Thitton (the owner of the hog) testified, the honorable judge knew that he was his brother; and when the witness swore that he was his brother, this settled the question; and the judge of his own motion should have recused himself to try said case." Our case of *Johnson* v. *State,* 87 Ark. 45, 112 S. W. 743, 18 L. R. A., N. S., 619, 15 Ann. Cas. 531, is indicative of the broad construction which should be given the word "party" as used in Art. VII, § 20, of our Constitution.

We think the Texas case is more consonant with the orderly and impartial administration of the law. If under the view of the Alabama court it be argued that the deceased sheriff cannot be a party to a prosecution for his murder, it may be answered that his estate may be augmented by a successful suit for damages for wrongfully killing him and the repercussions of a verdict finding the killer guilty of murder might have an effect upon a suit of that character, although a different judge presided at that trial, as would necessarily be the case.

Notwithstanding the fact that the trial judge acted in the utmost good faith, we are unwilling to establish the precedent of permitting a disqualified judge to preside, who makes no disclosure of his disqualification. Of course, as has been said, the disqualification may be waived, but it is not waived by one who proceeds to trial in ignorance of the fact.

It may be unfortunate that the case will have to be retried, but we think it better that a single case should be retried than to approve an improper precedent for the trial of future cases.

The judgment will therefore be reversed, and the cause remanded for a new trial.

ROBINS, J., dissenting. I cannot agree that justice requires the granting of a new trial to appellant.

The judge who presided over the trial in the lower court was not related to any party to the action nor was he interested in the matter so as to be disqualified. *Newman* v. *State,* 49 Ala. 9; *Ingraham* v. *State,* 82 Neb. 553, 118 N. W. 320.

An examination of the record discloses that the trial judge scrupulously safeguarded every right of the accused and saw to it that he was given a fair and impartial trial.

As to the merits of the case, it may properly be said that the admissions of appellant on the witness stand established his guilt. Appellant admitted that he knew he was being arrested by the sheriff of his county, and, instead of submitting to the arrest, as the law says he should do, appellant, according to his own testimony, resisted arrest, armed himself and slew the arresting officer. While appellant says sheriff Harber was aiming his gun at appellant when appellant fired two loads from a shotgun into the body of the sheriff, testimony on the part of the state was to the effect that the sheriff was unarmed and was holding up his hands begging appellant not to shoot him when appellant fired the lethal shots. But, if we accept appellant's own version of the matter,

he was guilty of murder. No citizen may, under the law, resist arrest, thereby bringing on a situation such as appellant says confronted him, and then claim that he killed the arresting officer in self-defense. Under our laws it is a misdemeanor to resist arrest. Section 3265, Pope's Digest. It is a felony for one to aim a weapon at an officer while resisting arrest. Section 3267, Pope's Digest.

So, according to appellant's own version of the matter, appellant was already engaged in the commission of a misdemeanor and also engaged in the commission of a felony before he took the life of the sheriff. The right of self-defense should never attach under such circumstances.

In the case of *Appleton* v. *State*, 61 Ark. 590, 33 S. W. 1066, it appeared that Appleton had killed a deputy constable who was attempting to arrest him. The defense was that the officer began firing at Appleton and Appleton shot only in self-defense. In affirming the judgment of conviction of murder, Judge RIDDICK, speaking for the court, said: "The testimony of appellant himself shows that he knew Richardson had a warrant for him, and that his purpose was to arrest him. He should therefore have submitted to the arrest." "One who, in resisting a lawful arrest, intentionally kills a person seeking to arrest him is guilty of murder." 40 C. J. S. 865. See, also, notes 29 C. J. 1093. "Where a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense." 26 Am. Jur. 314.

Appellant admitted on the witness stand that the difficulty arose solely from his own defiance of the law and his own violent resistance to a lawful arrest. He was in no position to plead self-defense. The jury's finding was responsive to the undisputed evidence and ought not to be disturbed.

I am authorized to state that Mr. Justice MCHANEY and Mr. Justice MILLWEE concur in this dissent.

4-8005 197 S. W. 2d 735

Opinion delivered December 2, 1946.

Glenn G. Zimmerman and *F. W. A. Diermann,* for appellant.

John L. Sullivan and *E. B. Dillon,* for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether Circuit Court erred when it instructed a verdict for the defendant following plaintiff's testimony relating to actual and exemplary damages to his land and its incidents.

Pat Hogan, one of the defendants, was manager of Greater Little Rock Stock Yards, and cooperated with

Dupree in maintaining a hog ranch. Dupree contracted with the Federal government for garbage, and in respect of this venture he and Hogan were partners. For an undisclosed period the stockyard was incorporated. Hogan acquired ownership and testified, "It is operated as an individual, so I accept all responsibility of the [former] Company." It was conceded an arrangement was entered into with Dupree by which he was to supervise hog feeding.

At a pre-trial conference the Court directed that there be eliminated from the complaint certified copy of an injunction issued by Pulaski Chancery Court, restraining the defendants from feeding hogs on property so near land owned by the plaintiff that consequential odors and other contamination became unbearable, or virtually so. It is also alleged in the motion for a new trial that the Court erred in striking Sec. 12 from the complaint, thereby preventing the plaintiff from pursuing his legal right to exemplary damages.

A temporary injunction was issued May 20, 1941, and made permanent July 23d of the same year. The suit for damages resulting in this appeal was brought five days after the order of July 23d, but the complaint was amended February 21, 1942.

After testifying that he had "lived out there" probably thirteen or fourteen years, appellant (a carpenter then taking irregular employment) described relative positions of the five acres he owned and the ten acres used by defendants. Appellant's [home] faced south on Lee avenue, while defendants' land was to the north, with back fences joining. It is undisputed that a steep grade leads from the area used for feeding hogs to the property occupied by appellant.

When the "hog ranch," as it is referred to, began functioning, the quantity of garbage brought from Camp Robinson was 75 [to] 100 barrels per day. According to appellant, the so-called feed, deposited on the ground, accumulated to a depth of two feet. When the hogs began "working on that, it began running over my garden."

Later appellant testified: "The garbage was dumped on the slope of that ground. . . . I didn't dream the hogs would be brought out there by the thousands. The seepage washed down, making the garden spot so wet it couldn't be planted that fall or the following spring. . . . It filled the spring I had dug, polluting the water and [infested it] with maggots."

Testimony given by Lee Scrape, a bookbinder residing on West Lee avenue, corroborates appellant. Excerpts are copied in the margin.[1]

The Court, in a lengthy summary before directing the jury to find for defendants, expressed the view (a) that there was no evidence regarding the quantity of vegetables appellant's garden would have produced if it had not been flooded—nothing to show the value. (b)

[1] Lee Scrape testified in part as follows: "The garbage was brought in and poured on the ground. Raw bones and carcasses were all thrown in. This kept getting deeper and deeper. Hogs tramped through it and it got to where it was almost unbearable. I was living out there with my mother and sister and two children, but moved them away. I stayed out there at night myself. When I came in at evening the green flies and all kinds of flies in the yard—all different colors and sizes—would light on the car. It drove me fractious. I didn't know what to do. One time I attempted to hit a branch on a bush and scare [the files] off. I noticed they had accumulated there and died. I have seen animals where they have drowned in floods and [the carcasses] had a very bad odor, but it wasn't anything like this; this is the worst thing I ever saw, and it kept getting worse. I don't understand how people stayed around it.

"The [garbage] was running down the sides of the hill into the branch. At the time I was over there after a little rain I saw a big bunch of white stuff and went up and examined it. It was what I call maggots of some kind and there were several piles of them—you could have taken a spade and spaded them up. I was on a committee that was trying to get something done and I didn't know whether to move away from the place [I occupied adjoining Mr. Faires] or not. We had several meetings and finally ended up getting an injunction, but it was two years before the odor was finally cleared up.

"I did go over on the property after the people moved. I didn't do any more than walk through there. The stuff was so deep. [People] would go in there and get the bones out, I suppose, to sell.

"The spring was ruined. He couldn't even water his cow out of it. We used to go down there and get that spring water and use it. As a matter of fact we thought it fine water. When our pipe line was frozen for a month we used that water for drinking, cooking and everything.

"At the time I moved my family Mr. Faires was sick and complaining of losing weight and showed me how his clothes didn't fit him and he was vomiting. My sister's children were vomiting—that is when we moved them away."

Although loss of the spring was undisputed[2] its worth was speculative. (c) In respect of appellant's testimony that he had lost 20 or 30 pounds in weight because of the terrible odor, there was failure upon appellant's part to prove the number of days he lost from work on account of illness occasioned by the nuisance. (d) Although the complaint alleged loss of thirty hens, "according to the Court's recollection he said these chickens wandered off." (e) Compensation asked because appellant's cow was affected—a reduction in milk, inflammation of the udder, etc.,—would have to be disregarded because of a failure to show what the decrease was, and conjecture had no place in the transaction.

First (a)—The Court correctly held that evidence was insufficient on the allegation that appellant's garden had been injured to the extent of $200. There is no testimony a garden had been planted; only a nebulous suggestion that financial loss actually occurred. A rule is that where crops are so immature when destroyed as to have no market value, the measure of damage is that for which the land would have rented. *St. L. I. M. & S. R. Co.* v. *Saunders,* 85 Ark. 111, 107 S. W. 194; *Brown* v. *Arkebauer,* 182 Ark. 354, 31 S. W. 2d 530; but if the crop has grown to a point where it can be said with reasonable certainty that a stated production would result, then damage is the value of such crop. *Crumbley* v. *Guthrie,* 207 Ark. 875, 183 S. W. 2d 47.

Second (b)—In matters of this kind one's ordinary experiences do not qualify him to say (with that fine degree of accuracy a perfectly poised judicial mind would consider absolute) how much a man has suffered financially because of tortiously-imposed filth. It is undisputed that bones, with putrified particles of meat adhering to them; colonies of maggots, soil saturated with odoriferous seepage, and green flies and other varieties

[2] Regarding the spring, the Court said: "It has been shown that the water was polluted and [its use] destroyed; but there is no evidence to show what the loss was. The only thing would be the loss of so much water if [appellant] had to purchase it for his cow; [that is], if he had to purchase one hundred or two hundred gallons, then we would have a definite amount; [otherwise] it is a matter of speculation."

in droves emphasized the conditions to which appellant was subjected. As to the flies, there were "millions" (it was said) to be seen promiscuously decaying in heaps on limbs of trees. These things created a situation wholly incompatible with the sensibilities of residents whose olfactory organs had not been overstrained.[3] In spite of this evidence perhaps it cannot be said (and the Court so held) that the complaining party had suffered an ascertainable monetary loss because the spring was invaded. But it does not follow that there was no damage to the freehold.

Third (c)—Appellant's testimony that he lost from twenty to thirty pounds in weight, was sickened by reason of the stench, flies, and filth,—these things were for the jury's consideration. Periods of vomiting, nausea, and general debility are shown to such an extent that the fact-finders should have been permitted to say whether appellant's illness was produced by the imposition of things complained of or whether he was overstating the corrupting causes.

Fourth (d)—In his direct examination appellant testified thirty hens were killed by the wrongful acts which caused insanitation. However, on cross-examination, there was an admission that the fowls wandered off—"went up the branch"—and did not return. The Court was correct in holding that the fact that they might have died in the circumstances described was not substantial evidence that they did die as alleged.

Fifth (e)—While it is true, as the Court held, that the complaint did not assert that milk production was reduced in a definite amount, appellant testified that his cow was in very bad condition for two or three months, ". . . and I would say she dropped from about three gallons to about a gallon, or a fraction more than a gallon." The witness added that ". . . for a considerable length of time" the milk, because of its [bad] qual-

[3] Testimony regarding the flies might be read in connection with Biblical references to locusts. 3c Rev., ch. 9, v. 2-12: ". . . And they had tails like unto scorpions, and there were stings in their tails: and their power was to hurt men five months."

ity, could not be used, and the loss, including remuneration for imposed care, amounted to $50. This was sufficient to go to the jury.

The complaint did not allege depreciation in value of the property through maintenance of the nuisance; but evidence on this point was introduced, and the pleadings will be treated to conform.

Appellant testified that the Home Owners' Loan Corporation made a "low" estimate of $2,500 on the property for mortgage purposes; that he (appellant) endeavored to realize this amount when he sold, but accepted $1,700. Inferentially, the $2,500 valuation was made shortly before the hog ranch was established. It is in evidence that the contaminating odors continued for two years after use of property for feeding had been discontinued. Destruction of the spring could have accounted for price depreciation. In any event, that is a matter subject to proof on retrial.

It was not improper, when the pre-trial conference was held, to direct that the injunction evidence, as certified, be eliminated. However, when the case was developed in Circuit Court on claim of punitive damages, it was competent to show by appropriate proof that the defendants had been restrained, and that they were operating in defiance of the order of abatement. Certainly violation of an injunction in the circumstances would be a matter for the jury to consider in determining whether the accused acted in a defiant and wanton manner.

Since the judgment must be reversed and the cause remanded for a new trial, it is not necessary to discuss the character of testimony tending to show that the $800 difference between *prima facie* value and what the property sold for was attributable to appellants' wrongful conduct.

Reversed, with directions that the cause be retried.

4-8013 197 S. W. 2d 738

Opinion delivered December 2, 1946.

O. T. Ward, for appellant.

A. F. Triplett, for appellee.

ED. F. MCFADDIN, Justice. This appeal concerns §§ 2 and 3 of Act 136 of 1941, known as the "Estate Tax Law of Arkansas." Act 294 of 1945 has no application to this case, because the rights and liabilities herein became fixed prior to the effective date of the 1945 act.

Mrs. Ross M. Taylor (wife of Pinchback Taylor I) departed this life in May, 1944. Her husband received from her estate the sum of $33,909.92, upon which amount both the state and federal estate taxes were duly paid. Then, on June 27, 1944, (about thirty days after the death of his wife) Pinchback Taylor I departed this life, leaving an estate likewise subject to state and federal estate taxes. Including the said $33,909.92, the net value of his

estate was in excess of $800,000. In settling the *federal* estate taxes with the U. S. Government, the appellee herein (executor of the estate of Pinchback Taylor I) successfully claimed that no estate tax was due on the $33,909.92, since that amount had been received by Pinchback Taylor I from his wife's estate within the preceding five years, and the federal tax had been collected from the estate of Mrs. Ross M. Taylor. 26 U. S. C. A., § 812(c), is the applicable provision, and says that an exemption is allowed "equal to the value of any property forming a part of the gross estate . . . of any person who died within five years prior to the death of the decedent."

In attempting to settle the estate tax due the State of Arkansas on the estate of Pinchback Taylor I, the appellee executor likewise claimed that no estate tax was due to Arkansas on the said $33,909.92; but the appellant (Commissioner of Revenues for the State of Arkansas) denied the appellee's claim to such exemption. The appellee then paid all of the estate taxes to Arkansas, except what the State claimed on the said $33,909.92; and this litigation is to determine whether the State is entitled to collect a tax on that last-mentioned amount. The appellant clearly states the question in this language:

"'There is but one question to be determined by this Court in this appeal: Does the provision of the Federal Estate Tax Law—that property previously taxed within five years is exempt—control in the collection of the Arkansas Estate Tax, under the provisions of Act No. 136 of the Acts of 1941? The appellee has paid all tax due if previously taxed property is exempt under the Arkansas law. If previously taxed property as provided for under the Federal Law is not exempt from the Arkansas law, appellee owes the amount sued for herein."

APPELLANT'S CONTENTIONS

The appellant urges:

1. That the federal estate tax law has a specific provision (U. S. C. A. Title 26, § 812(c)) for property

received within five preceding years from a taxed estate; whereas, the Arkansas Estate Tax Law has no such provision;

2. That § 2(i) of the Estate Tax Law of Arkansas provides: "The term 'net estate' means the net estate as determined under the provisions of the applicable federal revenue act, *except where otherwise provided*" (italics our own);

3. That § 3 of the Estate Tax Law of Arkansas provides ". . . the net estate shall be the value of the estate at the date of death after deducting from the gross estate funeral expenses, trustee's fees, attorney's fees, administration expenses, claims against the estate, unpaid mortgages, or any indebtedness in respect to property, the value of which is included in the gross estate, to the extent that such expenses, claims, mortgages, or indebtedness were incurred or contracted *bona fide* and for an adequate and full consideration in money and money's worth; . . ." and

4. That the words "except as otherwise provided" in § 2(i) clearly recognizes that the net estate under the state law may be different from the net estate under the federal law; and that § 3 of the Arkansas Estate Tax Law "otherwise defines" *net estate* by listing the items to be deducted from the gross estate, and omitting all reference to property taxable within five years; and that this failure to mention an exemption for property received within five preceding years from a taxed estate, clearly shows that there is no such exemption in the state law.

OPINION

Appellant's argument is most forcible; but when we consider this case in the light of our previous holdings, we are convinced that the chancery court was correct in deciding in favor of the appellee. Act 136 of 1941 has been considered by us in the following cases: *McLeod* v. *Commercial Bank,* 206 Ark. 1086, 178 S. W. 2d 496; *Moses* v. *McLeod,* 207 Ark. 252, 180 S. W. 2d 1010; *State ex rel. Commissioner of Revenues* v. *Carney,* 208 Ark. 943, 188

S. W. 2d 310. The holding in *Moses* v. *McLeod, supra,* is determinative of the case at bar.

In that case it was shown that the federal act gave the executor of an estate the option to determine values, either (a) at the time of the death of the decedent, or (b) one year after the death of the decedent; whereas, the Arkansas act (*i. e.,* the same §§ 2(i) and 3 here relied on by appellant) gave the executor no such option, but required the values to be determined as they existed at the death of the decedent. Nevertheless, we held that, in determining the value of the estate for state tax purposes, the executor could use the optional valuation allowed under the federal statute. This conclusion was reached because we held that—due to the peculiar wording of § 3 of the Arkansas act—the only tax that Arkansas could levy on the excess of an estate over $100,000 was "a sum equal to the credit allowable under the applicable federal revenue act for estate . . . taxes" less "the amount of all estate taxes paid to states other than Arkansas." We said in *Moses* v. *McLeod*:

"It will be observed in reading § 3 of said Act, above quoted, that it fixes no rates of taxation on values in excess of $100,000. . . . Arkansas is not concerned with the amount of the net value of the estate in excess of $100,000, because it levies no rate of taxation on such excess, but levies only a tax thereon equal to the amount of the federal credit—no more, no less. The language used in the concluding sentence in § 3 can mean nothing else. Stripped of unnecessary verbiage, or deleting words tending to confound its meaning, it reads: 'and on the amount of the net estate which exceeds one hundred thousand dollars, a tax . . . which shall be a sum equal to the amount by which the credit allowable under the applicable federal revenue act for estate . . . taxes actually paid to the several states shall exceed the aggregate amount of all . . . estate taxes actually paid to the several states . . . (other than . . . Arkansas) . . .' There being no estate taxes to other states, the tax due to Arkansas is the amount of the 'credit allowable.' If there were death taxes due and

payable to other states, the amount of the Arkansas tax would be the difference between the 'credit allowable' and the amount so paid to other states. Stated in the language of Commerce Clearing House, State Tax Guide Service, § 32-651, relative to Act 136 of 1941, 'If the net estate exceeds $100,000, the tax on the excess is 80 per cent of the basic federal estate tax less death taxes paid other states.' "

As intimated in our previous cases involving this estate tax law, the method of levying a tax by reference to a credit allowed under a federal statute, is—to say the least of it—an awkward and anomalous method of taxation by a sovereign state. In receiving the benefit of the federal credit, the state has surrendered a modicum, at least, of its right of free determination. But until clear unconstitutionality is shown in such surrender of sovereignty, then this method of levying taxes is for the Legislative Department of government, rather than for the Judicial. The cause here may be disposed of by saying —as we did in *Moses* v. *McLeod*—that the only tax which Arkansas levied on the excess of the estate over $100,000 is "a sum equal to the credit allowable under the applicable federal revenue act for estate . . . taxes." Therefore, when the federal government made the federal credit, and allowed $33,909.92 as exempt, then all the State of Arkansas could receive is whatever sum was the determined federal credit.

Therefore, the decree of the chancery court is affirmed.

EVANS *v.* JEFFRIES, GUARDIAN.

4-7987 198 S. W. 2d 62

Opinion delivered December 2, 1946.

U. A. Gentry, for appellant.

Price Shofner, June P. Wooten and *John S. Gatewood,* for appellee.

SMITH, J. In the case of *McHugh* v. *Jeffries,* reported in 207 Ark. 890, 183 S. W. 2d 309, it was held that the appellant, Miss McHugh, held title to certain lands and lots under a tax deed, as trustee for the two incompetent heirs at law of J. A. Comer, deceased. At the conclusion of the trial, from which came that appeal, a petition was filed for a writ of assistance to dispossess one John Evans from the possession of the property there in litigation, which petition was denied upon the ground that Evans was not a party to the suit, and the court was therefore without jurisdiction to award that relief. The decree in that case vested title in the incompetent heirs.

Thereafter suit in unlawful detainer was filed by the guardian of the incompetent heirs to dispossess Evans from the property, it being alleged that by reason of the decree in the former case the title had been divested out of Miss McHugh and vested in the incompetents. Inasmuch as Evans was not a party to that case, it has no binding effect upon him.

A motion was filed by Evans in this case, praying that it be transferred to equity, and an answer was filed praying that the complaint be dismissed, and that the title of the defendant Evans be quieted and confirmed. The cause was transferred on this motion and thereafter the suit proceeded as one to try the title. Upon the trial a decree was rendered holding that these heirs were the owners of the lots here in question, and that Evans was unlawfully in the possession of them and had refused to surrender possession upon demand, and that Evans was due the plaintiffs the sum of $42 as rent, and from the decree awarding plaintiffs the possession of the lots and rendering judgment for rents is this appeal.

Evans testified that he entered into a contract in 1925 or 1926 with J. A. Comer, the father of the incompetent plaintiffs, who sue by their guardian, for the purchase of the lots here in question. Evans testified that by the terms of his contract, which was in writing, but was retained by Comer and never given to him, he agreed to pay Comer $1,000 for the lots, of which sum he paid $250 in cash, the balance to be paid in installments of $10 per month. He further testified that he made the payments, not always promptly, but that if he missed a payment one month he "doubled up" the next month. If Evans ever had a contract, as stated, it was not offered in evidence.

Evans does not claim ever to have paid any taxes, his testimony being that Comer agreed to pay the taxes and charge him with the amounts thereof, to be repaid out of the monthly payments made Comer. It is undisputed that Evans entered into possession of the lots

about the time he claims to have purchased them, and that he has since continuously been in possession of them. He gave a retaining bond when the writ of possession in the unlawful detainer case was served upon him, and after the rendition of the decree from which is this appeal, he executed a supersedeas bond and has remained in possession.

Evans further testified that after Miss McHugh acquired the tax title, which was canceled on the former appeal above referred to, she advised him that he had lost his title and that she had acquired it. She proposed to sell him the lots for $200 to be paid for at the rate of $6 per month, and she later executed to him a quit claim deed for the recited consideration of $1 paid her. This deed was dated April 28, 1942.

Miss McHugh and Jeffries, now guardian for the incompetents, were both employed by the Comer Furniture Company, a business owned by a brother of J. A. Comer who by his will had appointed this brother executor of his estate. This will directed the executor to appropriate any and all rents collected to the use of the incompetents. Jeffries testified that Evans came to the place where both he and Miss McHugh were employed, and that in the absence of Miss McHugh, Evans made numerous payments to him for the account of Miss McHugh, for all of which he gave receipts reciting that the payments were made as rent of the lots.

Evans denied that he had ever paid any sum as rent, although the payments were so designated on the receipts given him by Jeffries, and that all the payments were made to apply on the purchase price due Miss McHugh, and eventuated in her giving him a deed.

We would have no hesitancy in holding that the testimony does not show that Evans had purchased the lots from Comer, but for a certain paper writing which appears to show that Evans took possession of the lots as purchaser, and not as tenant. The writing is to the following effect: Comer had Evans make application to the Home Owners' Loan Corp. for a loan of $1,200,

and in that connection Comer filled out a blank used by the Home Owners' Loan Corp. entitled "Mortgagee's Consent to Take Bonds." This instrument signed by Comer bears date of May 31, 1934, and recites that, "The undersigned is a holder of a first mortgage or other obligation, which constitutes a lien or claim on the title to the home property of John Evans located at 2218 Rice, Little Rock, Arkansas, in the sum of $1,250 including unpaid balance of principal and interest, to date." The property described is the property in litigation.

After inspection of the property, the Home Owners' Loan Corp. reported that a loan in excess of $650 could not be made, from which loan, if made, $250 would be deducted for necessary repairs. The application was not pursued further.

No one could know better than Comer, who died in 1935, what his relationship to Evans was, and this declaration by the owner, through whom plaintiff's claim title, appears conclusive that Evans was in possession of the property, not as a tenant, but as a purchaser.

We do not think that this relationship was destroyed by Evans' agreement to purchase the lots from Miss McHugh. He testified that he was advised by her that he had lost his title, and he proceeded to re-acquire it. There is no element of estoppel in this contract with Miss McHugh. See § 121, p. 394, Ch. Estoppel, 31 C. J. S., and cases there cited.

Now Evans claims that when he contracted with Miss McHugh to purchase the lots from her, he had already paid the full amount of the purchase money due Comer. He testified that Comer so advised him and appointed a day on which he would execute and deliver a deed, but Comer died before that date, and the deed was never executed.

We do not credit this testimony. If Evans made the payments which he testified he did make, he would have completed his payments exclusive of taxes in 1932, and Comer did not die until August 5, 1935. Evans pro-

duced no receipts for any payments and, but for the writing signed by Comer above referred to in connection with the application for a Home Owners' Loan Corp. loan, we would hold that Evans had not proved a contract to purchase the lots.

Now if it is held, and we do hold, that this writing proves that Evans was in possession as purchaser and not as tenant, it proves also that on the date of that writing, to-wit, May 31, 1934, a balance of $1,250 purchase money was due at that time.

We hold, therefore, that Evans was in possession as a purchaser and not as a tenant, but we hold also that he owed a balance of $1,250 purchase money on May 31, 1934. He does not claim to have made any payments, except to Miss McHugh, subsequent to that date, nor does he claim ever to have paid any taxes.

The decree of the court below will, therefore, be reversed for further proceedings as follows: Evans will be charged with $1,250, balance of unpaid purchase money, with interest thereon at 6% from May 31, 1934. He will also be charged with all taxes since 1934 except those paid by Miss McHugh, and judgment will be rendered for the balance of purchase money and interest, for taxes as stated, with interest thereon from date of payment, and a lien on the land will be declared for the total amount of these items, and a reasonable time will be allowed to discharge this lien, with directions to sell the land if the lien is not satisfied within the time limited.

Evans pleaded the Statute of Limitations, but this plea cannot be sustained. The holding in *Little Rock & Ft. Smith Ry. Co.* v. *Rankin,* 107 Ark. 487, 156 S. W. 431, is to the contrary. The facts in that case were that the railroad company entered into a contract to convey a tract of land to one Rankin for a cash consideration and certain deferred payments. This contract was dated January 2, 1891. Rankin entered into and remained in possession of the land under this contract until December 25, 1896, when he conveyed the land to one Smith,

who took possession and was in possession claiming title at the time the suit was filed to enforce the vendor's lien which the railroad company claimed. Smith knew nothing of Rankin's contract and claimed to be an innocent purchaser, but it was held he was affected with notice of the Rankin title, as this contract was in Rankin's chain of title. Smith had possession for about ten years prior to the filing of this suit to enforce the vendor's lien for the payment of the purchase money, and pleaded the Statute of Limitations against the debt, which plea was not sustained.

It was held that the deed from Rankin conveyed no greater title or right than Rankin had, and this right was to receive a deed upon payment of the purchase money. Such was Evans' contract, as he did not claim the right to have a deed made to him until he had completed his payments. His contention was that he had completed them. It was held in the case cited that Smith's possession was that of his grantor and as such was subordinate to the lien of the railroad company. It was there said: "In the case of *Perry* v. *Arkadelphia Lbr. Co.,* 83 Ark. 374, 103 S. W. 724, the court quoted with approval the following language from the case of *Tillar v. Clayton,* 76 Ark. 405, 88 S. W. 972: 'The statute of limitations does not run against a vendor in favor of a vendee, holding under a contract for sale and purchase; nor does it run where the original possession of the holder seeking to plead the statute was in privity with the rightful owner until there be an open and explicit disavowal and disclaimer of holding under that title and assertion of title brought home to the other party.' There are many cases to the same effect."

Here there is no intervening third party, but Evans could have no greater right than a third party would have had. Evans is claiming under a contract of purchase which he has not performed, and he may not therefore claim the debt was barred and at the same time assert title as his right to the title was dependant upon payments which he did not complete.

Appellees say that the Statute of Limitations would in no event be applicable for the reason that the heirs are mentally incompetent. This would not be true if the statute otherwise applied, for the reason that if it ran at all it was in motion in the lifetime of the ancestor of the incompetents through whom they claim title and was not arrested by his death. *Bozeman* v. *Browning*, 31 Ark. 365.

If this suit was merely one to enforce a vendor's lien, we would have to hold that the suit was barred inasmuch as the debt was barred by the Statute of Limitations. Section 9465, Pope's Digest, would require this holding. This section provides that in suits to foreclose or enforce mortgages, deeds of trust or vendor's liens, it is a sufficient defense that the suit had not been brought within the period of limitations prescribed by law for a suit on the debt or liability for the security of which they were given.

But this case has some very unusual features. Now Evans did not testify that he made application for a loan from the H. O. L. C., and we may only conjecture what Comer had in mind in signing the agreement to accept bonds from the H. O. L. C. for the loan. But as we have said, we would have no hesitancy in holding that Evans had not proved a contract to buy the lots but for this agreement signed by Comer. Considered by itself, the testimony of Evans is too unreasonable to be credited. He admits he was aware of the pendency of the suit against Miss McHugh in which it was sought to cancel the title which he claims he had purchased from her, and he permitted that suit to proceed to final decree without intervening or denying that the plaintiffs had the right to cancel the title which he had purchased from Miss McHugh.

The cause was transferred to equity on Evans' own motion, upon his prayer that his title be quieted and that he be given judgment for the payments made by him to Miss McHugh. But while he asks equitable relief, he does not offer to do equity. He asks that he be

adjudged to be the owner of the lots without paying for them.

The issue joined in the court below was whether Evans had a contract which, if performed, would have entitled him to a deed. He contended that he had such a contract, and had performed the conditions precedent by making the payments which it required to secure a deed. On the other hand, it was denied that he had such contract. To prove that he was in possession as a purchaser he must rely upon a contract which he has not performed, and he asks in equity that he be given the benefit of a contract which he has not performed, in other words, that he be given the lots without paying for them. We think § 9465, Pope's Digest, above referred to, does not apply to a situation such as we have here. Evans will be granted the equitable relief for which he prays, but this relief is granted upon condition that he do equity, that is, that he perform the contract upon which he must rely to obtain any relief.

Evans prays also that he be given judgment for the amount he paid Miss McHugh to acquire the tax title, but this relief will be denied upon the ground that if he was in possession as purchaser, as he claims to have been, it was his duty to pay the taxes and he is given all the relief to which he is entitled when he is not charged with those taxes.

The decree is reversed under the directions above recited.

Ed. F. McFaddin, Justice, concurring. I reach the same result as does the majority; but I differ from the majority as regards the issue of limitations. The majority holds that the plea of limitations is not available to Evans, since § 9465, Pope's Digest, does not apply to this situation. It is unnecessary, I think, to distinguish the situation in the case at bar from the § 9465, because I think the Evans payment of $200 to Miss McHugh constituted a tolling of the statute of limitations.

To elaborate: Evans testified (a) that he trusted Comer to pay the taxes; (b) that he was to repay Comer

for the taxes; and (c) that when he found that Comer had not paid the taxes, he paid Miss McHugh the $200 which she demanded for the tax title.

We held in the case of *McHugh* v. *Jeffries,* 207 Ark. 890, 183 S. W. 2d 309, that Miss McHugh was a trustee for the Comer estate. So, it appears to me that the $200 paid by Evans to Miss McHugh was in reality a payment to Comer's estate for taxes, which Evans testified that he had agreed to pay to Comer. Thus, the payment of the $200 to Miss McHugh by Evans would constitute a tolling of the statute of limtations, even if § 9465, Pope's Digest applied.

STATE OF TENNESSEE *v.* BARTON.

4-7984 198 S. W. 2d 512

Opinion delivered December 2, 1946.

Rehearing denied January 27, 1947.

Scott Wood, for appellant.

James R. Campbell, Guardian *Ad Litem.*

Curtis L. Ridgway and *Mallory, Rasmussen & Johnson,* for appellee.

MINOR W. MILWEE, Justice. Dr. D. S. Barton and his wife, Loretta Barton, were residents of Hot Springs, Garland county, Arkansas, in 1918 when she became insane. Loretta Barton was reared in Nashville, Tennessee, where her mother still resided on June 21, 1920, when Mrs. Barton was committed to the Central State Hospital in Nashville, Tennessee, by order of the county court of Davidson county. She was admitted to the

Tennessee hospital as a third class, or private pay, patient and the order of commitment recites the appointment of Mrs. Barton's mother as her guardian. The order also found: "That the said Mrs. Loretta Barton has relatives who are amply able to pay for her maintenance while in said hospital as her husband is a man of means living in Hot Springs, Ark."

On February 21, 1921, D. S. Barton was appointed guardian of the person and estate of his incompetent wife by the Probate Court of Garland county, Arkansas. In 1925, Dr. Barton sold certain real estate for $12,000, and $4,000 of the sale price was set aside by the Garland Chancery Court, under the insane wife's dower statute. (Pope's Digest, §§ 4447-51).

On February 26, 1926, D. S. Barton secured an interlocutory decree of divorce in the district court of Salt Lake county, Utah, on the ground of incurable insanity. The decree became final on August 27, 1926.

Mrs. Barton owned income producing property in her own right of the value of $12,000 at the time D. S. Barton was appointed guardian of her person and estate in 1921. Dr. Barton paid for the maintenance and hospitalization of Loretta Barton at the rate of $400 per year from June 21, 1920, until April 24, 1933. Although these payments were ostensibly made by Dr. Barton personally, he was reimbursed out of the income from the estate of Loretta Barton and credited with such payments in his settlements filed with the Garland Probate Court as guardian and curator of her estate.

On April 12, 1933, D. S. Barton wrote a letter to the superintendent of the Central State Hospital at Nashville, Tennessee, in which he stated: "I am writing you in regard to the payments which I have been making for the past ten years for the hospitalization of Mrs. Loretta Barton.

"Due to the existing economic conditions I find myself financially unable to further make these payments. You will note that in past I have been very prompt with

these, but at the present time I cannot continue to care for them.

"Kindly advise me what provisions can be made."

As a result of the representations made in this letter, the Davidson County Court authorized the hospital authorities to transfer Loretta Barton to the status of a state pay patient on April 24, 1933, and payments for the incompetent's hospitalization were discontinued.

On December 16, 1941, D. S. Barton filed a petition in the Garland Chancery Court for an order directing the clerk of that court to pay over to him the $4,000 fund set aside under the insane dower statute in 1925 because of the rendition of the Utah divorce decree in 1926. The decree was attached to the petition and contains the following provision: "That Dudley S. Barton, the above named plaintiff, be, and he is hereby, ordered and directed to support and maintain the said Loretta Y. Barton, during her detention as an insane person in the Central State Hospital, in the State of Tennessee, as the same may be demanded of him by said Central State Hospital of Nashville, Tennessee."

The prayer of the petition was that the chancery court give full faith and credit to the Utah decree and that the $4,000 fund be ordered paid over to petitioner free from any legal or equitable claims. A summons, with a copy of the petition attached thereto, was served on the superintendent of the Central State Hospital where Mrs. Barton was still confined. The court appointed a guardian *ad litem* for Loretta Barton who filed a demurrer and answer denying the allegations of the petition.

On May 6, 1942, the State of Tennessee, through the Department of Institutions, intervened in the suit instituted by Dr. Barton claiming that the income from the $4,000 trust fund, being administered by the chancery court under the dower statute, should be applied to the payment of Mrs. Barton's maintenance in the Central State Hospital of Tennessee since April, 1933. Various amendments to the intervention were filed to-

gether with a cross-complaint against D. S. Barton individually and as guardian of Loretta Barton's estate. It was alleged in the cross-complaint that Dr. Barton accepted the Utah divorce decree subject to the provision that he support his wife during her detention in the Tennessee hospital. It was further asked that, if the court should find that D. S. Barton was not personally liable for the debt due the State of Tennessee, then recovery should be allowed against him as curator of the estate of Loretta Barton.

On September 15, 1942, the chancery court entered its order holding that the divorce granted to Dr. Barton did not terminate the trust created under the insane dower statute, and the petition of Dr. Barton was denied, but the cause continued for a hearing on the claim of the State of Tennessee. There has been no appeal from this order.

In April, 1944, the guardian *ad litem* filed a cross-complaint in which it was alleged that the Utah divorce decree was granted upon condition that D. S. Barton pay the expenses of Loretta Barton in the Central State Hospital of Tennessee; that when he made the statement to the hospital that he was no longer able to pay for the support of Mrs. Barton, he was receiving substantial income from property belonging to her separate estate as well as the trust fund which was being administered by the court.

In his reply to the intervention of the State of Tennessee, D. S. Barton alleged that his wife was a resident of the State of Tennessee at the time she was placed in the hospital by her relatives; that there is nothing due the State of Tennessee for maintenance, since she was placed on the free list of patients by order of the county court of Davidson county, Tennessee; and that the claim was barred by the three-year statute of limitations.

After hearing the evidence, the trial court entered its final decree awarding judgment in favor of the State of Tennessee against D. S. Barton, as guardian of Lo-

retta Barton, in the sum of $2,500 for hospital maintenance of Mrs. Barton to August 6, 1945, with interest at 6 per cent from the date of the decree, December 17, 1945, and directed the guardian to pay the State of Tennessee $100 per quarter thereafter so long as Mrs. Barton remained in the hospital. The court held the three-year statute of limitations applicable and the $2,500 judgment represents payments of $100 per quarter from May 6, 1939, which date was three years prior to the filing of the intervention by the State of Tennessee on May 6, 1942. It was further held that D. S. Barton was not liable individually and the cross-complaint against him was dismissed. The State of Tennessee and the guardian *ad litem* have appealed from this decree.

It is the contention of appellants that the trial court erred in refusing to hold D. S. Barton liable personally for the maintenance and hospitalization of Loretta Barton since the discontinuance of the quarterly payments in April, 1933. We think this contention should be sustained. The personal obligation of Dr. Barton to pay for such maintenance is based upon the Utah decree of divorce. Although Dr. Barton especially prayed that the chancery court accord full faith and credit to the Utah decree in his petition to recover the dower fund, it is now insisted that that part of the decree which requires him to pay the hospital maintenance is not entitled to full faith and credit because no specific sum of money was adjudged to be due and payable in all events, but a condition is annexed to the decree which renders the sum payable thereunder uncertain. His insistence now is that this part of the decree is not enforceable in this state and the ten-year statute of limitations (Pope's Digest, § 8937), which applies to decrees, is not applicable. This presents an interesting question, but in view of the principles which will now be discussed, we deem it unnecessary to decide it.

In 17 Am. Jur., Divorce and Separation, § 460, pp. 376-7, it is said: "One seeking relief from a divorce decree may, by reason of his conduct subsequent to the

rendition of the decree, be estopped from attacking it. Thus, one cannot be relieved from a judgment of divorce after using the privileges which it confers; in other words, one cannot accept benefits of a decree and yet not be bound by its burdens."

In 19 Am. Jur., Estoppel, § 64, pp. 682-7, in a discussion of the broad general rule of acceptance of benefits it is stated: "Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation, or statute which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions, and it has been said that such cases are referable, when no fraud either actual or constructive is involved, to the principles of election or ratification rather than to those of equitable estoppel. The result produced, however, is clearly the same and the distinction is not usually made. Such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction in so far as it imposes a liability or restriction upon him, or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation." In a continuation of the discussion of this principle, at page 690, the textwriter states that it is applicable "to prevent one who accepts the benefit of a judgment or decree from questioning its validity or opposing the enforcement of its terms."

In his suit to recover the trust fund created for the benefit of the wife under the insane dower statute, Dr. Barton necessarily assumed a position adverse to the interest of his ward. While the suit was filed in the form of an *ex parte* proceeding, it was in effect a suit by Dr. Barton individually against himself, as guardian of Loretta Barton's estate. For this reason, the chancellor appointed an attorney as guardian *ad litem* to represent Mrs. Barton in the proceedings. The guardian *ad litem* filed various pleadings, but did not plead the

statute of limitations as a bar to the claim of the State of Tennessee.

The case of *Conditt* v. *Holden*, 92 Ark. 618, 123 S. W. 765, 135 Am. St. Rep. 206, was an action in replevin where defendant had taken up an estray in bad faith and failed to publish the statutory notice. It was held that the statute of limitations did not begin to run against the owner of the animal until he discovered the fraud. Section 8952 of Pope's Digest is a section of our statute of limitations and provides: "If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented." This action was held applicable in the Conditt case, *supra*, but Chief Justice McCulloch, speaking for the court, said: "But, apart from that statute, and without it, it is generally held that where there has been a fraudulent concealment of a cause of action, the statute of limitations does not begin to run until the discovery of the fraud. *McKneely* v. *Terry*, 61 Ark. 527, 33 S. W. 953; 25 Cyc. 1173; *Dorsey Mach. Co.* v. *McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; *Carrier* v. *Chicago, R. I. & P. Ry. Co.*, 79 Ia. 80, 44 N. W. 203, 6 L. R. A. 799; *Faust* v. *Hosford*, 119 Ia. 97, 93 N. W. 58; *Wear* v. *Skinner*, 46 Md. 257, 24 Am. St. Rep. 517." This holding was reaffirmed in *Kurry* v. *Frost*, 204 Ark. 386, 162 S. W. 2d 48, where this court said: "Apart from this statute (§ 8952, Pope's Digest) many cases hold, as does the case of *Wright* v. *Lake*, 178 Ark. 1184, 13 S. W. 2d 826, that, where there has been a fraudulent concealment of a cause of action, the statute of limitations does not begin to run until the fraud is discovered."

Dr. Barton occupied a peculiar position of trust with respect to both Loretta Barton and the State of Tennessee, on whom the burden of caring for his ward had been placed. As the New York court, speaking through Chief Justice Cardoza, said in the case of *Meinhardt* v. *Salmon*, 249 N. Y. 458, 164 N. E. 545, 62 A. L. R.

1, "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." The State of Tennessee was never apprised of the Utah divorce decree nor the fact that Loretta Barton was the owner of a separate estate in Garland county, and that fact was concealed from it by Dr. Barton until the instant suit was begun. It is true that mere ignorance of one's rights does not prevent the operation of the statute of limitations, but ignorance produced by the affirmative and fraudulent act of the debtor does prevent the bar of the statute.

The correspondence between Dr. Barton and the Tennessee hospital authorities reveals that the latter had implicit confidence in the truth of the representations made by Dr. Barton in his letter of April 12, 1933. Dr. Barton stated in this letter that he had been making the payments for Loretta Barton's maintenance personally and that he was no longer able to make them, when, in fact, all the payments had been made from the income of her separate estate. The statements filed by Dr. Barton as guardian and curator of Mrs. Barton's estate show that the annual income from said estate was more than sufficient to pay for her maintenance at the time these representations were made. The State of Tennessee relied and acted upon these representations and was thereby induced to classify Mrs. Barton as a pauper, or state pay patient. Under these circumstances, we think Dr. Barton should be estopped to plead the statute of limitations either individually, or as guardian and curator of Loretta Barton's separate estate.

It is expressly provided in the Utah divorce decree that Dr. Barton should pay the State of Tennessee for the support of his incompetent wife. Having accepted the benefit of the divorce decree, Dr. Barton should be precluded from questioning the validity of the burden imposed by the express condition on which the decree was granted, which requires him to pay for her support and maintenance during her detention in the hospital.

Appellees also insist that appellants are not entitled to interest except from the date of judgment. The cross-complaint of the State of Tennessee does not expressly pray for interest, but it does pray for its debt, costs and other relief. Under a complaint containing a similar prayer in the case of *Texas & St. Louis Railway Co.* v. *Donnelly,* 46 Ark. 87, this court held the prayer sufficient to include interest and said: "The complaint alleges that the amount was due and was unpaid, and the rule is that money due by contract shall bear interest from the time it is payable. *Roberts* v. *Wilcoxson,* 36 Ark. 355." Mrs. Barton was placed in the hospital as a private pay patient and the statutory charge of $100 per quarter was paid without objection from 1920 until April, 1933. There was an implied, if not an express agreement, that the statutory charge would be paid, and the claim of the State of Tennessee is not a mere open account as contended by appellees.

It is our conclusion that appellee, D. S. Barton, is individually and primarily liable for payment of the claim of the State of Tennessee under the terms of the Utah divorce decree, and that the separate estate of Loretta Barton is also liable for payment of the claim in the event satisfaction thereof cannot be had from D. S. Barton personally.

It follows that the decree will be reversed and the cause remanded with directions to enter judgment in favor of the State of Tennessee against D. S. Barton individually, and as guardian and curator of the estate of Loretta Barton, for all the quarterly payments of $100 each maturing and becoming due since April 24, 1933, together with interest at six per cent. per annum from the date each quarterly payment became due and payable. It is further directed that satisfaction of this judgment first be sought from D. S. Barton, and that, if his property be found insufficient to satisfy the judgment, any balance remaining be paid out of the separate estate of Loretta Barton.

4-8015 197 S. W. 2d 938

Opinion delivered December 2, 1946.

[redacted]

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

Taylor Roberts, for appellee.

Griffin Smith, Chief Justice. Appellee, a dentist, sued for divorce, alleging indignities of an intolerable

nature. His wife cross-complained with the averment that the Doctor's fractious attitude had become publicly insulting to such an extent that the mutual relationship of husband and wife had ended. The abstract does not show that the cross-defendant denied these charges. On the contrary, there is a ready inference that Dr. McCue welcomed the opportunity to make his wife a burden-bearer in matters of testimony and the production of witnesses. Within three weeks McCue married a widow who had a young daughter. Appellant (the former Mrs. McCue) testified in the proceeding from which this appeal comes that her understanding of arrangements pertaining to the divorce decree was that Dr. McCue sought matrimonial emancipation because he wanted to marry the widow.

Whatever the prevailing motives may have been, appellant—who is referred to as having assisted her husband in his profession for more than fifteen years—seemingly came to the conclusion that her interests would be best served by cross-complaining and permitting the Doctor to prevail in fact if not of record.

The decree was rendered on Mrs. McCue's testimony and, presumptively, on the testimony of a witness she called. An expression in the decree is: ". . . it appearing to the Court by agreement upon the part of the plaintiff and the defendant that a property settlement has been made, . . . it is ordered that $25 per week be made to Lida B. McCue as permanent alimony . . . This decree is based upon property settlement and is a consent decree."

Other items as to which there was adjudication included $350 to be paid by Dr. McCue in February for use of the former wife in moving "her" furniture and household goods from Arkansas to Texas. In a subsequent provision it was decreed that all household furniture and furnishings "now in possession of the defendant" should go to the cross-complainant "as her personal property." She was also awarded "the 1942 Nash Tudor sedan."

In June, 1946, Dr. McCue petitioned for modification of the decree, alleging that because of "a lack of business" he had been forced to abandon his profession in Little Rock, and had moved to Green Forest; [a city or town of 750 in Carroll County, Ark.] that he is a stranger there and will not be able to earn compensation in excess of necessary living expenses for a long period of time. It was further alleged that the petitioner "had information to the effect" that the former Mrs. McCue, then 54 years of age, ". . . is, or at least will in the near future, be employed in a remunerative position, [and that] she is able to work. His prayer was that provision in the decree of 1944 for alimony ". . . be cancelled, set aside, and held for naught."

The Chancellor thought otherwise and only partially modified. McCue was relieved entirely during June and July, 1946. The direction was that, beginning August 1, $25 should be paid "every two weeks until further orders."

Two questions are presented. (a) Did the Court have jurisdiction to modify the decree; (b) if there were power to relieve, was it appropriately exercised?

Dr. McCue testified he had adopted his second wife's daughter, a child thirteen years of age in 1946. He bought a piano for her use at a cost of about $800, and had paid $1,475 for an automobile. Appellee is 49 years of age, and with the exception of a slight leg impairment, is in good health "and happy." His present wife is 44.

Appellee purchased a home in Little Rock in October, 1944, with arrangements for deferred payments. The present Mrs. McCue used $1,227 of her personal funds in buying the property. It cost $4,500 and was sold for $8,250. Dr. McCue insisted that improvements he made, when added to the original consideration, represented an investment of $6,100. When the home was sold, $3,100 was given the second wife.

Gross income in 1944 was $13,000, in 1945, $11,252. Appellant's counsel argue that according to Dr. McCue's

testimony, his net income for 1945 was $6,668.25, while appellee contends other deductions to which he was entitled, and concerning which he testified, reduced the net to $4,627.32.

During the first five months of 1946, appellee's professional receipts were: January, $672; February, $1,088; March, $1,017; April, $810, and May, $672—a total of $4,259, or an average of $851.80 per month; whereas the 1944 average was, roughly, $1,083, a decrease of $231 per month from the highest income year mentioned.

Dr. McCue, after moving to Green Forest, purchased a six-room residence thirty years old, and says he agreed to pay $9,000 for it, $1,500 being the required "down" payment, with $1,500 to follow, the balance in monthly installments. Appellant (Lida B. McCue) has no income and has lived with a nephew and his wife. The relative has not finished school.

It was recognized in *Shirey* v. *Hill,* 81 Ark. 137, 98 S. W. 731, that a husband's contract for separate maintenance of his wife is binding. Mr. Justice Wood, in disposing of the argument that Lawrence Chancery Court was without jurisdiction, cited *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459, and § 2675 of Kirby's Digest, now § 4380 of Pope's Digest. The statute provides that an action for alimony or divorce shall be by equitable proceedings. Effect of the decisions is that enforcement of a contract for alimony is an action *for* alimony, as distinguished from an action on debt, although the debt, as such, is recognized as subsisting by reason of agreement between the parties.

A leading case dealing with alimony contracts is *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102. A part applicable to the case at bar expressed by Mr. Justice McCulloch, later Chief Justice, is this: Where husband and wife, in contemplation of immediate divorce, enter into a contract whereby the husband agrees to pay certain sums of money at stated times, and such parties voluntarily cause this contract to be made a part of the decree for divorce, the decree cannot subsequently

be modified in so far as it is based on the contract, for any substantial change would be a modification of the contract itself.

At page 309 of the Arkansas Reports, where the Pryor case appears, it is said: "The agreement was, in effect, contemporaneous with the decree granting the divorce."

Pryor v. *Pryor* was distinguished in *McConnell* v. *McConnell,* 98 Ark. 193, 136 S. W. 931, 33 L. R. A., N. S., 1074. Mrs. McConnell failed to establish grounds for divorce and her complaint was dismissed. On appeal we affirmed. The chancellor also set aside a separation agreement, effect of which was to relieve the husband of payments he had promised. In affirming, the following holding in *Bowers* v. *Hutchinson,* 67 Ark. 15, 53 S. W. 399, was quoted with approval: "In this country the courts, as a general rule, have enforced covenants and promises in deeds of separation relating to the maintenance of the wife and property, provided they are based upon a sufficient consideration, are fair and equal, are reasonable in their terms, and are not the result of fraud or coercion, and the separation has actually taken place when the agreement is entered into, or immediately follows." The McConnell opinion then says: "At the time of their separation when the agreement under consideration was made, plaintiff was in great distress and far away from any one whom she could look to for advice, and it seems that she trusted entirely to her husband's sense of fairness in the matter."

It is worthy of note that Mr. Justice HART, who wrote the McConnell opinion, spoke for the Court in *Erwin* v. *Erwin,* 179 Ark. 192, 14 S. W. 2d 1100. The Erwin case was decided in 1929, when the opinion writer was Chief Justice. The holding in *Pryor* v. *Pryor* is upheld, but explained in its relation to *Erwin* v. *Erwin.*

This brings us to a consideration of *Holmes* v. *Holmes,* 186 Ark. 251, 53 S. W. 2d 226. The first headnote treats the opinion as having held that ". . . . a decree fixing alimony in accordance with an agreement

of the parties may subsequently be modified by the Court to meet changed conditions." After stating that the appellant relied upon *Pryor* v. *Pryor,* the Holmes case quotes that portion where it is said, "The Court is not, in the first instance, bound by the agreement of the parties concerning the amount of alimony to be allowed to the wife; . . . and, *a fortiori,* the agreement cannot, in the face of the statute, hinder the Court in altering its own decree of allowance. The decree is not entirely dependent upon the agreement, and therefore the power to subsequently alter cannot be controlled by it."

Although the Holmes transaction and the case at bar are strikingly similar, the essential holding in *Holmes* v. *Holmes* is that the decree recitals were not intended as a finding by the Court that the plaintiff and defendant had by a joint undertaking having contractual force substituted their own arrangements for the Court's authority. Wording of the decree was: ". . . the parties hereto have agreed upon a settlement of the property rights; [therefore] it is ordered that the defendant pay to the plaintiff by way of alimony the sum of $150 at this time and $150 on the first day of each and every month hereafter."

There is this expression in the opinion: "It will be seen . . . that the agreement of the parties was 'merely one as to the amount the Court by its decree should fix as alimony,' and was not intended as an independent agreement for the payment of alimony."

It might be argued with a full measure of sincerity and earnestness that there was an independent agreement in the Holmes case, but that point has already been decided. The question is, Does the Holmes holding supersede *Pryor* v. *Pryor* and other decisions where it is said that an independent contract incorporated in a decree is not subject to subsequent modification by the Court?

Judicial hairsplitting is not a pleasant pursuit, nor is it conducive to confidence in lawyer or Court. The appeal with which we are dealing might very well be

disposed of by saying that a preponderance of the evidence does not show that appellee was unable to pay. But this would not harmonize the seeming conflicts to which reference has been made.

Dr. McCue testified his attorney told him he could agree to the obligation, have it incorporated in the decree, then later procure modification. But there is no suggestion that his idea was brought to Mrs. McCue's attention. On the contrary, her testimony is that the settlement was a covenant openly arrived at because it was the course thought best.

Certainly the Court is not bound by an agreement disputing husband and wife may enter into, in order to terminate a controversy; and this is true even in the absence of fraud or coercion. Where, however, as here, the wife is told that in substitution of her marital rights she will permanently be paid $25 per week, some rational meaning must be given the decree recital that "Said payments of $25 per week to be made by the plaintiff as permanent alimony for the defendant. This decree is based upon property settlement and is a consent decree."

To what could "consent" refer except that McCue and his wife had agreed upon what the husband would pay, how it should be paid, and over what period of time? The two could not have the divorce granted in consequence of mutuality, because of statutory inhibition and public policy.

We think the decree reflects this situation: The Chancellor required the minimum proof necessary under divorce laws, and in granting the decree exercised appropriate discretion. But in dealing with property rights it appears that the parties themselves, and their attorneys, reached an understanding. The Court had nothing to do with the method by which that result was arrived at. The suggested provisions could have been rejected; but that was not the Court's purpose or policy nor was it the desire of Dr. McCue. If he and his wife were satisfied, evidence affecting ability to pay was unnecessary; and their agreement became a part of the decree. As to that

phase of the litigation the Court relied upon representations. To say that the commitment on Dr. McCue's part to pay permanent alimony of $25 per week was not his contract, but was due to the Court's exercise of judicial discretion, would be to warp words and conduct to suit an undisclosed plan—the plan of a husband who told his attorney to proceed with the hearing, procure immediate results, but to stand by for a relief call when the occasion seemed inviting.

That part of the decree modifying the former allowance is reversed, with directions that all delinquent payments be made. Appellant's attorney is allowed a fee of $100, to be paid within thirty days.

LINCOLN NATIONAL LIFE INSURANCE COMPANY
v. HUFF.

4-8010, 4-8011 (consolidated) 197 S. W. 2d 927

Opinion delivered December 2, 1946.

Frank S. Quinn, for appellant.

T. B. Vance and *McDonald & Goldman,* for appellee.

ROBINS, J. These two cases have been consolidated here because they both present the same issue, which, in each case, is whether the suit of appellant against appellees to recover certain special and general taxes, paid under belief of ownership by appellant on two different tracts of land, one owned by the appellees in case No. 8010, and the other by appellees in case No. 8011, was barred by the three year statute of limitations. From decrees of the lower court absolving appellees from liability as to all taxes paid by appellant more than three years before the commencement of the instant suits, respectively, this appeal is prosecuted.

It appeared from the proof in one case, and from the complaint (to which demurrer was sustained) in the other, that appellant, under a belief that the lands belonged to it, paid certain taxes due on each tract; that at the time of such payments suits were pending between appellant and appellees in which appellant was seeking to establish its title and obtain possession of the lands; that more than three years had elapsed from the time of the payments of the taxes involved in this appeal to the date of the filing of the respective suits; but that the final judgments by which it was held that appellant had no title were each rendered within the three year period.

In the case of *Brobkfield* v. *Rock Island Improvement Company,* 205 Ark. 573, 169 S. W. 2d 662, it was shown that the Rock Island Improvement Company paid taxes on certain land under the honest belief that it was the owner of same, and later the company sued Brookfield, the true owner, for the amount of the taxes so paid. We held in that case that the three year statute of limitations applied and that no taxes paid more than three years before the institution of the company's suit could be awarded to it.

Appellant argues that the Brookfield case is not controlling here because the suits to settle the title to the

lands, upon which taxes sought to be recovered herein were paid, were not finally decided against appellant until less than three years before commencement of the suits at bar, and that the statute of limitations did not begin to run against appellant on its claims for reimbursement of taxes paid under belief of ownership until it was judicially determined that appellant did not own the lands. In the absence of proof of fraud on the part of the defendant pleading the statute of limitations, the plaintiff's ignorance of his right of action does not take the case out of the operation of the statute. *Hibben* v. *Malone,* 85 Ark. 584, 109 S. W. 1008; *Landman* v. *Fincher,* 196 Ark. 609, 119 S. W. 2d 521; *Faulkner* v. *Huie,* 205 Ark. 332, 168 S. W. 2d 839.

When appellant paid these taxes under an honest, but mistaken, belief of ownership, the liability of appellees to repay these taxes to appellant and appellant's right to collect them from appellees simultaneously accrued. The accrual of this liability and this right of action fixed the time when the statute of limitations began to run.

In case No. 8011, appellant urges that since, in its unsuccessful suit to recover the land, it also sought judgment (in the alternative) for the taxes involved in the case at bar and the judgment in the possessory action was by express recital thereof without prejudice to the bringing of an action for taxes paid by appellant, the statute of limitations was tolled by the bringing of the first suit. While that judgment did contain a recital that it was without prejudice to appellant's right of action as to taxes paid by it, the fact that recovery of the same taxes as herein involved was also sought in appellant's unsuccessful action for the lands does not appear from appellant's complaint in the case at bar, demurrer to which complaint was sustained by the lower court. Hence there is nothing in the record before us to show that another suit to recover the taxes sought herein had been brought by appellant; and it becomes unnecessary for us to decide whether, in any event, a plaintiff in ejectment suit may join with such suit an action to recover taxes

paid by plaintiff on the land to which he is seeking to enforce title.

The rule followed in the Brookfield case, *supra,* clearly applies in the instant cases. The decrees of the lower court were, therefore, correct and are accordingly affirmed.

BRANCH *v.* POWERS.

4-7983 197 S. W. 2d 928

Opinion delivered December 2, 1946.

Ed E. Ashbaugh, for appellant.

T. J. Gentry and *Rose, Dobyns, Meek & House,* for appellee.

HOLT, J. This appeal involves the use that may be made of a one story, two car garage, 18 x 30 ft. in size, located in the rear of appellant's residence, bordering the alley, on lot 1, block 6, Patrick Powers Addition to Little Rock, under a zoning ordinance enacted in February, 1937.

Appellant acquired the above lot in 1924 and built his home on it. It was then, and is now, a residential district. In 1932, after obtaining the necessary permit, he built a two car, one story, residence garage on the rear of the lot. This garage building was 18 x 30 ft., with sheet metal side walls and a concrete floor, and was built for a private garage. He rented this garage for the years 1933 and 1934 to be used as a public garage and the city was paid $50 each year for the necessary permit. Beginning with 1935, he discontinued the use of the building for a public garage and began storing certain automobile accessories in it, which accessories he was using in connection with two filling stations he was operating.

In November, 1936, he ceased operating the filling stations and began selling certain automobile accessories, an occupation that he has since followed. The merchandise which he sold consisted of articles for "tire and tube repairs, radiator stop-leak, radiator cleaner and cut-patches." Without making any structural changes in the garage building, he added a few shelves and stored his merchandise in it, on the shelves and on the concrete floor. The value of this merchandise averaged from $1,500 to $4,000 each week. About twice weekly, he loaded from $800 to $1,000 worth of this merchandise in a truck that he owned, drove to different parts of the state, and made sales to retail dealers. When he returned from these trips, he stored his truck in the garage. When he left home on the trips, he locked the garage and it remained locked until his return. No one was in this garage during the day and he made no sales from it. He had no employee and left no one in charge. He never assessed this merchandise for taxing purposes and paid no city taxes on it. He did not list his business in the telephone directory, just listed "O. T. Branch," and there was no sign on the property indicating the character of the business.

Appellant, in February, 1946, sought permission from the city to operate a public garage in this building, but was denied this privilege on the ground that to grant it would violate the provisions of the city ordinance, *supra*.

By appropriate proceedings, appellant sought the aid of the Pulaski Chancery Court to compel the city to issue a license to operate the garage business. Many property owners intervened and alleged that appellant had abandoned the use of this garage building, as a public garage, prior to the passage of the zoning ordinance in February, 1937; that after he built this building, they had purchased surrounding homes, and that to permit appellant to use this property for business purposes would depreciate the value of their homes and be in violation of the terms of the ordinance, etc.

The trial court found that the use of the garage proposed by appellant was not permissible under the zoning ordinance and dismissed his complaint for want of equity. This appeal followed.

As we view this record, the issue turns on a question primarily of fact. Appellant says: "This property is located in what is known under the city zoning ordinance No. 5420 as A or B Zone, a residential district, but this building at the time of the adoption of the city zoning ordinance in 1937 was being used in a non-conforming business and as such was exempt from the restrictions of the ordinance in so long as the non-conforming use was not discontinued or changed to one of a higher classification."

The ordinance divided the city into eleven zones, numbered from A to K, inclusive, Zone A being the most restricted and Zone K the least. Section 10 provides: "The lawful use of a building existing at the time of the passage of this ordinance may be continued, although such use does not conform with the provisions hereof, and such use may be extended throughout the building provided no structural alterations, except those required by law or ordinance are made therein. If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use of the same or more restricted classification."

Appellant argues that he has been engaged in the wholesale business and using his garage as a wholesale

warehouse, a non-conforming use under the ordinance, since before its adoption in 1937, and is entitled, under the provision, *supra,* to change its use or reconvert to that of a public garage, another non-conforming use. The fallacy of this contention, as we view the facts, is that the preponderance of the evidence is not against the Chancellor's finding that the use appellant has made of this small garage since 1935 has not been such a non-conforming use as the ordinance contemplated.

The recent case of *City of Little Rock* v. *Williams,* 206 Ark. 861, 177 S. W. 2d 924, on which appellant strongly relies, is clearly, we think, distinguishable on the facts. In that case, the building in question was built strictly for business or commercial purposes and a part of it had been used for a period of thirty-five years, both for retail and wholesale purposes.

Here, the facts, detailed above, are quite different. Under a permit for the purpose, appellant built this two car, one story garage in 1932 for a private garage and not for business purposes. In 1933 and 1934, it was used for what would be a non-conforming use under the ordinance, but since 1935, as we have indicated, the use which appellant made of this building on the facts was not that of a wholesaler or storage warehouse within the contemplation of the ordinance.

To repeat briefly, appellant carried his merchandise in his truck and made on-the-spot sales and deliveries direct to the purchaser, after the fashion of a peddler or a hawker. He made no sales from his garage and kept it locked during his absence. He carried in his truck more than one-third of the value of his entire stock of goods on each trip and had no employee to help him.

When we note the other businesses which the City Council placed in the same classification as "storage warehouse" and "wholesale business," we think it clear that it was not intended that the business in which appellant was engaged should fall within, and be classified with, any of these non-conforming businesses. The complete list of these businesses are: "Bakeries, other than

those whose products are sold at retail on the premises, blacksmith or horse-shoeing shop, bottling works, building material storage yard, carting, express, hauling or storage yard, contractor's plant or storage yard, coal, coke or wood yard, cooperage works, dyeing and cleaning works (employing more than five (5) persons on the premises), ice plant or storage house of more than five (5) tons capacity, laundries (employing more than five (5) persons on the premises), livery stable or riding academy, lumber yards, machine shop, public garage, except as provided in section 18, milk distributing station other than a retail business conducted on the same premises, stone monumental works (employing more than five (5) persons), storage warehouse, wholesale business, and any use excluded from the Light Industrial Districts."

It seems to us that a consideration and analysis of the nature and character of these different businesses must lead to the conclusion that the city's legislative body contemplated that before a business could measure up to that of "wholesale business" or "storage warehouse," it must be operated on a scale similar to or comparable to that of the other businesses on the list. The facts here fall far short of any such showing by appellant.

Having reached the conclusion that appellant, having used the garage in question for a conforming use since 1935, for approximately two years before the ordinance, *supra,* was enacted, and for about nine years thereafter, we hold this constituted an abandonment of the use of the building for a non-conforming use, and that the trial court correctly denied to him the right at this late date to reconvert to the business of a public garage.

Accordingly, the decree is affirmed.

REITER *v.* CARROLL.

4-8000 198 S. W. 2d 163

Opinion delivered December 2, 1946.

Rehearing denied January 13, 1947.

Marvin B. Norfleet, for appellant.

Daggett & Daggett, for appellee.

ED. F. MCFADDIN, Justice. This appeal results from an unsuccessful attempt by the appellants to have

the chancery court declare the appellee to be a trustee *ex maleficio*. J. N. Carroll was the father of eight children, seven of whom survive him. The appellants are five of Mr. Carroll's children, and also two grandchildren (heirs of his deceased child). The appellee is a child of Mr. Carroll. Mr. Carroll's other child is neither appellant nor appellee, but was a party to this cause in the lower court.

In March, 1934, when he was about to submit to surgery, Mr. J. N. Carroll executed his holographic will, and delivered the same to his son, J. H. (Jim) Carroll, appellee. Mr. Carroll recovered from the operation, and lived until July 25, 1945, when he departed this life at the age of 84, a widower, a citizen of Lee county, Arkansas, and seized and possessed of 200 acres of land and certain personal property. On September 14, 1945, appellee had the will of March, 1934, admitted to probate in common form, and became the executor of the estate and the chief beneficiary under the will. The probate of the will was never contested (see Act 401 of 1941); but on November 21, 1945, the appellants filed this suit against appellee, individually and also as executor, seeking to have appellee declared trustee *ex maleficio* of the entire estate of Mr. J. N. Carroll for the benefit of the appellants.

The complaint alleged, and the proof—as viewed most favorably to appellants—established these facts:

1. After J. N. Carroll recovered from his 1934 operation, he stated that he wanted his will destroyed, so that all of his children could share equally in his estate.

2. The appellee had the said will in the bank at Brinkley, and J. N. Carroll instructed the appellee to destroy the will.

3. Appellee advised his father that he had destroyed the will.

4. Instead of destroying the will as he had promised to do, and as he stated he had done, the appellee kept the will in the bank, and after his father had

passed away, appellee had the will probated, and then claimed as the chief beneficiary thereunder.

The chancery court refused the requested relief; and the appellants have appealed.

The Appellants' Theory of the Case. The appellants frankly and candidly admit that the 1934 will was not revoked in accordance with § 14519, Pope's Digest; but they claim that this revocation was prevented by the fraud of appellee, in that he reported to the testator that the will had been destroyed. The appellants urge that, since appellee prevented the destruction of the will, then equity will not allow him to profit from his own fraud, and that equity will declare him to be a trustee *ex maleficio* (*i. e.,* through his own wrong) for the benefit of the heirs of J. N. Carroll. To sustain their theory of the case, appellants cite, *inter alia,* these cases from our court: *Baron* v. *Stuart,* 136 Ark. 481, 207 S. W. 22; *Ripley* v. *Kelly,* 207 Ark. 1011, 183 S. W. 2d 793; *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437; *Moore* v. *Oates,* 143 Ark. 328, 220 S. W. 657. Appellants also cite, *inter alia,* 28 R. C. L. 182, where, in discussing fraudulent prevention of revocation, this statement appears:

"... a devisee who by fraud or force prevents the revocation of a will may in a court of equity be considered a trustee for those who would be entitled to the estate in case it were revoked."

And appellants cite the following cases to sustain the above-quoted text: *Gaines* v. *Gaines,* 2 A. K. Marsh (Ky.) 190, 12 Am. Dec. 375; *Blanchard* v. *Blanchard,* 32 Vt. 62; *Dowd* v. *Tucker,* 41 Conn. 197; *Brazil* v. *Silva,* 181 Cal. 490, 185 Pac. 174; *Dye* v. *Parker,* 108 Kan. 304, 194 Pac. 640, 195 Pac. 599.

OPINION

After giving the evidence offered by the appellants its full force and effect, and after carefully studying the appellants' theory of the case and the authorities cited, we reach the conclusion that the appellants are not en-

titled to the relief sought, and the decree of the chancery court must be affirmed. This is our process of reasoning:

1. *The Testator Did Not Revoke His Will in the Form and Manner Provided by Law.* Our statute on the revocation of a will is § 14519, Pope's Digest:

"No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation and alteration, and executed with the same formalities with which the will itself was required by law to be executed, or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some other person, in his presence, by his direction and consent, and when so done by another person the direction and consent of the testator, or the fact of such destruction, shall be proved by at least two witnesses."

It will be observed from this section that, in order to effect a legal revocation, short of executing another will, the testator must either (a) execute a written instrument of revocation with due solemnities, or (b) personally burn . . . or destroy the will with the intent to revoke it, or (c) have some other person in testator's presence and by his direction, to burn . . . or destroy the will, "and when so done by another person, the direction and the consent of the testator, or the fact of such destruction, shall be proved by at least two witnesses."

In the case before us the testator did not personally destroy the will, and never caused the will to be brought into his presence for destruction. So, the will was not revoked in the form and manner required by law. In 68 C. J. 814, in discussing by whom the act of revoking a will may be committed, this rule appears:

"General authority, however, to destroy a will is not sufficient to justify a cancellation at a remote period upon the exercise of the will and discretion of the agent, without further sanction, knowledge, or direction on

the part of the testator, and, where, as in some jurisdictions, the statute requires that the act of revocation when done by a third person be in the presence of the testator, it is, of course, essential that there be a compliance with the statute, . . . ''

And in *Page on Wills,* Lifetime edition, § 424, the rule is stated:

''The statutes which permit some person other than testator to revoke testator's will by some act which is manifest thereon, such as burning, tearing, and the like, usually provide that such act of revocation must be in testator's presence and by his authority. Under such a statute it would seem that testator could not give to another a power to revoke testator's will by some act which is manifest thereon, in a manner which did not comply with the statutory provisions on this subject.''

This strict rule, requiring certain acts to be done in a particular way to constitute revocation, may seem very arbitrary; but, when we consider the situation existing before the adoption of such rule, we see the salutary effect thereof. In England prior to 1676 a man might execute a solemn will, making the desired disposition of his property. Then, after his death, disappointed heirs could, for a price, find many witnesses who would testify that the testator had told these witnesses that he had decided to revoke his will. Such testimony was allowed to destroy the will, with the result that the most solemn wills were defeated by witnesses who swore that the testator had made an oral revocation. So flagrant did this practice become, that in 1676 the English Parliament passed the salutary statute known as 29 Chas. II, Chap. 3. Sections 6 and 22 of that act not only prevented the oral revocation of a will, but prescribed minutely the acts short of which there could be no revocation of the will.

The English statute of 29 Chas. II, Chap. 3, entitled ''An Act for the Prevention of Frauds and Perjuries'' has been adopted in one form or other in most of the American States. It has been the inspiration and pattern

for the Arkansas statutes which may now be found in Pope's Digest, §§ 6059, 6061, 6062, 6063, 6064, 6065, 14515, 14516, 14517, 14518 and 14519. This last § 14519, as previously copied, comes literally from Chap. 157, § 6 of the Arkansas Revised States of 1838 (as approved on March 3, 1838), which amplified an earlier act of the Missouri Territory of January 21, 1815, when Arkansas was a part of the Missouri Territory. The territorial act may be found in § 3 of the chapter on "Wills and Testaments" in Steele and McCampbell's *Compiled Laws of Arkansas Territory,* published in 1835. We give this history of § 14519, Pope's Digest, to show that the strict rules covering revocation of a will are as old as our statehood, and have been found most salutary. In considering a document as solemn as a last will and testament, the courts must carefully follow the law, and every man is presumed to know the law. So, if Mr. J. N. Carroll had wanted to revoke his will, he should have pursued one of the methods provided by § 14519, Pope's Digest, as previously listed. This he failed to do, so his will of March, 1934, was never legally revoked.

II. *The Appellants Have Failed to Show That the Testator Was Prevented by the Appellee From Accomplishing Acts Which Would Have Resulted in a Legal Revocation of the Will.* The most that the appellants proved in this regard was that Mr. Carroll instructed the appellee to destroy the will, and that the appellee told him that the will had been destroyed. Even if the appellee had destroyed the will, it would have been out of Mr. Carroll's presence, and such destruction would have worked no legal revocation. In other words, Mr. Carroll's act in merely telling the appellee to destroy the will, was not a revocation; and the statement by appellee, that such a destruction had been accomplished—while false and therefore reprehensible— nevertheless, was not sufficient to constitute an actionable fraud, because, even if the statement had been true, and the will had been destroyed, there was still no legal revocation. Before one may be held to be a trustee *ex maleficio* in a case such as this, the proof must show that the defendant's conduct was such as to have prevented the testator from

accomplishing what would have amounted to a legal revocation. To hold that any less quality or *quantum* of proof is sufficient, would be to repeal or overturn the Statute of Frauds, and allow a will to be revoked by a mere oral declaration. This is exactly what would be accomplished if the appellants prevailed in this case, because all that Mr. Carroll ever did was to declare orally that he wanted the will revoked.

In *Page on Wills,* Lifetime Edition, after stating that the will may be probated, even where its revocation was prevented by force or fraud, the author makes this most enlightening statement in § 444 on the power of equity:

"A different question is presented where the disappointed heirs recognized the validity of the will as a formal legal instrument; but attempted to prevent the fraudulent devisee or legatee from reaping the fruits of his wrong doing, by applying to equity to have him held as trustee for those who would have taken the property if the will had been revoked. There has been some authority for this view in obiter.[1] In the few cases in which the question has been presented squarely for decision, we find a conflict of authority. It has been held in Ohio that equity is bound by the words of the statute which regulates the revocation of the will, and that oral evidence is inadmissible to show fraud and duress for the purpose of holding the devisee or legatee as a trustee, as this, in effect, will amount to treating testator's oral declarations as revocation of the will in equity.[2] In an Illinois case, testator was so feeble for more than two months before his death that he was unable to leave his house, and most of the time he was confined to his bed, while his will was in a neighboring town five miles away. He requested two of the devisees under such will, who were his sons, living in testator's

"[1] *Card* v. *Grinman,* 5. Conn. 164. Some wrongdoer 'may in a court of equity be considered a trustee.' *Gains* v. *Gains,* 9 Ky. (2 A. K. Marsh) 190, 12 Am. Dec. 375.

"[2] 'The Statute was designed to prevent the frauds and perjuries arising out of mere parol revocations, and to sanction a recovery in this case would open the door for the very evils which the statute intended to exclude.' *Kent* v. *Mahaffey,* 10 O. S. 204.

house, to have a lawyer brought to testator's house so that he might change his will; but such devisees refused to comply with his request and threatened violence to anyone who would bring a lawyer to their father or in any manner render assistance to him in changing or revoking such will. It was held that equity could not set aside such will at the instance of the other heirs; and that a bill in equity which set up such facts and sought such relief was subject to demurrer.[3] In a California case, on the other hand, the beneficiary induced the testator by fraud to believe that the will was destroyed, by telling the testator that the will was in an envelope, which envelope was burned in testator's presence. While the court had previously held that probate could not be denied because of such facts,[4] the beneficiary under the will was held as trustee for the heirs.[5]''

We do not have, here, the use of force as in the Illinois case, *supra.* If we had such a case, we think equity might well have granted relief. Nor do we have before us facts comparable to those in the California case, *supra.* There the testator followed the law by requiring the will to be brought to him for destruction, and by fraud was prevented from destroying the instrument. In such a case equity could well grant relief. But, in the case here at bar, the testator did not have the will brought to him for legal destruction. He merely made a request which was not sufficient—even if observed—to constitute legal revocation. So, the appellant's proof falls short of a case for equitable intervention. In addition to the cases cited by the appellants to support their theory of the case, as previously mentioned, and in addition to the cases discussed in *Page on Wills, supra,* other cases may be found collected in an annotation in 41 L. R. A. N. S. 105 on "Effect of Interference with Revocation of a Will," particularly those cases collected on page 109 in the subtopic "Effect Upon Right of Legatees and Devisees to Take." See, also, the an-

"[3] *Bohleber* v. *Rebstock,* 255 Ill. 53, 41 L. R. A. (N. S.) 105, 99 N. E. 75.

"[4] *Estate of Silva,* 169 Cal. 116, 145 Pac. 1015.

"[5] *Brazil* v. *Silva,* 181 Cal. 490, 185 Pac. 174."

notation in 98 A. L. R. 474, and see, also, 68 C. J. 824, § 529 on "Preventing Revocation." To discuss all of these cases would unduly extend this opinion; but we believe the reasonable rule deducible from the cases, on prevention of revocation as a ground for equitable relief, may be summarized as follows:

Before there is made a case for equitable intervention, the plaintiff must prove these two essentials: (1) that the testator undertook to accomplish acts which would have resulted in a legal revocation of the will, and (2) that the testator was prevented from the fulfillment of such acts by the force or fraud of the defendant. When these two essentials are proved, then a case is made for equitable intervention. The proof of essential No. (1) should show that the testator set about to act in compliance with the Statute (§ 14519, Pope's Digest); and the proof of essential No. (2) should show the conduct of the defendant which prevented the accomplishment of the acts embraced in essential No. (1). Here, the appellants failed in their effort to prove even the first essential: that is, they did not prove that the testator undertook to accomplish acts which would have resulted in a legal revocation of the will. In short, we agree with the general statement of the rule found in 28 R. C. L. 182 (that a devisee, who by force or fraud prevents the *legal* revocation of a will, may in a court of equity be considered a trustee); but we hold that the appellants failed to offer proof to bring this case within that rule.

In their theory of the case, the appellants cited the several Arkansas cases hereinbefore listed. It is sufficient to say that we adhere to all that is stated in those cases, but find them clearly distinguishable, on the facts, from the case at bar. None of the Arkansas cases was on the question of prevention of revocation of a will. *Baron v. Stuart, supra,* strongly relied on by the appellants, is on the question of securing the execution of a will by fraud. But in that case the testator undertook to perform acts which would have led to the execution of a valid will showing the testator's real and intended disposition of his property. He was prevented from accomplishing

such intention because of acts which this court held equivalent to fraud. In such a situation we said that a case was made for equitable intervention. That case is full support for our conclusion here.

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

TILLEY *v.* TILLEY.

4-8014 198 S. W. 2d 168

Opinion delivered December 2, 1946.

Rehearing denied January 13, 1947.

Holt & Holt, for appellant.

George F. Hartje, for appellee.

MINOR W. MILLWEE, Justice. This suit was brought by appellant, Nannette Tilley, against her husband, Rudolph Tilley, for separate maintenance and for custody of their six-year-old daughter. A trial of the issues on June 21, 1946, resulted in a decree awarding custody of the child to the husband and denying the wife's prayer for separate maintenance and attorney's fee.

The parties are natives of Conway, Faulkner county, Arkansas, where they were married in October, 1938. They lived in Conway, Arkansas, except for a period when appellee was employed in Oklahoma City, Okla., until December 8, 1943, when appellee was inducted into military service. Appellant and the child accompanied appellee to different military camps until he was sent overseas in September, 1944. Appellant then went to San Antonio, Texas, and secured employment at the Brooks Army Medical Center where she was still employed at the time of the trial. The parties corresponded regularly during the sixteen-month period that appellee was overseas and appellant received the monthly government allotment of $80 for herself and child, in addition to the salary of $2,100 per year from the Army Medical Center.

About thirty days before appellee's release from the army, and while he was still overseas, appellant wrote appellee that she could not be happy with him and did not intend to live with him again. Appellee testified, and it was not denied by appellant, that the parties had experienced no marital troubles of any kind prior to this time. Immediately upon his release from the armed forces on February 9, 1946, appellee visited his wife and child in San Antonio, Texas, in an attempt to persuade his wife to reconsider her decision to abandon him. Despite his earnest solicitation, appellant refused to resume the marital status. Appellee returned with the child to Conway where they have since resided in the home of appellee's parents.

There is some dispute between the parties as to the conditions under which it was agreed that appellee might take the child to Conway. Appellant testified that

her husband told her he would either return the child to San Antonio or she might come for the child, but that he had refused to allow her to have the child. Appellee testified that he made no promise to return the child, but did agree that appellant might come for the child, and that she had not done so.

The evidence discloses that appellant resides in San Antonio, Texas, with her uncle and aunt who are each past 70 years of age and unable to care for the child. Appellant works five days each week, and occasionally on Saturday, at the medical center. The child was left in a private nursing school during appellant's working hours from 8:00 a.m. until 4:30 p.m.

The child has resided with appellee at the home of his parents in Conway, Arkansas, since February, 1946. The grandfather and grandmother of the child are 57 and 56 years of age, respectively, and own their home. The child has received excellent care at the hands of her grandparents who are strongly attached to her. The child attends Sunday school regularly and appears to be happy. Appellee is regularly employed at a salary of $2,600 per year and is a kind and attentive father.

It is not contended by appellant that there is any merit in her prayer for separate maintenance. Her sole reason for abandoning her husband and refusing to restore the family status is that she does not love him and cannot be happy with him. According to her testimony, she did not love appellee at the time she assumed the marriage vows, but was induced to proceed with the ceremony upon his insistence that he would affect a change in her regard for him.

The chancellor found that it would be to the best interest of the child to award its custody to the father for the present with the right of the mother to visit the child and be entertained in the home of the grandparents at Conway at all reasonable times.

In § 6205 of Pope's Digest, it is provided that, where the husband and wife are living apart, there shall be no preference between them as to the custody of their chil-

dren, but that in each case the welfare of the child must be considered first in determining its custody. In many cases arising under the statute, this court has held that the welfare of the child is the first and primary consideration in awarding custody. In the case of *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817, it was 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. *Caldwell* v. *Caldwell,* 156 Ark. 383, 246 S. W. 492; *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47." It was further said in that case: "It is the uniform practice in this court that a chancellor's finding of fact will not be overturned on appeal unless found to be clearly against the preponderance of the testimony. *Eureka Stone Co.* v. *First Christian Church,* 86 Ark. 212, 110 S. W. 1042; *Scott* v. *McCraw, Perkins & Webber Co.,* 119 Ark. 135, 177 S. W. 901; *Vaughan* v. *C., R. I. & P. Ry. Co.,* 120 Ark. 37, 179 S. W. 165."

It is true, as appellant contends, that this court has always been reluctant to deprive the mother of the custody of a child of tender years. Appellant cites several cases so holding and also relies on the rule stated in 27 C. J. S., p. 1172, where it is said: "All things being equal, preference is given to the mother in awarding custody of a child of tender years, of a daughter, or of a child who is not in good health, notwithstanding the divorce was granted to the father, or the father may be better able financially to raise the child than the mother. However, such a child may be awarded to the father, in the court's discretion, where the circumstances of the case require it for the child's best interests."

The chancellor heard the witnesses testify and was in a more favorable position than is this court in passing on the question of the child's best interests. We are unable to say that his finding on this issue is against the preponderance of the evidence.

It is also insisted that the trial court erred in its refusal to allow an attorney's fee to appellant. Act 274 of 1945 amended § 4388 of Pope's Digest and provides: "During the pendency of an action for divorce or alimony, the court may allow the wife maintenance and a reasonable fee for her attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt, and the court may allow additional attorney's fees for the enforcement of payment of alimony, maintenance and support provided for in the decree." This court in construing the earlier statute in *Kincheloe* v. *Merriman,* 54 Ark. 557, 16 S. W. 576, 26 Am. St. Rep. 60, said: "Under our statute the allowance of alimony and suit money, pending a suit for divorce, is in the sound discretion of the court and, before the court will make the allowance, the wife must show merits." See, also, *Hecht* v. *Hecht,* 28 Ark. 92, and *Countz* v. *Countz,* 30 Ark. 73.

In 27 Am. Jur., Husband and Wife, § 416, it is said: "If a wife succeeds in her suit for alimony, support, maintenance, or separate maintenance, without a divorce, the court should, in its judgment or decree in her favor make an allowance for costs of the suit and for reasonable attorney's fee which she had had to pay or for which she has become liable. If, however, the wife fails to secure any relief under her bill for separate maintenance because of her fault in the separation of the spouses, she ordinarily will not be allowed costs of the suit."

In the case of *Hodge* v. *Hodge,* 161 Ark. 299, 255 S. W. 1090, it was held that the trial court properly refused the allowance of an attorney fee for the wife where there was lack of merit in the suit, although the custody of the child was left with the mother. In the case at bar appellant does not contend that appellee was at fault in any manner in their separation. Appellant brought the instant suit for separate maintenance and custody of her child under a situation that was brought about by her abandonment of her husband without legal cause. Under these circumstances, and giving due considera-

tion to the respective financial positions of the parties, we cannot say that the trial court abused its discretion in refusing to allow an attorney's fee to appellant.

The decree is affirmed.

HOLT, J., not participating.

METROPOLITAN LIFE INSURANCE COMPANY *v.* HAWLEY.

4-8018 198 S. W. 2d 171

Opinion delivered December 2, 1946.

Rehearing denied January 13, 1947.

Coleman & Gantt, for appellant.

Rowell, Rowell & Dickey, for appellee.

ROBINS, J. Appellee sued appellant in the lower court on October 12, 1945, for $2,500, alleged to be due under a policy issued by appellant providing certain indemnity in case of appellee's disability. Judgment for penalty and attorney's fee was also asked. By an amendment to his complaint appellee reduced the amount of his claim, alleging that he was entitled under the policy to a total of forty monthly installments of $52.50 each, and that he had been paid thirty of these installments, leaving $525 due him. Appellant's defense was that appellee, during the time the last ten instalments accrued, was not disabled within the meaning of the policy; and this averment made the issue in the court below. From judgment of the lower court based on jury's verdict, for $472.50, appellant prosecutes this appeal.

The policy sued on was a certificate issued by appellant under a "group policy" covering employees of a Pine Bluff newspaper and it provided for payment of $52.50 per month for forty months, upon proof that "insured . . . has become so disabled as a result of bodily injury or disease, as to be prevented permanently from engaging in any occupation or from performing any work for compensation or profit."

The evidence, in which there is little dispute, shows that appellee had worked for the Pine Bluff Commercial for about thirty years. He was circulation manager and as such earned an average (for four years before retiring from the work) of $3,985.38 net, according to his income tax returns, per year. By reason of illness he was forced to give up his position with the newspaper in January, 1943, and did no work of any kind for about a year. In 1944, he did some collecting at a salary of $22.50 a week, working, as he stated, when he felt like it. In January, 1945, he began working as a salesman for a monument

dealer at a salary of $40 per week, and he was doing this during the time indemnity sought herein accrued. In this position he worked about three or four hours a day and took regular rest each day.

Dr. J. D. Riley, superintendent of the Arkansas Tuberculosis Sanatorium, testified that an examination on January 19, 1943, disclosed that appellee was suffering from pulmonary tuberculosis and that an examination on June 29, 1945, showed unimprovement. From the latter examination Dr. Riley concluded, and so testified, that appellee was totally and permanently disabled. Attached to his deposition were copies of the records of the sanatorium showing numerous examinations, all of which revealed a continuing and almost static tubercular involvement of appellee's lungs.

Dr. W. T. Lowe, a witness for appellant, testified that he had recently examined appellee and found that he had an "arrested case" of tuberculosis. He said: "Sometimes people have these cases of arrested tuberculosis . . ., not benefited much by medicine of any kind whatsoever, for his life is strictly in his own hands, and when a doctor gives him advice, . . . and he follows that advice he probably will go on and live a long time, but there is also the danger that his resistance will not be sufficient to keep this localized area of infection dormant, maybe he will develop pneumonia, the grippe, a bad cold, or he might break a rib and puncture the lung —a good many things might lower his resistance and cause that thing to become active again." When asked as to whether Mr. Hawley is capable of doing some work, Dr. Lowe testified: "Some doctors might examine him and say he ought to stay in bed all the time, and another . . . might say it would be better for him to be up and around. The question is, is he able, can he work, if he can work and does work I or no other doctor has got a right to say he is permanently and totally disabled because his actions belie that. . . . I don't think he should be in bed; whether the work is going to hurt him or not, . . . I don't think the work will hurt him. . . . Q. It is in evidence in this case that for 30 years

Mr. Hawley was circulation manager for the Pine Bluff Commercial, and as such he had as his duty to see to it that the paper was distributed to the customers, and collections made. He has testified that it required him to work a full day for six days a week, and sometimes at night, especially on Saturdays; and seven days a week wasn't it; in your opinion could he perform his usual work with tuberculosis arrested? A. I don't think he could do that kind of work. I don't think he should try to do it. Q. That, in your opinion, would produce strain that might bring the condition back in an active status? A. Yes."

Lee Dunlap, owner of the monument concern, testified that appellee's work "is about a half time job"; that when appellee went to work for him appellee explained that he had to have rest periods . . . "some days probably he wouldn't go out at all."

Appellant urges that the lower court erred in giving instruction No. 1, at the request of appellee. This was a general instruction as to liability in cases of this kind, and merely stated the rule as frequently expressed in decisions of this court.

It is also argued by appellant that the lower court erred in refusing to give a proper instruction as to the burden of proof. This phase of the case was properly covered in another instruction given by the court.

Appellant's principal contention is that the lower court erred in refusing to give a peremptory instruction in its favor, because the proof failed to show such disability of appellee as to entitle him to indemnity under the policy.

It is urged by appellant that, since appellee was able to, and did, earn some compensation during the period for which he asked indemnity payments, he was not "disabled" within the meaning of that term as used in the policy.

Many cases from this and other jurisdictions might be cited to show the efforts of courts to arrive at a proper

construction of policies such as was issued by appellant to appellee. To enumerate these cases, and to attempt to reconcile the rules laid down in them, would serve no useful purpose. Divergent as are the views expressed in these decisions, we think it may be said that all of them support these conclusions:

(1) That the language of the policy being that of the insurer it should be given the strongest construction against the insurer that it will reasonably bear.

(2) That no rigid standard as to the extent of disability necessary to create liability can be set up and that every case must be governed by its own peculiar facts.

(3) That the disability contemplated under a policy such as is involved here does not mean utter helplessness and that ability of the insured to earn only a nominal income does not necessarily bar his right of recovery.

Dealing with this question, the Supreme Court of South Carolina, in the case of *Dunlap* v. *Maryland Casualty Company*, 203 S. C. 1, 25 S. E. 2d 881, 149 A. L. R. 1, said: "A policy of this kind cannot be held to be one of income insurance, guaranteeing the insured against depreciation of his income on account of any injury; yet, if an insured is rendered incapable of continuing in his former occupation, but is able to perform some other work, that work in our opinion must not only be an occupation or employment for which he is reasonably fitted, but must rationally approach the same livelihood and standard of living which he enjoyed prior to his injury. This in our opinion, is a reasonable construction of the policy provisions, and one which must have been in the minds of the parties." This South Carolina case, *supra,* is reported in vol. 149 American Law Reports, and after extensive annotations the editorial writer (p. 77) thus deduced the majority rule: "An employment or occupation which yields the insured a mere nominal compensation does not of itself exclude the insured from recovery under the disability clause."

We think a reasonable rule to be applied in these cases is that whenever it is shown by competent evidence

that by reason of accident or serious malady the insured suffers a considerable physical handicap and his earning capacity has been so adversely affected that he can no longer pursue the occupation for which his training or experience has fitted him and he has been forced to resort to some other occupation, from which he cannot earn a livelihood reasonably comparable to that which he was earning when he obtained the insurance, then the trial court may properly submit to the jury for its solution the question of whether the insured has suffered the disability required under the policy to entitle him to the indemnity for which he has sued.

One of the latest decisions of this court in which the question of disability under a policy with language similar to the policy here involved is that of *Aetna Life Insurance Company* v. *Orr,* 205 Ark. 566, 169 S. W. 2d 651. In that case Dr. Orr sought and obtained in the lower court judgment for disability under a policy providing indemnity for him in case he " 'becomes totally and permanently disabled by bodily injuries or disease, and is thereby prevented from performing any work or conducting any business for compensation or profit.' " He had suffered an x-ray burn on the thumb and fingers of his right hand, which he asserted had disabled him; but it was shown that during the period for which he sought indemnity he earned an average of $426.53 per month from the practice of his profession. While the judgment of the lower court in that case was reversed, we refused to dismiss the case, saying: "In passing on the question of total disability, consideration must be given not only to the specific wording of the policy, but also to the business or profession of the insured when the policy was issued and when the claim arose. What would totally disable or incapacitate one person might not seriously impair some other person. For instance: the loss of a toe might be a total permanent disability to a professional dancer, but might have no such effect upon a lawyer or a school teacher. Likewise, the loss of a finger might be a total permanent disability to a professional pianist, but would have no such effect upon a lawyer or

school teacher. These sketchy illustrations show that each case has to be determined on its own particular facts. As is stated in 29 Am. Jur. 874: 'Of course, total disability is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case; consequently, what constitutes total disability in a particular case depends largely upon the occupation, employment and capabilities of the person insured.' Chief Justice HART, speaking for this court in *Aetna Life Insurance Company* v. *Spencer*, 182 Ark. 496, 32 S. W. 2d 310, recognized this obvious truth when he 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.' "

We conclude that under the testimony adduced it was proper for the lower court to submit the question of appellee's disability to the jury.

Counsel for appellee in their brief argue that the lower court should have allowed the statutory attorney's fee and penalty in this case; but appellee has not cross-appealed and we therefore may not consider the correctness of the lower court's order in this particular.

The judgment of the lower court is affirmed.

TRANSPORT COMPANY OF TEXAS *v.* ARKANSAS FUEL OIL CO.

4-8016 198 S. W. 2d 175

Opinion delivered December 2, 1946.

Rehearing denied January 13, 1947.

[redacted]

M. J. Harrison and *Rose, Dobyns, Meek & House,* for appellant.

Buzbee, Harrison & Wright, for appellee.

McHANEY, Justice. Alfred Powell, a resident of Nashville, Arkansas, was accidentally killed in a truck accident on February 19, 1945. His widow, Maggie Burke Powell, cross-appellant, and a minor son, Charles

Powell, survive him. The deceased was, at the time of his death and for some time prior thereto, in the employ of Mr. and Mrs. J. B. Hill as a truck salesman of petroleum products, they (the Hills) being retail distributors for appellee, Arkansas Fuel Oil Company, and they paid Powell $150 per month, or an average weekly wage of $34.62. The Arkansas Fuel Oil Company will be hereinafter referred to as appellee, although its insurance carrier is the other appellee, and they provide workmen's compensation insurance on the employees of appellee's distributors, including the Hills. The premiums for insurance on employees of distributors are paid by appellee who charges same to and collects same from the distributors, including the Hills. So, Powell was covered by compensation insurance procured by appellee.

The Hills distribute at Nashville Cities Service products under a contract with appellee, dated February 14, 1944. Hurshal D. Clark operates a Cities Service filling station in Nashville as lessee of appellee, receiving his supplies from the Hills.

Barney Smith is the distributor in Nashville for Texaco Oil products. Coy Dyer is the tank truck driver for Smith. Frank Moss operates the Texaco filling station in Nashville. These facts are mentioned because of what follows.

On February 19, 1945, a truck driver brought word to Clark's Cities Service station that an oil transport was broken down between Nashville and Lockesburg and that the driver wanted some of the oil boys in Nashville to come to his assistance. The same information was given by a passing motorist to the Texaco station operated by Moss who contacted Coy Dyer. The latter prepared to go to the assistance of the driver of the transport. He contacted Powell to borrow his chains and Powell learned that Clark had also received a request for assistance to the transport and was seeking Powell to give him the information. Upon learning this, Powell left in his truck to render assistance. Both Dyer and Powell arrived at the scene of the accident

at the same time. The transport had a broken rear axle, was stopped on the up-grade of a hill and had its motor running to supply air to the brakes to keep it from running back down hill. Both hitched their trucks to the transport by chains and tried to pull it to the top of the hill, but could not do it. One Chenault was the driver of the transport and acknowledged he had sent word to Nashville for help and assisted Dyer and Powell in attaching their chains. All three then left to take Chenault to Lockesburg in Dyer's truck, where Chenault telephoned his employer for assistance. They then returned to the transport, leaving Chenault, and Dyer and Powell then left for Nashville, each driving his own truck with Dyer ahead. After traveling some eight or nine miles toward Nashville, Dyer pulled off the road to observe a passenger car in the ditch. When he tried to re-enter the highway Powell's truck struck Dyer's and Powell was killed. The night was dark and rain was falling at the time.

The transport was loaded with kerosene or gasoline for the Texas Oil Company in Nashville where it was delivered the next day.

On February 24, 1945, appellee filed with the Workmen's Compensation Commission what is called "Employer's First Report of Injury," disclosing the death of Powell on February 19, 1945. The Fidelity & Casualty Company of New York was designated as insurance carrier. On April 2, 1945, cross-appellant Maggie Burke Powell filed her claim for compensation against appellee and its insurance carrier for the death of her husband. Appellee gave notice it would controvert the claim on the ground that Powell's death was caused by an injury received while outside the scope of his employment.

Based on the facts above set out, about which there appears to be no substantial dispute, the Commission held that at the time of his death Powell was an emergency employee of appellant Transport Company of Texas, and made an award of compensation against it and its insurance carrier of $15.58 per week from February 19, 1945, and to continue subject to the pro-

visions of the Compensation Act (No. 319 of 1939, as amended), not to exceed 450 weeks or $7,000.

From this award an appeal was taken to the Howard Circuit Court, where the award was affirmed, and this appeal followed.

Appellee does not contend that Powell was not its employee, and could not consistently do so in the face of its First Report of Injury filed with the Commission and its notice of intention to controvert the claim of Mrs. Powell for compensation. The only claim it makes in this regard is that Powell, although its employee generally, had departed from its service at the time of his death and had entered the service of appellant, and, therefore, that the fatal accident to Powell did not arise out of and in the course of his employment for it.

We cannot agree with this contention or that Powell became an emergency employee of appellant under the facts here presented, even assuming which we do that Chenault sent word to Nashville for some of the oil boys to come out to help him and that Dyer and Powell responded because of this message. Dyer went because Moss, the Texaco dealer and a customer of his employer, told him of the transport's trouble. Powell went because of word received from Clark, Cities Service dealer and a customer of his employer. Both employers of Dyer and Powell were expecting a shipment of needed merchandise and both Dyer and Powell, we think, went to help the transport to render a service to their respective employers. In this view neither had departed from the service of his master.

In such cases the general rule seems to be that, where the person rendering assistance to another in an emergency has an interest for his employer in relieving the emergency condition, he does not become an emergency employee of the person to whom he renders such assistance. We have no such case in our reports and to us it is of first impression under the Compensation Act. We have a number of cases of emergency employment growing out of tort actions for damages for in-

juries sustained in rendering emergency services by strangers to the transaction. One of such cases is *Henry Queelmalz Lbr. & Manufacturing Co.* v. *Hays,* 173 Ark. 43, 291 S. W. 982. We have no case, however, in point with the case at bar, and we know of no case which holds that the emergency master is liable for an injury received by an emergency employee who was not injured at the scene of the emergency. We do not hold that this could not be.

In *Pacific Indemnity Co.* v. *Industrial Acc. Com.,* 105 Cal. App. 525, 288 Pac. 129, decided May 8, 1930, and rehearing denied by the Supreme Court of California July 7, 1930, the general rule above stated was sustained. We do not set out the facts in that case nor quote from the opinion, as to do so would unduly extend this opinion. This California case has been cited and followed in a number of cases in the same and other courts.

So, we conclude that Powell, in going to the scene of the transport's trouble and in attempting to render assistance to its driver Chenault, did not become an emergency employee of appellant so as to make it liable for compensation under the Compensation Law. Nor did he depart from the service of the appellee so as to relieve it and its insurance carrier from liability for compensation to his widow and minor son for his death. The cause will be reversed and remanded to the Circuit Court with directions to reverse the award of the Commission and to remand the same to the Commission with directions to make the same award against appellees, with interest on the past due payments from their due date until paid. Appellee to pay all costs.

HILL *v.* TALBERT.

4-8004 197 S. W. 2d 942

Opinion delivered December 9, 1946.

Reinberger & Eilbott and *Gene Baim,* for appellant.

A. F. Triplett, for appellee.

SMITH, J. Warren and Celia Boyd, husband and wife, owned as tenants by the entireties, three lots in the city of Pine Bluff. Warren died in 1931. After Celia's death in 1945, her heirs brought suit in ejectment to recover possession of the lots from Rayford Talbert, referred to by the witnesses as Ray, who was in possession, claiming ownership. Ray filed an answer in which he claimed title under an oral contract with Warren and Celia, whereby it had been agreed that if he would live with them and take care of them during their lives, he should have title to the lots. He alleged performance of this contract, and prayed that his title be quieted, and that the specific performance of the contract be decreed, and on his motion the cause was trans-

ferred to equity. The relief prayed was granted by the chancery court, and from that decree is this appeal.

Testimony offered by Ray was to the following effect: He and the Boyds lived in Mississippi, where he married their daughter in 1913, with whom he lived until her death in 1921. The Boyds lived with him from 1915 until 1917, and he and Warren farmed together. Warren moved to Pine Bluff in 1921, and he and his wife acquired title to the property here in litigation. Warren sent him a special delivery letter in October, 1931, asking him to come to Pine Bluff. He went to Pine Bluff, and Warren said to him, "If you will move over here and take care of us until we die, the place is yours," and Celia said, "I will say the same thing. If you will do that I want you to have the place."

Ray testified that he accepted the offer as a contract, and that he removed to Pine Bluff to perform it, and that he did perform the agreement on his part. He did not go to Pine Bluff at once, but returned to Mississippi where he finished gathering his crop, consisting of twenty-one bales of cotton, after which he went to Pine Bluff. He took all of his personal effects, including a quantity of meat which he had cured and which was consumed by the Boyds and himself. He testified that Warren said that he did not feel like Ray was his son-in-law, and that Warren always thought of him as a son, and one of the numerous witnesses who testified in Ray's behalf referred to him by that name.

Many of the nearest neighbors and closest friends of Ray and Celia testified in Ray's behalf, and if their testimony is to be credited, there appears little doubt that Warren and Celia made the contract under which Ray claims title. Several of the witnesses testified that the terms of the contract were repeated to them by both Warren and Celia, it being explained that it was desired that they might be witnesses if Ray's right to the property was questioned after their death. The explanation offered of the failure to evidence this contract by some writing is that Warren and Celia were ignorant and illiterate.

Now the law is that contracts of this character must be proved by testimony that is clear, decisive and convincing. *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82; *Walker* v. *Eller,* 178 Ark. 183, 10 S. W. 2d 14.

The reason for the rule is that the finding that there was such a contract depends upon the testimony of witnesses who are living, and the decedent is not present to rebut that contention. We think the testimony meets this requirement of the law, although the testimony tending to prove the contract is not undisputed. But the law does not require that the testimony be undisputed. It suffices if the testimony which is credited and believed to be true clearly, decisively and conclusively establishes the existence of the contract. The rule is the same as in the case of reformation of a written instrument which will be ordered only upon testimony which is clear, cogent and convincing. *Sturgin* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236; *Sewell* v. *Umsted,* 169 Ark. 1102, 278 S. W. 36; *Meekins* v. *Meekins,* 168 Ark. 654, 271 S. W. 18.

To prevail, Ray must not only prove that he had such a contract, but he must also show that he performed it, and there is more conflict on this issue than there is in regard to the existence of the contract. According to Ray's own testimony, the contract required him to pay the taxes on the property, to feed, clothe and furnish fuel and necessary medical attention to both Warren and Celia during their lives.

The strongest circumstance tending to show that Ray had not complied with this contract by furnishing Celia necessary food and fuel was that offered by a welfare worker who testified that for some time Celia was given aid, which would not have been given "if she had an independent living." It is a matter of common knowledge that many persons, with little pride or compunction of conscience, received this aid. Ray admitted that this aid was given Celia, but he testified that it was not required, and that Celia used this aid entirely for her personal purposes, and that he at all times supplied the necessities suitable to their condition.

On the whole, however, the testimony of this witness was not unfavorable to Ray. This welfare worker testified that Celia told her that Ray had promised Warren on Warren's death bed that he would take care of Celia during the remainder of Celia's life, and that Ray had paid her taxes and furnished her fuel.

It was shown without dispute that Ray made only a few minor repairs of the house, but these were all the repairs which were made, and that he paid premiums on the burial policy from the proceeds of which Celia's funeral expenses were paid. Several neighbors testified that on several occasions Celia had eaten a meal with them, but Ray explained that this was not through lack of food at home, as he raised and cured his own meat, had a large garden and had plenty of garden truck; that he drove a delivery wagon and with the money thus earned he supplied Celia's wants, suitable to their humble station. Tax receipts found in Celia's possession showed that all taxes had been paid in Celia's name. Ray did not claim to be the owner of the property until after Celia's death, nor did he claim that he had personally paid the taxes, but he did claim to have furnished the money with which they were paid, and the testimony of the welfare worker is corroborative of this statement.

Two letters were offered in evidence over objection of Ray's counsel addressed to a brother of Celia, in which she appealed for assistance in paying her taxes, and in getting Ray out of the house, as he was paying no rent. There was no testimony, however, that Ray had ever paid rent or had agreed to do so, and no reason is shown why Celia could not have ordered him out of the house if he was not complying with his contract to furnish her support.

However, we think these letters were not admissible in evidence as they offend against the hearsay evidence rule, and were not statements against interest. Celia did not write these letters, but a neighbor testified that she wrote them for Celia. If Celia was mercenary enough to apply for aid, which she did not require, she might

also have been mercenary enough to apply to her brother for money to pay her taxes, when Ray was paying them.

But if the letters were inadmissible in evidence, it is unnecessary to consider what weight should be given them had they been competent. The subject of Self-Serving Declarations is extensively annotated in the chapter on Evidence in 31 C. J. S., page 948, § 216, in which cases are cited from nearly every state in the union, supporting the text from which we extensively quote as follows: "Generally a party cannot make evidence for himself by his own declarations, and it is a well-established general rule that a statement of a party, whether oral or written, which is of a self-serving nature is not admissible in evidence in his favor. Such declarations are not rendered admissible by the mere fact that they were made in the presence of, or in a conversation or correspondence with, the opposing party or his agent, in the absence of assent to their truth by the opposing party, see subdivision (b) of this section; by having been brought to the attention of the other party or his agent and commented on by him; by having been part of a conversation or correspondence with the declarant's witness; or by being brought out on cross-examination. Such declarations are equally inadmissible when offered by the declarant's representatives, devisees, or heirs, since, as is noted, *infra,* this subdivision, the death of a declarant does render his statements admissible. The rule of exclusion also applies when such declarations are offered in evidence by third persons on their own behalf.

"The rule excluding self-serving declarations is a part of the hearsay rule, and its purpose is to prevent the manufacturing of evidence. A self-serving declaration within the rule is one made by a party in his own interest at some place and time out of court and it does not include testimony which he gives as a witness at the trial." . . .

"Effect of death of declarant. The death of the declarant does not render his self-serving declarations admissible, except in jurisdictions where the rule has been changed by statute."

These statements are consonant with rules announced by this court dealing with the subject in the following cases: *Strickland* v. *Strickland,* 103 Ark. 183, 146 S. W. 501; *Caffey* v. *Allison,* 107 Ark. 153, 154 S. W. 202; *Carter* v. *Younger,* 123 Ark. 266, 185 S. W. 435; *Raymond* v. *Raymond,* 134 Ark. 484, 204 S. W. 311; *Watson* v. *Davidson,* 141 Ark. 591, 217 S. W. 777; *Black* v. *Hogsett,* 145 Ark. 178, 224 S. W. 439; *Arkmo Lumber Company* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901; *Davis* v. *Falls,* 172 Ark. 314, 288 S. W. 723; *Heard* v. *Farmers' Bank,* 174 Ark. 194, 295 S. W. 38; *Beichslich* v. *Beichslich,* 177 Ark. 37, 5 S. W. 2d 739; *Brotherhood of Railroad Trainmen* v. *Fountaine,* 155 Ark. 578, 245 S. W. 17; *Dunaway* v. *Ragsdale,* 177 Ark. 718, 9 S. W. 2d 6; *Smith* v. *School Dist.,* 192 Ark. 792, 94 S. W. 2d 706; *Gray* v. *Gray,* 199 Ark. 152, 133 S. W. 2d 874. There are other cases in our reports to the same effect.

In view of the relationship of Ray and Celia, and the long period of time during which he lived in her house, until she became an old woman, during all of which time Celia was without income, so far as the record shows, except the contributions made to her by the government, we are constrained to hold that the chancellor was warranted in finding that Ray had substantially complied with his contract, and was entitled to the benefits inuring from its performance, and the decree granting Ray the relief prayed is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* KING.

4-8019 197 S. W. 2d 931

Opinion delivered December 9, 1946.

Thos. S. Buzbee and *A. S. Buzbee,* for appellant.

Chas. X. Williams and *Paul X. Williams,* for appellee.

MINOR W. MILWEE, Justice. Appellee, Simon King, brought this action in the Yell Circuit Court, Danville District, against appellants, Chicago, Rock Island & Pacific Railway Co. and Larry Smith, train conductor, to recover damages for personal injuries which appellee sustained in a fall from one of the railway company's passenger trains on July 1, 1945.

Appellee alleged in his complaint that, while riding as a fare paying passenger on a train of the company traveling west from Little Rock, Arkansas, he had no seat and an agent of the railroad company in the operation of the train negligently directed him to sit upon a step stool near an opening in the baggage car; that while the train was being operated at a speed of approximately 60 miles an hour out of a curve, appellee was thrown from the baggage car and sustained severe personal

injuries. It was also alleged that, although the trainmen were immediately notified of the accident, they negligently failed to stop the train or render any assistance to appellee.

The answer of appellants contained a general denial and a plea that any injuries sustained by appellee were the result of his own negligence. Trial to a jury resulted in a verdict and judgment for appellee against the railway company for $5,000.

Appellants urge two assignments of error by the trial court: (1) that appellants' request for a directed verdict should have been granted, and (2) that the verdict is excessive.

In determining whether the trial court erred in its refusal to direct a verdict for appellants, we give the evidence its strongest probative force in support of the verdict, which must be sustained if there is substantial evidence to support it. After reaffirming this long established rule in *Chicago, Rock Island & Pacific Railway Company* v. *Manus,* 193 Ark. 397, 100 S. W. 2d 258, this Court said: "We have also many times held that this Court must give to circumstances in proof, their highest probative value in favor of the appellee, and indulge every inference which is reasonably deducible from them in support of the jury's finding. *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798; *Ft. Smith Traction Co.* v. *Oliver,* 185 Ark. 227, 46 S. W. 2d 647; *Arkansas Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45; *Union Securities Co.* v. *Taylor,* 185 Ark. 737, 48 S. W. 2d 1100; *St. Louis S. F. Ry. Co.* v. *Hall,* 182 Ark. 476, 32 S. W. 2d 440."

Appellee testified that he was a private, first class, in the United States Army and was returning from a furlough to his base in Roswell, New Mexico, on the night of June 30, 1945, when he boarded Rock Island Train No. 111 at Memphis, Tennessee. The car in which appellee was traveling was an old type combination passenger coach and baggage car. The train was crowded and appellee had no seat. About 2:00 a. m., appellee

began to get sleepy and requested a trainman to find him a seat. At the direction of this trainman, appellee was taken from the passenger compartment to the baggage compartment and directed to sit upon a stool furnished by the trainman. The appellee went to sleep on the stool and remembered nothing further until he was in the Camp Chaffee hospital. He saw no one else in the baggage compartment when he and the trainman entered it. Some of the lights in the passenger compartment had been turned off, but he paid no attention to the lights in the baggage compartment.

Hayden Walker, an employee of the railway company, was riding on a pass ("dead heading") to Blue Mountain, a small station in Logan county, Arkansas, about one and one-half miles beyond the point where appellee was later found. He was sitting with the conductor when he heard the head brakeman tell other trainmen that the negro soldier had fallen off the train about one and one-half miles east of Blue Mountain. After leaving the train at Blue Mountain, this witness, with the assistance of a deputy sheriff and another, found appellee lying in a ditch about 20 or 25 feet from the south side of the railway track. The frames of appellee's glasses were found about 2 feet from the track. Appellee was unconscious and remained in the ditch about one and one-half hours. A doctor was summoned and appellee was identified by furlough papers found on his person. The provost marshal at Camp Chaffee, near Ft. Smith, Arkansas, was notified and appellee was taken to the camp hospital in an army ambulance. The trainmen of appellant had no knowledge of the assistance rendered by Walker. The train which appellee was traveling met the "Rocket," another passenger train, at Blue Mountain. This train and a freight train had passed the place of injury when appellee was found. At the time of the accident, train No. 111 was traveling downgrade at a speed of 50 miles per hour and had emerged from a curve about a train's length from the point where appellee was found.

There was other evidence that the weather was warm and both side doors of the baggage compartment were open. There was a conflict between the testimony of the trainmen as to whether the train stopped before it reached Blue Mountain. The conductor testified that he gave no stop signal and that the train did not stop until it reached Blue Mountain. He also testified that he arranged with the conductor of the Rocket for the latter to pick up appellee and take him to a hospital, if he was still alive. This was not done. He later received a wire from the conductor of the Rocket stating that they were unable to find appellee.

The head brakeman and another employee of the railway company, who was riding on a pass, testified that they were in the west end of the baggage compartment about 3:00 a. m. and saw appellee arise from his seat in the passenger compartment and walk directly toward them until he reached a point opposite the opening in the baggage car when he suddenly turned and walked out the side door of the baggage compartment. The trainmen also testified that appellee occupied a seat in the passenger compartment and that there were no passengers standing in the train. They also testified that no fare paying passengers were allowed in the baggage compartment.

Appellants insist that appellee was relying on the doctrine of *res ipsa loquitur* which, it is argued, does not apply because it must be concluded that the accident and injuries sustained might as plausibly have resulted from negligence on the part of the passenger, as the carrier, under the rule announced in *Price* v. *St. Louis, Iron Mountain & Southern Railway Company,* 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79. But appellee did not proceed under the doctrine of *res ipsa loquitur.* He specifically alleged negligence on the part of an employee of the railway company in directing him to occupy an unusual and dangerous position in the baggage compartment, which was being operated with open doors. The case was submitted to the jury under the conflicting testimony that was adduced on the specific acts of negligence

thus charged and under instructions which are not challenged.

It is also contended that there is nothing in the testimony to indicate any negligence on the part of the employees of the railway company. The evidence presented a disputed question of fact as to whether appellee was directed to occupy an unusual and dangerous place in the baggage compartment, as he testified, or whether he voluntarily or negligently arose from a seat in the passenger compartment and walked out the side door of the baggage compartment, as the railway employees testified. It was the province of the jury to weigh the evidence and pass upon its truthfulness. When the facts and circumstances in evidence are viewed in the light most favorable to appellee, we think it was substantial and sufficient to go to the jury upon the issue of appellants' negligence. This issue, as well as the issue of appellee's contributory negligence, was submitted to the jury under proper instructions, and the trial court properly overruled appellants' request for an instructed verdict.

Appellants contend that, since appellee was a soldier, he sustained no loss of time, or money, and incurred no doctor bills, and that the verdict is, therefore, grossly excessive. Appellee is 22 years of age and testified that his shoulder, wrist and three fingers were fractured. There were other bruises and cuts over his body. The fractured wrist and fingers resulted in a limitation in the use of his left hand which still existed at the time of the trial, and rendered it impossible for him to pursue his duties as a mechanic. The first finger of his left hand was permanently injured and rendered useless. He remained in the hospital 10 days and suffered much pain. The jury observed the results of appellee's injuries, and the limitation of the use of his hand and fingers was demonstrated before the jury. Appellants offered no proof to contradict the testimony of appellee on the extent of his injuries.

Appellants also contend that the failure of appellee to produce the testimony of the army physicians who

treated his injuries raises a presumption that such testimony would have been unfavorable to appellee and would not have substantiated his claim for injuries. Appellants rely on the rule announced in *Rutherford* v. *Casey,* 190 Ark. 79, 77 S. W. 2d 58, as follows: "The failure to produce evidence within the party's control raises the presumption that, if produced, it would operate against him, and every intendment will be in favor of the opposite party." The proof in the case at bar does not show whether the testimony of these army doctors was available to appellee, and it cannot be said that such evidence was within his control under the aforementioned rule.

We are unable to say that the amount of the verdict demonstrates such bias and passion on the part of the jury as to make it grossly excessive, and call for a reversal or modification of the judgment.

No error appearing, the judgment is affirmed.

LOCKHART *v.* NEWMAN.

4-8017 197 S. W. 2d 934

Opinion delivered December 9, 1946.

Walter M. Purvis, for appellant.

L. P. Biggs, for appellee.

McHaney, Justice. On the former appeal of this case, *Lockhart* v. *Roberts, Admr.,* 208 Ark. 569, 187 S. W. 2d 183, the judgment was reversed because the administrator was not authorized by law to bring the action for possession of the property involved and the past due rentals thereon, since neither was needed to pay the debts of the intestate.

Appellees are the husband and all the other heirs at law of Clara Bertha Newman who died intestate on January 16, 1944, the owner of the real property here involved, described as the west 28 feet of lot 8, Compton's Subdivision of block 403, Little Rock, or No. 1428 West 9th street in said city. They brought this action against appellant for possession of said property and for the past due rentals thereon. The complaint alleged that defendant entered into possession under a rental contract with Mrs. Newman at $15 per month, payable in advance, and that no rent had been paid from October 1, 1943, until the filing of the complaint on May 25, 1945, and judgment was prayed for the accrued rentals, possession and damages. They caused a notice to quit and surrender the possession to be served on appellant on May 17, 1945.

After several apparently dilatory motions, demurrers and pleas were filed and overruled, appellant, on October 13, 1945, filed a lengthy answer and cross-complaint consisting of 13 pages in the record, praying judgment against appellee, Henry Newman, in the sum of $440 actual and $1,050 punitive damages against him. A demurrer to the cross-complaint was sustained on April 4, 1946, and on that day the case was set for trial by agreement for April 24, and on the latter date judgment by default was rendered for appellees for the possession of said property and for $462 for accrued rents.

Thereafter, on May 16, appellant filed his motion to set aside the default judgment of April 24 on a number of grounds, some of which will hereinafter be dis-

cussed. The court overruled said motion and this appeal is from that order.

For a reversal appellant insists that the court abused its discretion in denying his motion to set aside the default judgment, because his failure to be present on the day set for trial was due to an unavoidable casualty, in that his attorney was ill and could not attend court and that there was illness in his family preventing him from attending. Also that his attorney through error marked his office calendar so as to show the case set for trial on April 25, instead of April 24. Assuming that all this is true, no abuse of discretion of the trial court is shown, and no such unavoidable casualty is shown which calls for a reversal of the judgment.

But even if there was such a casualty or abuse of judicial discretion in the premises, it does not necessarily follow that the judgment must be reversed. We agree with the trial court and appellees that no meritorious defense to the action has been shown, and it would be a vain and useless procedure to set aside a judgment and grant a new trial where the defendant does not allege a meritorious defense, and it is manifest that the same result would necessarily follow on another trial. Appellant does not claim that he has paid any rent since October 1, 1943, and he admits that he owes rent to someone at the rate of $15 per month. He complains that he was not given 30 days' notice to quit, and cites *Dillon* v. *Miller;* 207 Ark. 401, 180 S. W. 2d 832, to support his complaint. That case is not in point here. That was an action of unlawful detainer and there was no claim that the tenant was in default for the rent. Here the notice was given May 16, 1945, and demanding possession on May 22. At that time the monthly rental was in default from October 1, 1943. Appellant also says appellees did not comply with the Federal Housing Regulations in bringing the action. We do not understand that a certificate of authority from the Rent Control office is necessary to evict a tenant who is in default in the payment of his rent.

Appellant also questions the right of appellees to receive the rent, it not being shown, he says, that they are the only heirs at law of said intestate. Whether they are or not is of no concern to him. When he pays the amount of the judgment into court and the judgment is satisfied, he will be fully protected from another action.

The court correctly refused to set aside the default judgment, and its action is accordingly affirmed.

JOHNSON *v.* STATE.

4428 197 S. W. 2d 936

Opinion delivered December 9, 1946.

J. H. Brock and *Linus A. Williams,* for appellant.

Guy E. Williams, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

ROBINS, J. Appellant was charged by information with the offense of murder in the first degree for un-

lawfully killing Rinehart Herman Doerr on August 30, 1945, by "striking, bruising and choking him." From judgment, based on trial jury's verdict, finding him guilty of murder in the second degree and sentencing him to imprisonment in the penitentiary for a term of twelve years, he prosecutes this appeal.

For reversal numerous rulings of the lower court as to admission of evidence and as to instructions are urged by appellant as having been erroneous and prejudicial, and it is also contended that the evidence was insufficient to establish the guilt of appellant. In the view we take of the case, it is unnecessary to discuss any assignment of error except that relating to the sufficiency of evidence.

The evidence against the accused was entirely circumstantial. In such cases it is required that the evidence relied on must show the guilt of the accused to a moral certainty and must exclude every other reasonable hypothesis than that of the defendant's guilt. Judge Butler, speaking for the court, said in the case of *Bowie v. State,* 185 Ark. 834, 49 S. W. 2d 1049, 83 A. L. R. 426: "This demands that in a case depending upon circumstantial evidence the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than that of the guilt of the accused. Circumstances, however strong they may be, ought never to coerce the mind of the jury to a conclusion of guilt if they can be reconciled with the theory that one other than the defendant has committed the crime, or that no crime has been committed at all."

The evidence in this case, when given the strongest probative force in favor of the state, as must be done, may be summarized thus:

Appellant, a married man with three children, lived at Lamar, a few miles east of Clarksville. Doerr, the deceased, was an unmarried farmer, living alone near Clarksville. On August 30, 1945, appellant and Doerr spent a considerable portion of the day together. Both

of them were drinking. In the afternoon they and others hired a taxicab and drove to Russellville where they drank beer. They returned to Clarksville and in the late afternoon appellant and Doerr were seen together going toward and about half a mile from "Ripple Hole," a large pool of water about a mile south of Clarksville on Spadra Creek. An hour or two later appellant was seen in Clarksville, where he hired a taxi to drive him out to the south part of the city. About midnight he was driven to his home at Lamar, where a woman spending the night in his home noticed that his shirt was torn.

On the following afternoon a party of young people swimming in "Ripple Hole" discovered the nude body of Doerr in the water. Officers removed the body. When his body was discovered, Doerr's right hand clutched a stick about three feet long and as large as a man's middle finger, and in his left hand was some "underbrush." There was some discoloration of the skin around his neck. The funeral director who took the body in charge testified that the man had been dead about twenty-four hours—at about 4:30 or 5:00 o'clock on August 31, 1946—when he first saw him. An autopsy performed Saturday night, September 1, 1946, disclosed no water in his lungs and the physicians making the autopsy testified that Doerr had been choked to death, and that he had been dead about forty-eight hours at the time of the autopsy. No clothing belonging to Doerr was ever found, but some ashes containing shoe eyelets, shoe tacks and a "zipper" were found about one hundred yards from "Ripple Hole." There was testimony that Doerr had a pocket book which closed with a "zipper."

Appellant did not testify, but a written statement made to the sheriff after his arrest was read in evidence. In this statement he denied guilt and said that he was not in the company of Doerr on the way to "Ripple Hole" late in the afternoon of August 30th. He claimed he left Doerr in the business district and never saw him any more. There was some corroboration of appellant's explanation as to his whereabouts in the late afternoon and early night of that date.

In the case of *Hall* v. *Commonwealth,* 149 Ky. 42, 147 S. W. 764, the appellant was by a jury found guilty of manslaughter for killing Elijah Wood. The evidence showed that the appellant had been trying to obtain $500 from Wood for some counterfeit money possessed by appellant. The appellant and deceased were seen together a short time before deceased disappeared and appellant was seen going toward the secluded spot where deceased's body was found. There was some evidence tending to show appellant was spending money freely shortly after the killing. The Court of Appeals of Kentucky held that this evidence was not sufficient to sustain the conviction.

Likewise, in the case of *Warren* v. *Commonwealth,* 144 Va. 669, 131 S. E. 227, the Supreme Court of Appeals of Virginia held that proof that appellant, deceased and others had been drinking, that deceased and appellant had a fight and deceased ran away toward a railroad track where his mangled body, with two bullet wounds in it, was found some time later was not sufficient to establish that appellant was guilty of murder. The court in that case said: "Mere suspicion, however strong, will not support a verdict of guilty. The burden is on the commonwealth to prove the guilt of the accused beyond a reasonable doubt. . . . In the instant case, there are some circumstances of suspicion, but there is no satisfactory evidence of the guilt of the accused. Suspicion cannot be substituted for proof, nor supply the place of evidence necessary to overcome the presumption of innocence, and for this reason the judgment of the trial court must be reversed."

The facts in the case at bar bear some resemblance to those in the case of *Edmonds* v. *State,* 34 Ark. 720, in which a conviction of murder based on circumstantial evidence was sustained. But there was proved in the Edmonds case a strong motive for the killing of the deceased by Edmonds. This feature—proof of motive or cause for the alleged homicide—is entirely absent in the instant case. No trouble between the parties, no ill will on the part of appellant toward deceased, was

shown by the evidence, nor was there any proof adduced to show that robbery was the motive.

We conclude that the testimony adduced was not sufficient to establish the guilt of appellant with the certainty that the law requires in cases of this kind. We cannot say that the circumstances shown could not be reasonably explained except upon the hypothesis of appellant's guilt. This language by Mr. Justice Frauenthal, in the case of *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604, where a conviction had been had upon circumstantial evidence, is appropriate here: "It may be that these defendants are guilty of this crime, but, after a careful examination of all the evidence adduced upon the trial and after drawing from it every inference that is rightfully deducible therefrom, we do not think that it was sufficient to warrant the defendants' conviction of this crime. *France* v. *State,* 68 Ark. 529, 60 S. W. 236. It may be that on a future trial additional evidence may be introduced showing their guilt. The evidence that was introduced upon the trial below we think too slight to justify a conviction."

The judgment of the lower court is, therefore, reversed and the cause remanded for a new trial.

CROUCH *v.* GILBERT.

4-8023 198 S. W. 2d 72

Opinion delivered December 9, 1946.

Hardin, Barton & Shaw, for appellant.

Chas. X. Williams and *Paul X. Williams,* for appellee.

ED. F. MCFADDIN, Justice. The judgment of the circuit court is affirmed because of appellants' noncompliance with Rule 9 of this court, which rule provides, in part: "In all civil cases the appellant shall . . . file abstract . . . The abstract or abridgment of the transcript shall set forth the material parts of the pleadings, proceedings, facts and documents . . ., together with other matters from the record as are necessary to an understanding of all questions presented to this Court for decision. . . ."

This is a law case; and the appellants argue that the evidence is not sufficient to sustain the verdict. That assignment of error would have to be preserved in a motion for new trial (see *Western Union Tel. Co.* v. *Sockwell,* 91 Ark. 475, 121 S. W. 1046; *Van Hoozer* v. *Hendricks,* 143 Ark. 463, 221 S. W. 178). The appellants' abstract is fatally defective, in that it makes no reference to the filing or overruling of any motion for new trial. *Wallace* v. *S. L. I. M. & S. Ry. Co.,* 83 Ark. 356, 103 S. W. 747, and *Draper* v. *Robinson,* 101 Ark. 126, 141 S. W. 762, are cases in point: each of which holds that in a law case the judgment of the trial court will be affirmed if the appellant's abstract fails to show that a motion for new trial was made and overruled.

The history and salutary effect of Rule 9 is set forth in *Thompson* v. *Dierks Lbr. & Coal Co.,* 208 Ark. 407, 186 S. W. 2d 426. The language of Mr. Justice HUMPHREYS in *Van Hoozer* v. *Hendricks, supra,* is applicable to the case at bar:

"The abstract presented by appellant fails to show that a motion for a new trial, embracing the assignments of error insisted upon, was filed and overruled by the

court. The abstract and brief make no reference whatever to the filing of a motion for a new trial in the lower court. Under rule 9 of this court, a judgment will be affirmed unless appellant's brief shows that a motion for a new trial was filed and overruled. The enforcement of this rule is necessary to the orderly and efficient dispatch of the business of this court. *Reeves* v. *City of Hot Springs,* 103 Ark. 430, 147 S. W. 445; *Love* v. *Cowger,* 130 Ark. 445, 197 S. W. 853."

Appellee, by timely motion, called attention to the deficiency in appellants' abstract, and asked that the judgment of the trial court be affirmed under rule 12 of this court, which provides: "If abstract and brief have not been filed by the appellant in accordance with Rules 9 and 10, when the case is called for trial, the appellee may have the appeal dismissed or the judgment affirmed as of course." This cause has been regularly reached for submission, and the deficiency in the abstract has not been supplied: so appellee is entitled to the enforcement of rule 12.

It is only fair to both sides to state that a majority of this court has reached the conclusion—from the abstract submitted by appellant—that the cause should also be affirmed on the merits, even if the deficiency in the abstract had been cured.

Affirmed.

MITCHELL *v.* EAGLE.

4-7969 198 S. W. 2d 70

Opinion delivered December 9, 1946.

Virgil R. Moncrief and *John W. Moncrief,* for appellee and cross-appellant.

GRIFFIN SMITH, Chief Justice. D. F. and L. R. Mitchell are brothers. They own large tracts of land near Sherrill, in Jefferson County, operate a commissary, and engage in other plantation activities. Pat Eagle is ordinarily a renter. In 1943 he arranged, through another Mitchell tenant, to farm certain lands, the landlords having approved. The deal involved acquisition of a team of mules and harness, in consequence of which a book charge of $480 was entered against Eagle. The mules were in possession of Sam Bates, who had rented a "larger" place from the Mitchells, and who in turn dealt with Eagle.

Before crops were harvested Eagle procured employment and moved away, taking the mules, harness, etc., to Arkansas County. October 18, 1943, an action in replevin was filed. The Mitchells asserted value of the property taken to be $585, and asked $100 to compensate damage for detention. Shortly thereafter Eagle answered and cross-complained. He alleged the Mitchells had wrongfully caused his arrest on a charge of grand larceny, and that he had been taken to Pine Bluff and kept in jail several hours. Release was on bail, but another warrant was issued, arrest made, and the prisoner again placed in jail.

This conduct, it was asserted in the amended answer and cross-complaint filed January 1, 1944, constituted

an abuse of judicial process, and was intended to coerce Eagle into surrendering the mules. Criminal charges were ultimately dismissed. The prayer was for $2,000 compensation and exemplary damages in an equal sum.

There were numerous trial delays, with final hearing February 21, 1946. The jury found that the Mitchells owned the mules, and awarded possession, or $480. But at the same time there was a finding in Eagle's favor for $880 on his cross-complaint. The judgment shows that Eagle, in open Court, agreed to deliver the mules at a designated place the following day, and the Mitchells acquiesced.

There is this provision in the judgment:

"The parties present the question of costs, plaintiffs contending that [they] should pay only the costs made or caused to be made by them; and defendant contending that all costs should be adjudged against plaintiffs, and the Court sustains the contentions of plaintiffs. . . . ."

* * * *

May 9, 1946, plaintiffs below (the Mitchells) filed with this Court a certified copy of the judgment and were granted an appeal. Certiorari directed that the full record be brought up. The Circuit Clerk for Arkansas County made his return, *prima facie,* May 29th. However, this Court's records show it was received with the record (exclusive of the bill of exceptions) June 12. When appellants failed to file a bill of exceptions, Eagle prayed a cross-appeal. It was granted Oct. 7; and November 27 he moved for affirmance of that part of the judgment awarding $880. In the meantime—but more than six months and thirty days after judgment—a bill of exceptions was tendered. The motion of November 27th is, in effect, a prayer that the jury's verdict awarding the mules and harness to appellants be reversed, and that Eagle recover all costs.

Rule Five of this Court, entitled "Writs of Certiorari," was adopted for the aid of litigants who because of unusual circumstances were unable to expeditiously

transmit necessary appeal records. Subdivision (b) directs that the Clerk's return shall be within twenty days. There is an additional provision (c) for a second writ:—"if the omitted portion be the bill of exceptions or transcribed oral testimony, appellant may obtain issuance of a second writ." This provision follows: (d) "Limitation for Filing.—In no event will transcribed testimony, *filed more than thirty days after the time limited for appeal,* be permitted to become a part of the record." The italicized matter in this opinion is printed in blackface type in the rule.

The right given an appellant to apply for *certiorari* for the purpose of supplying missing matter may be invoked by a cross-appellant. In the instant case Eagle did not seek such aid. Instead, when the bill of exceptions became available, (judicial approval is dated April 18, 1946) an amended certificate was procured from the Circuit Clerk, who subscribes to its execution as of August 27.

It thus appears that from April 18 until a period subsequent to six months and thirty days after judgment was rendered, an unfiled bill of exceptions was outstanding.

It would be difficult to select language more direct than that contained in Rule Five (d). Its meaning is not subject to construction; there is nothing ambiguous, uncertain, or involved in the phrasing. In short, *testimony filed more than thirty days after the time limited for appeal is not a part of the transcript.*

The final question is, Does error appear upon the face of the record? The judgment recites that the parties "present to the Court" the questions involved in taxing costs. Without a bill of exceptions it must be presumed testimony was heard regarding the issue; or, in the absence of specific evidence on that point, that the Court considered the necessary and unnecessary charges. Pope's Digest, § 2354, provided that when there are several causes of action in a complaint, and any shall be adjudged insufficient, or a verdict on any issue

joined thereon is for the defendant, costs shall be awarded at the discretion of the Court. The section is from Ch. 34, § 17, Revised Statutes; and while some of the words in Pope's Digest and in the Revised Statutes are different, effect is not destroyed.

In *Davies* v. *Robinson,* 65 Ark. 219, 45 S. W. 471, it was held that Circuit Court may exercise its discretion in determining whether costs incurred by either party are unreasonable or unnecessary. The case was distinguished in *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024. Reference to the Davies case will be found at page 279, effect being that the preceding decision was authority for the Circuit Court's right to disallow unreasonable or unnecessary costs. Again, (*McKewen* v. *St. Louis, Iron Mountain & Southern Railway Company,* 93 Ark. 530, 124 S. W. 506) the holding was that although taxation of costs is within the Circuit Court's discretion, a judgment for such based upon an erroneous conception of the law will be reversed.

Because a bill of exceptions cannot, under Rule Five, be considered if tendered more than six months and thirty days after the lower Court, by judgment or decree, has finally made an appealable order, it follows that the judgments must be affirmed, both on appeal and cross-appeal.

DIXON *v.* HALL, SECRETARY OF STATE.

4-8024 198 S. W. 2d 1002

Opinion delivered September 30, 1946.

Tilghman E. Dixon, for petitioner.

Guy E. Williams, Attorney General, and *Ike Murry,* Assistant Attorney General, for respondent.

GRIFFIN SMITH, Chief Justice. A proposed initiated amendment to the Constitution has tentatively been designated No. 40. It bears the popular title, "Increasing Purposes and Millage for Municipal Improvement Bonds".[1]

On July 20th plaintiff filed an original action in this Court, asking that the Secretary of State be enjoined from accepting additional signatures. It is not disputed that when the initative petition was filed July 3 it contained but 3,664 names, while the requisite number was 21,685—a deficiency of 18,021. But, say proponents of the measure, Act 195 of 1943 commands the Secretary of State to receive additional names within a period of thirty days; and these, it is insisted, must be considered a part of the petition.

Amendment No. 7 to the Constitution, under which the proposed measure and the method of initiating it are sought to be justified, provides that if sufficiency of any petition is challenged and the Secretary of State shall hold it to be deficient, "he shall, without delay notify the sponsors . . . and permit at least thirty days from the date of such notification . . . for correction or amendment".

Attention is called to *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S. W. 2d 26; *Beene* v. *Hutton,* 192 Ark. 848, 96 S. W. 2d 485; *Wait* v. *Hall, Secretary of State,* 196 Ark. 508, 118 S. W. 2d 585; *Hammett* v. *Hodges,* 104 Ark. 510, 149 S. W. 667; *Stewart* v. *Hulett,* 196 Ark. 403, 117 S. W. 2d 1067; *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81, and other decisions of our own. There are also citations to holdings in other jurisdictions.

The point at issue does not appear to have been directly determined by us.

[1] Two other measures, one known as "The Four Year Term Amendment," the other as "Community Property Law," were involved in the original pleadings, but inasmuch as sufficient signatures to complete the petitions were not secured within the extension of thirty days corresponding with the period here involved, it is not necessary to discuss them.

Any attempt by the General Assembly to add something to or take substance from the constitutional provision would be a nullity.

An elastic construction would be the result if we should say that the right to correct and amend means that proponents may file an obviously deficient petition—containing, for example, one name from each of fifteen counties—and upon notification by the Secretary of State that twenty thousand or more additional names were needed it would become mandatory that time be extended thirty days from the so-called "dead line".

Our view is that, under any rational construction, it was intended that a petition be filed within the time fixed by Amendment No. 7. To be a petition it must, *prima facie,* contain at the time of filing the required number of signatures. Correction and amendment go to form and error, rather than to complete failure.

The Secretary of State is directed to treat the proposed amendment as having failed for want of initiation. He is enjoined from certifying the measure to election commissioners.

MR. JUSTICE MCFADDIN dissents.

ED. F. MCFADDIN (dissenting). Constitutional Amendment No. 7 is generally called the "Initiative and Referendum Amendment." It was submitted at the general election in 1920, but not until the Special Supreme Court rendered the decision in *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865, on February 16, 1925, did the amendment become adopted officially.

The various paragraphs in the amendment are not numbered; so it is difficult to refer to any particular provision. But in the constitutional amendment as published in Pope's Digest, certain paragraphs begin with capitalized catchwords; and, by considering these as sections, it will be seen that the amendment has 22 sections which I list and number by the capitalized catchwords, as follows:

Section 1 Section 1
Section 2 Initiative

Section 3	Referendum
Section 4	Emergency
Section 5	Local for Municipalities and Counties
Section 6	Definition
Section 7	No veto
Section 8	Amendment and Repeal
Section 9	Election
Section 10	Majority
Section 11	Canvass and Declaration of Results
Section 12	Conflicting Measures
Section 13	Title
Section 14	Limitation
Section 15	Verification
Section 16	Sufficiency
Section 17	Court Decisions
Section 18	Amendment of Petition
Section 19	Unwarranted Restrictions Prohibited
Section 20	Publication
Section 21	Enacting Clause
Section 22	Self-executing

Through this method of identification, I proceed to refer to certain sections of the amendment.

The purpose of Amendment 7 was to facilitate the submission of measures to the people, either by initiative or by referendum. Section 16 of the amendment deals with the sufficiency of the petition. Sufficiency in what regard? The number of signers; because § 18 says, in part: "If the Secretary of State, . . . shall decide any petition to be insufficient, he shall without delay notify the sponsors of such petition, and permit at least thirty days from the date of such notification, in the instance of a state-wide petition, . . . for correction or amendment."

This language, to me, clearly means that the sponsors of the measure are to have thirty days (for a state measure such as is here involved) to secure additional signatures if the original petition does not contain sufficient signatures. That being true, the Secretary of State was acting within the letter and the spirit of the law when he

gave the sponsors of the measure here involved thirty days from July 20th in which to obtain additional signatures.

The majority opinion in this present case holds that the petition, when originally presented to the Secretary of State, must be *"PRIMA FACIE"* sufficient when filed, or there is no filing. My answer to that holding is, that the majority is writing the words *"PRIMA FACIE"* into the amendment, and thereby not only rewriting the amendment, but doing violence to its intent and its language. The words *"PRIMA FACIE"* are not in the amendment, and the adding of the words restricts and makes more difficult the right of the people to initiate laws.

It is very significant that this *"PRIMA FACIE"* requirement was not mentioned in the opinion in *Wait* v. *Hall,* 196 Ark. 508, 118 S. W. 2d 585. In that case this court recited that the original petition (for referendum) needed an additional 1,242 *valid* signatures to be sufficient; yet the court made no issue of the fact that the Secretary of State gave the sponsors of the petition the additional thirty days in which to obtain enough signatures to make the petition sufficient. Did this court mean to hold in that case that *invalid* names on a petition can make it *"PRIMA FACIE"* sufficient?

I think Act 195 of 1943 is valid as within the authority and scope of § 22 of this amendment No. 7, which says: ". . . laws may be enacted to facilitate its operation."

Section 5 of Act 195 of 1943 clearly permits—in fact, requires—the Secretary of State to do what he did in the case at bar. The majority, without saying so in words, has in effect held § 5 of Act 195 of 1943 to be void. Yet no authority is furnished for such holding.

Without prolonging this dissent, it is sufficient to say that I respectfully, but most seriously, dissent.

4-8020 198 S. W. 2d 66

Opinion delivered December 9, 1946.

[redacted]

L. P. Biggs, for appellant.

W. J. Kirby and *U. A. Gentry,* for appellee.

HOLT, J. May 3, 1946, appellant filed complaint in which she alleged: 1. That she was the owner of "plots 1, 2, 3, 4 and 5, Prospect Terrace, an addition to the city of Little Rock, Arkansas," . . . that "2. Street Improvement District 508, a regularly organized local assessment district, on July 31, 1936, filed a suit in the Pulaski chancery court, which suit was numbered 54187

and was for the purpose of enforcing payment of delinquent assessments due said district against said plots for the year 1933. 3. A summons was issued on said complaint, dated July 31, 1936; said summons was delivered to the sheriff of Pulaski county for service; said summons was returned by the sheriff and was filed in the office of the clerk of the Pulaski chancery court on February 18, 1937. Said summons shows the following return as to the plaintiff: 'I have this 10 day of February, 1937, duly served the within summons by delivering a true copy thereof to Della M. Pinkston, *et al.*, all in said county as herein commanded.' Signed, 'L. B. Branch, Sheriff, by J. G. Glidewell, Deputy Sheriff.' 4. The said district, on July 26, 1937, filed a suit in the Pulaski chancery court, which suit was numbered 55828, and was for the purpose of enforcing payment of delinquent assessments against said plots for the year 1934.

"5. Service of summons based on this complaint, in suit numbered 55828, was had by publication of notice. 6. The Pulaski chancery court, by order, dated August 17, 1937, . . . ordered that cases numbered 46583, 47907, 54187 and 55828 be consolidated under the title 'Board of Improvement of Street Improvement District Number 508 of the City of Little Rock, Arkansas, plaintiff vs. No. 55828, J. B. Shepherd, *et al.*, defendants, and to proceed accordingly.' 7. The Pulaski chancery court, in the case numbered 55828, of the date of January 6, 1938, entered a decree . . . for the amount of assessments and penalties for the years 1933 and 1934 and an attorney's fee. (8, 9 and 10). That the plots were sold to the district under the terms of the decree, the sale confirmed, and on May 14, 1945, the said plots were conveyed by the district by quitclaim deed to appellee, Manie Schuman.

"11. The return of the sheriff of the summons in case numbered 54187, heretofore mentioned, showing service of summons on the plaintiff, Della M. Pinkston, is false and fraudulent. The plaintiff alleges that no summons, either actual, personal or constructive has ever been had on the plaintiff in said case number 54187,

and plaintiff has never entered her appearance in said case. 12. The decree of the court in consolidated case numbered 55828 . . . in the office of the chancery clerk, is void for the reason that there has been no legal service of summons on this plaintiff and no entry of plaintiff's appearance in suit number 54187. The confirmation of said sale, . . . the order approving deed, . . . the commissioner's deed, . . . deed records of Pulaski county, are void for the reason set out above. 13. The deed of said district to the defendant . . . is void for the reason that the district had no title which it could convey to said defendant. WHEREFORE, this plaintiff prays that the decree of the court, . . . ; the sale of the plaintiff's property had on October 19, 1938; the confirmation of said sale of record . . . ; the order approving deed of record . . . ; the commissioner's deed, . . . ; and the quitclaim deed, . . . be canceled and held for naught in so far as plots 1 to 5, inclusive, Prospect Terrace, may be involved, and that the court quiet the title to said plots in this plaintiff, and for all costs and other relief."

She prayed that the decree of the court foreclosing the lien, the sale of the property, the confirmation of said sale, the commissioner's deed to the district, and the deed from the district to the defendant, Manie Schuman, be canceled and held for naught, in so far as it affected plots 1 to 5, inclusive, Prospect Terrace, and that the court quiet the title to said plots in the plaintiff, etc.

An amendment to this complaint was filed by appellant June 8, 1946, by which Street Improvement District 508, and its commissioners were made parties defendants, and in which the allegations of the original complaint were adopted and a prayer for the vacation of the decree wherein the district's lien was foreclosed.

On June 12, 1946, a second amendment to the complaint was filed in which it was alleged that the judgment of foreclosure was void, that said decree was procured by fraud practiced by the successful party within the meaning of subsection 4, § 8246 of Pope's Digest, and prayed that said decree be vacated.

To the complaint and amendments thereto, a demurrer was interposed in which it was alleged that: "1. The facts stated in the complaint are not sufficient to constitute a cause of action. II. The complaint on its face shows that it is a collateral attack upon a decree of the chancery court of Pulaski county under which lands therein described were sold, and there are no facts alleged showing that it affirmatively appears from the record that the court did not have jurisdiction to render said decree. On the contrary, the allegations of the complaint show that in the record of the cause condemning the lands to sale, it affirmatively appears that facts existed essential to the jurisdiction of the court. III. The complaint on its face shows that the lands were condemned and sold at a judicial sale more than five years prior to the filing of the present suit and that the plaintiff is barred by the statute of limitations (Pope's Digest, § 8924) pertaining to judicial sales."

From the decree sustaining the demurrer and dismissing appellant's complaint comes this appeal.

Appellant says: "The decree in this case is void because of want of process and consequently lack of jurisdiction of the person of appellant," and "The decree is void *ab initio* and the complaint is a direct attack."

It will be noted from the allegations in the complaint that when the first foreclosure suit was filed by the district on July 31, 1936—case No. 54187—for the assessments due the district in 1933, personal service was had on appellant. At that time personal service was required under Act March 22, 1881, C. & M. Digest, § 5678. This personal service was shown by the return of the sheriff on the summons, July 17, 1937, set out in the complaint.

On July 26, 1937, when the district filed the second suit—No. 55828—to foreclose for assessments due in 1934, service by publication was alleged. The law at that time had been amended by Act 101 of 1937, which provided for service on property owners within the district by publication.

Further allegations were that on August 17, 1937, the trial court consolidated suits 54187 and 55828, along with two other suits, under suit No. 55828, and on January 6, 1938, the court entered a decree in these consolidated cases against appellant's lots for amounts due for the years 1933 and 1934, together with penalty and attorney's fee, that the lots were subsequently sold to the district under the decree, the sale confirmed and the property sold and conveyed by the district by quitclaim deed to Schuman May 14, 1945.

On the face of the record before us, was the decree rendered against appellant in these consolidated cases without notice, actual or constructive, so as to render it void and deprive the trial court of its jurisdiction? We think not. In the suit for the 1933 assessments, there was proper personal service on appellant, and in the suit for the 1934 assessments, proper service was had by publication which gave the court jurisdiction.

In *McDonald* v. *Fort Smith & Western Railroad Company,* 105 Ark. 5, 150 S. W. 135, this court said: "But in all cases seeking to impeach a judgment for want of notice the question involved is, what is the character of the evidence which is necessary to show such notice or the want thereof? This question was fully and well considered by this court in the case of *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704. It was there held that, in the case of a domestic judgment collaterally attacked, 'the question of notice or no notice must be tried by the court upon an inspection of the record only.' This ruling has been adhered to so often that the doctrine thus laid down can be considered settled in this state. . . . It follows that, in a case seeking to impeach collaterally a domestic judgment, the question as to whether or not process has been served in the manner prescribed by law upon the parties defendant therein is tried alone by an inspection of the record, and the verity of such record can not be assailed by parol evidence."

Appellees concede that if the judgment here were a nullity, either a direct or collateral attack might be made upon it.

We think it clear that the present suit is a collateral attack, upon the decree, *supra,* foreclosing the district's lien. It is a suit, in effect, against Schuman, in which the district was not a necessary party, to cancel certain record instruments as a cloud upon her (appellant's) title and to quiet title to the lots involved in appellant. It was not a proceeding in the original suit of the district to have the decree vacated and set aside, but an independent action seeking to quiet appellant's title to the property by setting aside the decree in favor of the district, *supra.*

In *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, the meaning of a collateral attack, as distinguished from a direct attack on a judgment, is given by this court as follows: "Any proceeding provided by law for the purpose of avoiding or correcting a judgment, is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power. . . . If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral," and in *State ex rel. Attorney General* v. *Wilson,* 181 Ark. 683, 27 S. W. 2d 106, this court said: "Except in those cases where an attack upon the judgment is authorized by statute, it is necessary, in order to constitute a direct attack upon a judgment, that some step be taken to impeach its validity in the action itself, such as by appeal taken from it or by motion to vacate or modify on account of some irregularity; any other is a collateral attack. This action is a collateral attack."

In the *Cassady* v. *Norris* case, *supra,* the improvement district was made a party defendant and there had been a foreclosure by the district, as here. The facts are similar and the rules announced there apply with equal force in the present suit. We quote further from that opinion: "The improvement district was not a necessary party to the proceeding. There is no allega-

tion that the taxes due the district were paid or that same were not legal charge against the land. The judgment condemning the lands for sale had been fully executed and satisfied, the district having received its taxes. Therefore, no such suit could be maintained against the district for these taxes, and the district was not concerned in the controversy between appellant and the appellee Norris, the purchaser of the land, over the title thereto. The court correctly found that the improvement district had no interest in the matter. The primary purpose of the suit was to quiet title by having the deed held by appellee Norris canceled and set aside. It is a proceeding not in the original suit in any direct manner to have the judgment vacated and set aside, but is merely an independent proceeding and having as its direct purpose the quieting of the title of appellant by setting aside the deed of appellee Norris. This is the proper characterization of the suit, and it constitutes only a collateral attack upon the judgment of the chancery court under which the land in controversy was condemned and sold."

Also, the case of *Clay* v. *Barnes,* 121 Ark. 474, 181 S. W. 303, presents a situation similar in all respects to that presented here. There, suit was instituted to cancel certain deeds as clouds upon defendant's title. There had been a decree of foreclosure against the property at the instance of a drainage district. The validity of the decree and the commissioner's deed executed thereunder were attacked on the ground that no notice of the suit had been given or published as the law required, and in an amended complaint, it was alleged that "the invalidity of the decree ordering the sale of the land in controversy, does not appear upon the face of the decree or upon or by any record in the case in which it was rendered, and that the want of publication of notice alleged and complained of in plaintiff's complaint does not appear upon the face of the judgment or decree or upon record in the cause, but the same must be established by evidence *aliunde.*"

It was there prayed for cancellation of the judgment, the decree, the deeds and conveyances, that title be quieted and for general relief. A general demurrer was interposed and sustained, and on appeal to this court, it was said: "The complaint alleges that the decree of the chancery court foreclosing the lien of the drainage district for taxes is regular and valid and the sale and commissioner's deed thereunder likewise valid, in so far as shown by the record of the case, and that the invalidity of the decree for want of the alleged notice and of the commissioner's deed, 'does not appear upon the face of the judgment or decree or upon the record in the cause, but must be established by evidence *aliunde.*' The purpose of the suit as disclosed by the complaint is to set aside the decree and cancel the deeds of the commissioner and other grantors of appellee, as clouds upon appellant's title and for possession of the lands claimed.

"It is not a proceeding in the original suit in any direct manner, to have such judgment vacated for any of the grounds authorizing vacation of judgments under the statute, but is an independent proceeding merely, having as its chief purpose the gaining of the possession of the lands claimed and the cancellation of the conveyance to appellee as a cloud upon the title. Such proceeding constitutes no more than a collateral attack upon the said decree of the chancery court, under which the land in controversy was condemned and sold. *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10."

On the record presented and the above authorities, we must, and do, conclude that the trial court properly sustained appellee's demurrer, and accordingly, the decree is affirmed.

McFaddin, J., concurs.

MARTIN *v.* MARTIN.

4-8002 198 S. W. 2d 408

Opinion delivered December 9, 1946.

Rehearing denied January 20, 1947.

J. Loyd Shouse and *Merle M. Shouse,* for appellant.

Ben Henley and *Willis & Walker,* for appellee.

ED. F. MCFADDIN, Justice. Appellee, Marvin Martin (a minor), by his guardian and next friend, Vesta Rohe (now Taylor) filed this suit against appellant, Mrs. Nettie Martin, praying that the minor be decreed to be the owner of certain real estate in Boone county, known and referred to as the "Touch-Me-Not Place," devised to him by the will of his father, L. M. Martin. From a decree granting the relief prayed, there is this appeal.

L. M. Martin was at one time a respectable citizen. He had a wife (appellant) and three daughters. In 1932, he began an illicit relationship with Mrs. Vesta Rohe, which continued until his death in 1942. After 1934,

L. M. Martin's relationship with Vesta Rohe was open and notorious. The appellee, Marvin Martin, now 11 years of age, is admitted to be the child of Mrs. Vesta Rohe and L. M. Martin, although they were never married, and L. M. Martin was never divorced from the appellant. On July 7, 1942, L. M. Martin departed this life, leaving a last will and testament dated June 24, 1942, which—omitting attestation of witnesses and land descriptions—is as follows:

"Last Will and Testament of L. M. Martin

"Know all men by these presents:

"That I, L. M. Martin, of lawful age and of sound and disposing mind and memory do hereby make and publish and declare this my last will and testament:

"First, I am not unmindful of my beloved children, Verna Martin Rogers, Gladys Martin Womack, and Maxine Martin, and my wife, Nettie Martin, whose financial interests have been in part cared for in the past.

"It is my will and purpose that such further financial and property benefits as they may receive from my estate be had and received by operation of law out of the properties of which I may die seized other than the properties included in this will.

"I will and bequeath unto Marvin Martin fee simple title to the following property situated in Boone county, Arkansas, to-wit:

(substantially the lands here involved)

"In witness whereof I have hereunto set my hand this 24th day of June, 1942, in the presence of D. N. Stewart and Andy Harris who attest the same at my request.

"Signed: L. M. Martin, Testator."

After a lapse of three years (the reason therefor being mentioned later), the will was probated, and Floyd Rogers became the administrator of the estate. This suit was filed on November 1, 1945, after it had been discovered that the record title to the Touch-Me-Not

Place was in Mrs. Nettie Martin by virtue of a deed to her from L. M. Martin dated in 1930, but not recorded until 1936. The plaintiff alleged that Mrs. Nettie Martin had reconveyed the place to L. M. Martin; and that such deed had been lost or purloined before being recorded, and that L. M. Martin was the real owner of the place when he executed his will.

In her amended answer, Mrs. Nettie Martin: (1) claimed ownership of the land by virtue of the 1930 deed to her; (2) denied that she had ever reconveyed the lands herein to L. M. Martin; and (3) made this statement in her verified answer:

"She says that she is inexperienced in business affairs; that soon after her husband, the deceased L. M. Martin, became entangled with Vesta Mae Rohe Taylor, suing as next friend herein, and about December, 1932, she turned over all of her business affairs to her son-in-law Floyd Rogers, who thereafter transacted all her business and conducted all transactions with the deceased; that the deceased continued to look after most of her properties and particularly the farming lands and unimproved lands; that deceased, L. M. Martin, continued to own some tracts of lands in his own rights; that frequently he wanted her to execute deeds of conveyance to various parties; that in all such transactions she and her said husband dealt through the medium of their said son-in-law Floyd Rogers, and this defendant signed such papers and only such papers as the said Floyd Rogers advised her it was proper that she sign; that she never signed and never intended to sign any deed reconveying the lands herein involved to her said husband, L. M. Martin."

The evidence is voluminous, and in some places is quite sordid; but the issues in this court may be summarized and disposed of under the two headings herein listed.

I. *The Admission of Incompetent Evidence.* All the evidence was taken on deposition. Counsel for the appellee persisted in having various witnesses state the

remarks made by L. M. Martin to show his claim of ownership of the lands in question. Appellant objected to this evidence at the time the depositions were taken and at all other stages in the case. The evidence was clearly inadmissible. In 22 C. J. 229, the rule, supported by many cases, is stated: "An owner of property cannot use as evidence in his favor the self-serving declarations of his predecessor in title . . ." The facts in this case do not bring it within any exception to the above quoted statement.

See, also, opinion in the case of *Hill* v. *Talbert, ante,* p. 866, 197 S. W. 2d 942.

When the case was presented to the chancery court, appellant filed a motion to strike the incompetent evidence (itemizing it in detail). The chancery court deferred any decision on the motion until final decree; and then in the final decree recited that the findings were made "from the competent evidence adduced." Appellant lists here the incompetent evidence objected to in the lower court; and we have stricken from our consideration all of the testimony relating to conversations had with L. M. Martin, and information received from Martin's words; and we proceed to decide the case solely on the competent evidence. Since the appellant has been forced to lengthen her briefs because of the incompetent evidence, we are making an adjustment in adjudging the costs as hereinafter shown.

II. *Is the Legally Competent Evidence Sufficient to Entitle the Plaintiff to the Relief Prayed?* Plaintiff sought to prove a lost deed. The rule on the *quantum* of proof in such cases was well stated by Mr. Justice Wood in *Erwin* v. *Kerrin,* 169 Ark. 183, 274 S. W. 2:

"The rule is well established in this State, as well as by the authorities generally, that the burden is upon one who claims title under the alleged lost instrument to establish the execution, contents, and loss of such instrument by the clearest, most conclusive, and satisfactory proof. *Nunn* v. *Lynch,* 73 Ark. 20, 83 S. W. 316; *Kennedy* v. *Gilkey,* 81 Ark. 147, 98 S. W. 969; *Jacks* v.

Wooten, 152 Ark. 515, 238 S. W. 784. See, also, 25 Cyc. 1626, and numerous cases cited in note; 17 Cyc. 778, and numerous cases cited in note. Note to *Clark* v. *Turner,* 38 L. R. A. at page 441; *Johnson* v. *McKamey,* 53 S. W. 221; *Rhodes* v. *Vinson,* 9 Gill. (Md.) 169, 52 Am. Dec. 685."

The chancery court "from the competent evidence adduced" found (1) that L. M. Martin had deeded the Touch-Me-Not Place to Mrs. Nettie Martin in 1930; and (2) that Mrs. Nettie Martin had reconveyed the said place to L. M. Martin; and (3) that L. M. Martin died seized and possessed of the place. The latter two of these findings are challenged by the appellant. We hold that the chancellor's findings are correct under the *quantum* of proof rule as previously mentioned.

To present the full situation in this case would require the cataloguing of details that had better be left unwritten. But certain facts are necessary to an understanding. In 1930, L. M. Martin was Sheriff of Boone county, and Floyd Rogers was his business associate. Martin owned several hundred acres of land (including the Touch-Me-Not Place, which was his favorite), and also some other property. Before he went out of the sheriff's office and into the mercantile business with Rogers, Martin, in 1930, prepared and executed several deeds conveying some of his property to his wife and some to his two adult daughters. The youngest daughter was an infant; so no deed was made to her. This fact is significant, in that it indicates that Martin was not conveying property to any person who could not reconvey to him when he desired. Martin subsequently sold some of the lands he had previously conveyed to his wife; and she joined him in deeds to the purchasers. Later Martin caused one daughter to reconvey to him the property he had conveyed to her. At another time Martin executed a mortgage to Rogers as a "cover-up." We mention these to show that conveyances and reconveyances were a part of the pattern in the life of Martin. Floyd Rogers was the only witness for the appellant, and—in telling about Martin's attitude after

executing these deeds—Rogers said (as abstracted by appellant):

"He collected rents and everything. He never made any strict settlement with the folks, but was always liberal and helped the girls and Mrs. Martin. He told me when he made the deeds that he would continue to oversee and look after the places, and that was the understanding."

As aforesaid, Martin executed the deeds in 1930, and Rogers kept them in the safe in the mercantile store, then owned by Martin and Rogers. The deeds remained unrecorded until 1936, and were all the time after 1932 in this store safe in the constructive possession of both Martin and Rogers. In 1932, there began the affair between Martin and Vesta Rohe; and thereafter all communications between L. M. Martin and his wife (appellant) were conducted through Floyd Rogers. In 1935, the appellee was born. It is significant that Rogers then (in 1936) recorded the deeds, without any further instructions from Martin. Later (in 1937) Martin sold his interest in the mercantile business to his other son-in-law (Harold Womack), but continued to leave all of his papers in the store safe until 1939 or 1940.

It was then (1939 or 1940) that Martin was sick at the Midway Hotel in Harrison, and sent to the store for his deeds and papers that were supposed to be in the safe. He discovered that some of the deeds, papers, etc., were missing, and "he raised a howl." He sent for each of his sons-in-law, and then for his lawyer; and they came to his room at the hotel. As a result, certain deeds were prepared and delivered to Martin, and he became pacified. No witness could definitely swear that any one of those deeds described by section, township and range the lands known as the "Touch-Me-Not-Place"; but the evidence clearly shows that some deeds were executed and delivered to Martin, and that one such deed was signed by the appellant. Vesta Rohe definitely swore that there was at that time a deed in L. M. Martin's possession signed by Mrs. Nettie Martin, although Vesta Rohe could not identify the Touch-Me-Not-Place by the

land numbers. A short time after the Midway Hotel episode, as above mentioned, an entirely disinterested witness—W. H. Wingate—testified that he saw a deed in the possession of L. M. Martin, which was signed by Mrs. Nettie Martin, but this witness could not identify the Touch-Me-Not-Place, because the land numbers in the deed were by section, township and range.

Did this deed—in Martin's possession, and signed by Mrs. Nettie Martin—convey the Touch-Me-Not Place? Floyd Rogers (appellant's admitted agent in all matters) admitted that Mrs. Martin did execute a deed to L. M. Martin in 1939-40; but Rogers maintained that the said deed was never delivered, and that it involved lands other than the Touch-Me-Not Place. The disinterested witness, Wingate, saw a deed, signed by Mrs. Martin in the possession of L. M. Martin: so it is evident that whatever deed Rogers held as undelivered is entirely distinct from the deed that Martin received from Mrs. Nettie Martin. The fact that Rogers held as undelivered a deed describing other lands makes certain the fact that the deed from appellant, which L. M. Martin possessed and which Wingate saw, did convey the Touch-Me-Not Place.

The record also shows what the parties did after 1939-40 regarding the Touch-Me-Not Place. L. M. Martin moved on the place, built a house on it; and made other improvements. He paid the taxes. He signed the government soil conservation contracts as the owner. He received all the rents and profits. In 1942, he executed the will, as previously copied. It is not shown that Martin ever claimed to own any of the land not duly deeded to him; and it is shown that his occupation, possession and enjoyment of the Touch-Me-Not Place was well known from 1940 until his death. From these facts, and the others in the record, it is clear that Mrs. Martin did deed the Touch-Me-Not Place to L. M. Martin, and that he did own the place at the time of his death in 1942.

Here are some of the others facts: Vesta Rohe testified that after the death of L. M. Martin she went

to Floyd Rogers, and to another named party as the representatives of Mrs. Nettie Martin; and that this latter representative agreed with Vesta Rohe that, if she would withhold probating the will, the Martins would recognize Marvin Martin as an heir of L. M. Martin, and would also deed him the Touch-Me-Not Place. The representative never denied making that statement; in fact, he said, "I might have said it." Because of these conversations, Vesta Rohe delayed the probating of the will, and brought this suit for her son only after the Martins had refused to execute the deed to the Touch-Me-Not Place. The Martins did recognize appellee as an heir of L. M. Martin; and—notwithstanding Rogers' testimony to the contrary—we are convinced that they also agreed to deed appellee the lands, just as Vesta Rohe testified. On the strength of the conversation of Vesta Rohe with Floyd Rogers and the other representative of Mrs. Martin, Vesta Rohe delivered to Floyd Rogers the key to the safety deposit box of the bank where L. M. Martin had kept his papers after the Midway Hotel experience in 1939-40. It was this acceptance of the key to the safety deposit box by Floyd Rogers, and his opening of the box in the absence of Vesta Rohe, that allowed her to make the charge against him, that he had purloined the papers. We do not go to that extent in deciding this case. We merely hold that competent evidence amply supports the chancellor's decree, which is affirmed.

But because of what was said in Part I about the incompetent evidence lengthening the record, and because this is an equity case, we adjudge all of the costs of this appeal to be paid equally by appellant and appellee.

Affirmed with division of costs.

McKinney v. Jones.

4-8030 198 S. W. 2d 415

Opinion delivered December 16, 1946.

Rehearing denied January 20, 1947.

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

Jay M. Rowland, for appellee.

Ed. F. McFaddin, Justice. Appellant was plaintiff in the trial court, and brings this appeal from a jury verdict and consequent judgment in favor of appellee, who was the defendant. We will refer to the parties as they were styled in the trial court.

The defendant was operating a grocery store and meat market in Hot Springs in a building rented at $35 per month from a Mrs. Evans. One Thursday afternoon in September, 1945, plaintiff went to the defendant's store, and—after a brief negotiation—agreed to pay the defendant $4,000 for the fixtures and the entire stock of groceries and meats. In the course of the negotiation

plaintiff went to see the owner of the building about a rental agreement. She promised to give him her answer the next day. Without waiting for such answer, plaintiff returned to the defendant's place of business, and paid the defendant $400 as "down payment" on the $4,000 purchase price. It was agreed that the defendant would continue to operate the business until (a) the balance of $3,600 had been paid, and (b) certain licenses could be transferred from defendant to plaintiff. It is important to note that the defendant remained in charge of the business.

On the next day (Friday) the owner of the building advised the plaintiff that the rent would be $60 per month. Then Saturday the plaintiff's son examined the store, and advised the plaintiff that he could not successfully operate the business. Immediately the plaintiff informed the defendant that the trade was cancelled, and demanded a return of the $400 payment, which the defendant promptly refused to pay. Plaintiff then left the store; and a few months later filed this action, seeking to recover the $400 down payment, on the contention that the plaintiff and defendant had entirely rescinded the original contract by mutual consent, and that restitution of the $400 should follow as a matter of course. The defendant not only denied that there was any mutual rescission, but also claimed that the $400 down payment had been agreed to be earnest money, and by way of forfeit, and that when plaintiff elected to abandon the contract, then the $400 belonged to the defendant.

At the trial the plaintiff offered no proof of any fraud or misrepresentation, and did not claim that the defendant was in any wise at fault. Plaintiff admitted that he was the one who sought to rescind. His sole hope of recovery lies in (1) proving a mutual rescission, and (2) establishing the principle that restitution automatically must follow mutual rescission. Thus, the plaintiff's situation in the case at bar is distinctly different from the Arkansas cases on rescission, some of which are: *Desha's Executors* v. *Robinson,* 17 Ark. 228; *Bellows* v.

Cheek, 20 Ark. 424; *Ft. Smith Lbr. Co.* v. *Baker,* 123 Ark. 275, 185 S. W. 277; *Sanford* v. *Smith,* 163 Ark. 583, 260 S. W. 435; *Rhodes* v. *Survant,* 209 Ark. 742, 192 S. W. 2d 880.

The trial court refused to give the plaintiff's requested instruction, which reads as follows: "You are instructed by the Court that if you find from the evidence there was a rescission of the contract by mutual agreement, and that the plaintiff put the defendant in possession of all property received from the defendant by reason of the contract, then you will find for the plaintiff in the sum of four hundred dollars, the amount paid to the defendant upon the purchase price of the property."

The refusal to give this instruction is assigned as reversible error; but we cannot agree with the plaintiff, because the refused instruction is contained in another instruction given by the court without any objection from either side. The instruction given by the court embraced the theories of both sides. We copy the instruction, and italicize the part covering the plaintiff's refused instruction:

"The question for the jury to determine in this case is whether the plaintiff is entitled to recover back the sum of four hundred dollars, or any part thereof, made as a payment on the merchandise purchased from the defendant. The plaintiff contends that this payment was made as a part of the payment of the purchase price for the merchandise purchased from the defendant, and that, thereafter, the plaintiff and defendant agreed upon a rescission of the contract, and the plaintiff claims that by virtue thereof, he is entitled to recover back the sum of four hundred dollars made as a payment on the merchandise.

"The defendant claims that the sum of four hundred dollars, while made as a part payment of the purchase price of said merchandise, was also intended, and was paid, as a forfeiture to insure the performance and completion of said contract on the part of the plaintiff, and that it was understood that if the plaintiff failed to carry

out the contract for the purchase of said merchandise, that the sum of four hundred dollars paid thereon would be forfeited to the defendant.

"The burden of proof is on the plaintiff to show by a preponderance or greater weight of the testimony that he is entitled to recover the sum paid by him to the defendant by virtue of their contract. *If the jury believe from a preponderance or greater weight of the evidence that the sum of four hundred dollars was paid by the plaintiff to the defendant as a part of the payment of the purchase price of said merchandise, and that thereafter the plaintiff and defendant agreed upon a rescission of said contract whereby the defendant agreed to, and did, accept back the merchandise purchased from him by the plaintiff, then the plaintiff would be entitled to recover the sum of four hundred dollars as claimed by him in action.* If the jury believe, however, that the sum of four hundred dollars was paid to the defendant by the plaintiff and was to be considered not only as a part payment of the purchase price of said merchandise, but also to be considered as a forfeiture in the event that the plaintiff should fail to carry out his contract as agreed upon, and you further find from a preponderance of the evidence that through no fault of the defendant the plaintiff failed, neglected and refused to carry out his contract as agreed upon, then the plaintiff would not be entitled to recover."

The rule is well established that the refusal of a correct instruction is not error, when such instruction is substantially included in those given. Literally scores of cases to sustain this rule are collected in West's Arkansas Digest, "Trial," § 260. The fact, that the plaintiff's requested instruction was covered in the court's instruction, seems clear.

Counsel for plaintiff have furnished us a most carefully prepared brief to support the statement, that where there is mutual rescission, then there must be restitution to put the parties in *statu quo ante.* There are authorities which recognize this statement in general language. *Gibula* v. *Sause,* 173 Md. 87, 194 At. 826; Black on Rescis-

sion and Cancellation, 2d Ed., §§ 526 and 535; 66 C. J. 733; 27 R. C. L. 641; and annotation in 59 A. L. R. 215, *et seq.*

But there are also authorities to the effect that, in the event of mutual rescission, restitution is a matter of contract. Black on Rescission and Cancellation, 2d Ed., § 535, discusses this point; and in the American Law Institute's Restatement of the Law of Contracts, § 409, there is this statement as to whether rescission includes a promise of restitution:

"It is a question of interpretation whether on rescission of a bilateral contract partly performed on one or both sides, the parties agree not only to forego future performance, but to make restitution by returning payments that have been made, or by paying for performance that has been rendered.

"*Comment*: a. There is no rule of law establishing a presumption either that restitution shall be made or shall not be made when an earlier contract is rescinded. The question is to be determined on the facts of each case."

In 13 C. J. 603, in speaking of the effect of rescission, the text reads: "Ordinarily any claim in respect of performance and of what has been paid or received on the contract will be referred to the agreement of rescission, where the contract is rescinded while in the course of performance, and as a general rule no such claim may be made unless it has been expressly or impliedly reserved; . . ."

However interesting may be this question of restitution after mutual rescission, it is entirely academic in this case; because the trial court in its instruction as previously copied, fully covered the plaintiff's requested instruction, even if such requested instruction stated the correct rule of law—which question we do not decide. There was ample evidence to support the jury verdict, and the judgment is affirmed.

4-8012 198 S. W. 2d 417

Opinion delivered December 16, 1946.

Rehearing denied January 20, 1947.

Thomas B. Pryor, H. L. Ponder and *H. L. Ponder, Jr.*, for appellant.

Kaneaster Hodges, for appellee.

SMITH, J. About 2:30 p. m., March 10, 1945, appellee was walking with two friends on the sidewalk in front of appellant's garage in the city of Newport, when he tripped and fell over a piece of iron pipe extending far enough over the sidewalk to constitute an obstruction of it. The pipe was partially covered by a car parked against the sidewalk. Appellee testified that he was unaware of the presence of the pipe, and that he was engrossed in conversation with his companions and did not observe it. In this suit to recover damages for the injury which appellee sustained, the defense of contributory negligence was interposed, but that issue was submitted to the jury under correct instructions, and is concluded by the verdict of the jury. Appellee recovered a judg-

ment which is not complained of as being excessive, and from that judgment is this appeal.

The question of appellant's negligence was submitted to the jury on two theories. One was that the pipe had fallen on the sidewalk through appellant's negligence. Upon this issue there was testimony, when viewed in the light most favorable to appellee, as we are required to view it in determining its legal sufficiency, to support the verdict of the jury, to the following effect:

Appellant owned and operated a bus repair shop in the city of Newport, and as an advertisement, and as a means of identifying the business, appellant had placed two iron signs upon the sidewalk in front of its garage, over which sidewalk pedestrians customarily walked, of which appellant was fully advised. The signs were approximately four feet high. The base of each consisted of a circular iron band which rested upon the sidewalk, to which base there was attached a metal pole, fastened to the base by fitting into an opening approximately the size of the pipe in the center of the base. Upon the top of the pole there was a flat, round, iron disc, upon which was the lettering identifying the shop or garage, as that of appellant. There was testimony that the vertical pole supporting the upright disc was fastened to its base in a hole ill-fitted to the pipe, as a result of which the sign frequently toppled over and fell on the sidewalk, where it obstructed the path of pedestrians upon the sidewalk, and that this happened with such frequency that appellant, in the exercise of ordinary care, must have known that the sign was likely to topple over. It was also shown that because of the proximity of the sign to the street, frequently cars parking on the street near the sign, knocked the sign over. It was ordinarily at night when this occurred.

There were two of these signs of identical construction, and the testimony is conflicting as to whether the one which had fallen was in defective condition rendering its use unsafe on that account. This question of fact was submitted to the jury.

Now the sign may not have fallen because of its defective condition. It may have been knocked over by parking a car, and the testimony shows that this frequently happened. But it is insisted that even so, appellant was negligent in permitting the detached pole to lie on the sidewalk, when ordinary care would have disclosed the presence of the pole on the sidewalk, and its danger to pedestrians, and would have caused its removal. This second question of fact was also submitted to the jury.

Appellant insists that the testimony was not sufficient to warrant the submission of either allegation of negligence, and this contention presents the point to be decided. We think, however, there was sufficient testimony to carry both issues to the jury.

On the first allegation of negligence there was testimony that the threads on the pole designed to secure it in the hole into which it fitted, had become worn to the extent that the pole had to be welded, and that after appellee's injury the whole sign was thrown into a junk pile.

Upon the allegation that the presence of the pole was not discovered, and that it was not removed within a reasonable time thereafter, the testimony is to the following effect:

Appellant's landlord who occupied an adjacent building testified that when he went to his place of business early every morning, he frequently noticed that one or both of the signs had been knocked over by a parked car. Appellee's injury did not occur until 2:30 in the afternoon. If therefore, the sign had been knocked down by a parked car and had not fallen because of its defective condition, the jury was warranted in finding that it had been lying on the sidewalk for several hours, and that ordinary care would have discovered its presence. One witness testified that the broken sign was left lying on the walk for a week, after appellee's injury.

This testimony was not objected to, but we think it was competent even though an objection to its admission had been made.

In the case of *Collison* v. *Curtner,* 141 Ark. 122, 216 S. W. 1059, cases were cited holding that testimony is incompetent after an accident occurred tending to show that the defect causing the accident and injury was removed, altered, or changed for the purpose of showing negligence. That rule has no application here. The testimony was competent as tending to show that appellant, who had encroached upon the sidewalk, did not use the care a reasonably prudent man would have employed in discovering and removing from the sidewalk an instrumentality under his control which might, and in fact did, imperil the safety of pedestrians using the sidewalk.

These issues were submitted under instructions of which no complaint is made, except that the testimony did not warrant their submission. Finding as we do that the testimony did warrant the submission of these issues to the jury, the judgment must be affirmed, and it is so ordered.

CRUMP *v.* TOLBERT.

4-8008 198 S. W. 2d 518

Opinion delivered December 16, 1946.

M. P. Watkins, for appellant.

Maddox & Greer, for appellee.

GRIFFIN SMITH, Chief Justice. The principal questions are: (a) Did M. T. Loggains as lessee of eighty acres have a right to assign the interest? (b) If such authority were not implicit in the written contract, would an indorsement by Loggains, made after he had assigned, have the effect of waiving the lessor's objections? (c) If the act of assigning was wrongful, what amount would be due as rentals?

In December, 1942, J. W. Guest loaned Mrs. Lydian Tolbert $3,000 at four percent, secured by mortgage. The obligation was due December 1, 1943, but Guest did not press for payment. Instead, he joined with Mrs. Tolbert in a lease to Loggains, whose term began January 1, 1944, and ended December 31, 1947. Guest died intestate in July, 1944. G. B. Knott was appointed administrator. Knott, acting with the Guest heirs, sold the note and assigned the mortgage to J. M. Crump and R. R. Murray for $2,250, with Probate Court approval. This occurred December 23, 1944. Five days later, for a recited consideration of $2,000, Loggains undertook to transfer his unexpired leasehold to Crump and Murray. By the transactions appellants (Crump and Murray) became owners of the Tolbert note with the land as mortgage security, and acquired whatever rights Loggains could convey in the lease.

Loggains needed more water on the eighty-acre tract than was available for rice culture, but did not require as much as might be expected from a well he proposed to provide and equip. The Tolbert-Loggains lease, as

originally drawn, reserved to the lessor a fourth of the rice, there being no mention of any other crop. On the contrary, paragraph five is a stipulation that Loggains ". . . will use said lands for the production of rice, . . . and will [apply the] diligence and skill usual in such agricultural industry in [the rice territory near Harrisburg"].

Paragraph seven obligates Loggains to "put down" a twelve-inch turbine rice well at a cost of approximately $1,935. Since, in contemplation, (and as a matter of fact) watering facilities would then be abundant, Loggains and Mrs. Tolbert made written contracts with John D. Smith and Charlie Easley. Loggains agreed to farm these designated tracts which adjoined Mrs. Tolbert. By oral agreement Loggains cultivated another contiguous farm, owned by John Burton, water in each case to come from the Tolbert property. The written contracts with Smith and Easley are not abstracted. However, appellants state in their brief that these contracts (and presumptively the Burton lease) are not involved except to the extent that Mrs. Tolbert claims she is entitled to credits equal to five percent of the rice, Loggains having retained sales proceeds to apply on cost of the well.

It is not disputed that the well, with equipment, represented an investment of $2,165.50. Plan of repayment was that Loggains take "the proceeds of one fourth rent in each of the years of the term of this lease." (Sec. 8). Sections 8 and 9 of the contract are printed in full in the footnote.[1]

[1](Paragraph 8). It is mutually agreed and understood by and between the parties hereto that the cost of said rice well of approximately $1,935, to be advanced by the lessee, shall be repaid to the lessee out of the proceeds of one fourth rent in each of the years of the term of this lease until the said lessee is fully repaid and reimbursed for the entire cost of the construction of said rice well, and the lessee is hereby authorized to retain and hold out the said one fourth rent in each of said years of the term hereof until he has been fully reimbursed and repaid for the cost of said well.

(Paragraph 9). The lessee agrees to furnish a tractor or other power unit to pump water from said well to irrigate said rice so planted and sown on said lands, and the lessor agrees to pay on the cost of pumping said water and for the furnishing said power unit by the lessee one twentieth of the amount of rice in kind paid as rent or the proceeds of the sale of the amount of rice paid as rent each

The Tolbert-Guest-Loggains lease appears twice in the bill of exceptions, first as an exhibit to Mrs. Tolbert's testimony, and again, seemingly,[2] in connection with Crump's explanation of the assignment. The Crump exhibit is the original contract between Mrs. Tolbert, Loggains, and Guest. Paragraph *eight,* as shown by the stenographic (first) copy—and as disclosed by the original made available for comparison—is bracketed with a pen; and in the limited space between paragraphs eight and nine there is penned, "Lessors pay nothing for water rights." In respect of the original lease introduced with Crump's testimony, paragraph *nine* is enclosed in penned brackets, with the interlineation, written in ink: "Lessors pay nothing for water rights." Difference is that on Mrs. Tolbert's contract the added matter is between paragraphs eight and nine, while as to the second exhibit it is between paragraphs nine and ten. Still another dissimilarity is that in paragraphs three and four of Mrs. Tolbert's copy rental is fixed at one-fourth, while in the Crump exhibit (paragraph three) "fourth"—as originally written, followed by "¼[2]" in parentheses—has been changed. "Fifth" has been added with ink over "fourth," and a "5" covers the numeral "4." It is significant that "one fourth" in paragraph four of the Crump exhibit was not changed. The expression also appears twice in paragraph eight without change; nor is there an alteration in Mrs. Tolbert's copy other than the bracketing of paragraph eight, and the condition that nothing is to be paid by the lessor for water rights.

First (a).—Was the lease assignable? It will have been observed that Loggains' purpose was to invest Crump and Murray with his unexpired interest as distinguished from subletting. Distinction between assignment and sublease goes to quantity of interest passing by the transfer. An assignment conveys the entire estate

year, and that the same shall be retained by the lessee and applied to the cost of the construction of said rice well until the lessee is reimbursed for the entire cost of said rice well. One twentieth of the rent is to be paid lessee by lessor on the cost of pumping water and as compensation for furnishing the power unit by the lessee.

[2] The word "seemingly" is used because there are no stenographic filing marks or other evidence of the precise manner of introduction.

held by the assignor. In subletting, only a portion of the term or a part of the property is involved. *Cities Service Oil Company* v. *Taylor,* 242 Ky. 157, 45 S. W. 2d 1039, 79 A. L. R., p. 1514.

American Jurisprudence, "Landlord and Tenant," v. 32, § 319, and publications of a similar nature, construe a majority of the decisions to hold that in the absence of statutory restriction, or of a restriction on the right of assignment fixed by the parties, a tenant under a lease for a definite term has, as an incident to his estate, the right to assign his leasehold interest in the demised premises without the consent of the lessor. "This right of a tenant to assign," it is said, "exists at common law notwithstanding any common-law limitation upon a right to assign contracts, for although a lease is necessarily a contract, yet it is a contract which creates an estate. The right is not dependent on the use of the word 'assigns' in the lease, but exists absolutely, in the absence of contractual stipulations, or statutory prohibition." But there is another principle, and we think it has application here. Section 320, American Jurisprudence, has this to say:

"Notwithstanding the general rule that the power of assignment is incident to the estate of a lessee of real property unless it is restrained by statute or the terms of the lease, a lease of land on shares, including the use of buildings, farm implements, stock, and other personal property, is regarded as a personal contract and is not assignable without the consent of the lessor, for the reason that the amount to be received by the lessor and the care of the property depend on the character, industry, and skill of the lessee. But where the original lease runs to the lessee and his assigns, or where the crop has been harvested and marketed, the lease is assignable."

A footnote to the quoted text cites *Tipton* v. *Martzell,* 21 Wash. 273, 57 Pac. 806, 75 Am. St. Rep. 838, and contains this comment: "[The question at issue] was whether a growing crop was subject to levy under an execution against a tenant, [and] the Court stated the rule as to the assignability [of a lease] as follows:

'. . . There was an existing contract between the landlord and the respondents that they would properly take care of the growing grain, and harvest and deliver one third of the product to the landlord. In a contract of this nature the landlord depends on the character and skill of the lessee, and it would seem to be personal, and not assignable'."

Language similar to that used by Mr. Justice REAVIS in *Tipton* v. *Martzell* is to be found in the annotation, "Lease, Right to Assign or Sublet," 23 A. L. R., p. 143. Subdivision (d) deals with leases where a share of the thing produced or percentage of earnings is the *quid pro quo*. Cases from Michigan, Oregon, New York, and other states are cited.

. . . .

Paragraph six is Loggains' promise that during the term of four years the land will be used for the production of rice, and that in accomplishing this end he will use "due diligence and skill."

Appellants rely largely upon *Mitchell* v. *Young*, 80 Ark. 441, 97 S. W. 454, 7 L. R. A., N. S., 221, 117 Am. St. Rep. 89, 10 Ann. Cas. 423. In the opinion in that case it was stated that "where there is no covenant against subletting, a lessee has a right to sublease all or any part of the leased premises; and when he does so, he cannot, by a surrender of the leased premises to the lessor, defeat the right of his undertenant. The interest of the undertenant will continue as if there had been no surrender; the owner of the property becoming the direct landlord of the undertenant. The lessee could only surrender what belonged to him and, having sublet part of the property, it is not his to surrender."

Facts in the case were that Metropolitan Hotel in Little Rock was owned by W. N. Young, who leased to Spencer H. Torrey. February 21, 1902, Torrey sublet barbershop space to W. A. Mitchell. Torrey's term expired November 1st of the year he dealt with Mitchell, but in his contract with Mitchell there was a provision that if he, (Torrey) procured a renewal lease, Mitchell

should continue as subtenant. The primary lease was renewed, and Mitchell was not then disturbed. Torrey died while in possession. Ownership of the hotel became vested in the heirs of W. N. Young. Roger Young (appellee in the suit to dispossess Mitchell) had leased the property. He ascertained that the barbershop space was worth $40 per month instead of the $12 charged Mitchell. But Mitchell had paid for two years after Torrey renewed his lease, and Roger Young's action was not brought until 1905, following Torrey's death in 1904.

We do not think the decision is authority for the proposition that as a matter of law a lease of agricultural land (which does not expressly or by implication authorize substitution of parties) is assignable. While there is testimony that unskilled persons who have not had experience in farming or with cultivation of rice are qualified to assume such duties, or *may* be, the Chancellor was not required to accept these statements with the implications they were intended to convey. In the first place, Mrs. Tolbert was to acquire, through appropriation of rents, a valuable well with pumping equipment; and necessarily they had to be maintained in an efficient manner. Neither of the sublessees was a rice grower. Crump testified that while he was a farmer, he had never lived in a rice country. Murray, he said, had nothing to do with actual operations. Crump had never talked with Mrs. Tolbert about the farming.

We are not cited to any of our own cases holding that as a matter of law such a contract is assignable. Section 6063 of Pope's Digest does not help appellants. It is a part of the Statute of Frauds and mentions what may *not* be done. It does not provide that in reverse circumstances the transactions mentioned are free from other objections.

Second (b).—Alterations in the written contract, and the fact that Mrs. Tolbert's copy did not correspond with changes appearing on the original retained by Loggains, justified the Chancellor in receiving evidence regarding intentions. A reasonable construction of markings on Loggains' copy—that is, the bracketing of paragraph

nine and addition of the provision exempting lessors from paying for water rights—is that when the legal phraseology was read to or by Mrs. Tolbert, an inexperienced person, its meaning was not clear, and she concluded simplified language would best suit the purpose. However, she testified that her understanding of the several transactions was that the net rental from the cultivated land she owned was a fifth, and that she was due five percent of the Burton-Easley-Smith crops as compensation for water used by Loggains. While these computations were for 1944, the Court also found what was payable for 1945—this on the theory that appellants had wrongfully occupied the eighty acres and had without authority utilized water in farming the adjacent areas. These matters are set out in detail in the decree, which is only partially abstracted. An examination of the entire record convinces us that results were not contrary to a preponderance of the testimony.

It is insisted that because Mrs. Tolbert requested Loggains to write on her copy of the lease a statement that the assignment had been made, waiver or acquiescence occurred. We do not think so. At the time this was done the contract with Crump and Murray had been consummated. Mrs. Tolbert, apparently, only sought evidence regarding a matter over which Loggains had no further control.

Appellant calls attention to a mathematical error in computing interest on $3,000 for two years, eleven months, and four days, contending there is an undercharge of $11.70. This objection is tenable; but, since the amount is small we shall assume that appellee will consent in writing that the calculations be amended. If this is not done, appellants may urge the point at any time within fifteen juridical days.

Affirmed on appeal and cross-appeal.

COOK, COMMISSIONER OF REVENUES, *v.* COCA-COLA BOTTLING COMPANY.

4-8056 198 S. W. 2d 193

Opinion delivered December 16, 1946.

[redacted]

O. T. Ward, for appellant.

Daily & Woods, for appellee.

ROBINS, J. Appellant, Commissioner of Revenues of Arkansas, made an examination of the income tax return of appellee, an Arkansas corporation domiciled at Fort Smith, for the year 1943, and, determining that the taxpayer had failed to return and pay a sufficient income tax for that year, issued a "deficiency letter," assessing and demanding payment of the amount of tax which he claimed had not been paid. Within thirty days thereafter appellee brought this action in the chancery court, under authority of the provisions of the first paragraph of § 14055, Pope's Digest, asking for review of the action

of the Revenue Commissioner in assessing the additional tax, and for cancellation of the lien for same. We upheld, in the case of *Cook* v. *Wofford,* 209 Ark. 824, 192 S. W. 2d 550, the jurisdiction of the lower court in the case at bar.

Appellee for many years had been keeping its books and rendering its income tax return (except as to one item) on the "accrual" basis, as distinguished from the other accounting method in ordinary use, the "cash receipts and disbursements" basis. Under the method used by appellee it treated as gross income all amounts becoming due to it during the tax year, whether actually collected or not, and it classed as expense, to be deducted from the gross income to ascertain net income, every item, except one, of cost and expense accruing during the tax year, whether paid during that period or not. This one item of expense, which had not been carried into the appellee's accounting on the basis of accrual, was the amount paid for federal income tax; and up to 1943 appellee had deducted, not the federal income tax *accruing for the tax year,* but the federal income tax *paid during the tax year,* which actually accrued during the preceding year.

In 1943, appellee changed its accounting and its state income tax return for that year by deducting from gross income, in order to arrive at net income, the amount of federal income tax that *arose* from operations during 1943, instead of the amount of federal income tax that was *paid* during that year. Presumably, any right to deduction of the amount of federal income tax actually paid in 1943 has been waived. Since the amount of the federal income tax that accrued during 1943 was substantially more than that paid by appellee during that year (accruing during 1942) this change resulted in a corresponding reduction in the amount of tax shown by appellee's return. The Revenue Commissioner made the assessment against appellee to cover the amount of this reduction, and this suit resulted.

The lower court found from the testimony, in which there was no dispute, that up to 1943 appellee kept its books and made its income tax returns wholly in accordance with the "accrual" method of accounting, except that by mistake in each year it entered on its books and claimed in its return, as a deduction, the federal income tax paid in each year, instead of the federal income tax which accrued in such year, and that in 1943 "the plaintiff kept its books and made its return wholly upon the 'accrual' basis, thus conforming its books and its return to what had always been the dominating and controlling system of accounting used by it." Upon this finding the lower court decreed that the determination of the tax shown by the Commissioner's "deficiency letter" was erroneous and that appellee should be absolved from liability for the amount of the said deficiency assessment.

The Revenue Commissioner has appealed.

Authority for the collection of tax on incomes is conferred by Act 118, approved March 9, 1929, appearing as §§ 14024 to 14066, inclusive, of Pope's Digest. Some amendments to the original Act have been enacted, but none of these amendments affect the controversy herein involved. By the provisions of this law a tax, as set forth therein, is imposed on the entire income, after allowance of prescribed deductions, of every resident of the state. One of the deductions from gross income authorized by the Act (paragraph (c), § 14036, Pope's Digest) is "taxes paid or accrued within the income year, imposed by the authority of the United States . . ."

By the terms of § 14032, Pope's Digest, a taxpayer, who customarily computes his income on a basis other than that of actual cash receipts and disbursements, is authorized, with the approval of the Commissioner of Revenues, to make return of his income on the basis so used by him.

The Commissioner of Revenues is empowered by § 14058, Pope's Digest, to make, with the approval of the Governor, such rules and regulations, not inconsistent

with the law, as he may deem necessary to enforce its provisions. In pursuance of this authority the Commissioner promulgated the following rule:

"A taxpayer who changes the method of accounting employed in keeping his books for the taxable year 1929 or thereafter should, before computing his income upon such new basis for purposes of taxation, secure the consent of the Commissioner. Application for permission to change the basis of the return shall be made at least sixty days before the close of the period to be covered by the return and shall be accompanied by a statement specifying the classes of items differently treated under the two separate systems and specifying all amounts which would be duplicated or entirely omitted as a result of the proposed change."

It is conceded that under the law a taxpayer has the right to keep his books and make his income tax return on either the "cash receipts and disbursements" basis or the "accrual" basis, but appellant argues that, when the election as to method of accounting has been made by the taxpayer, he can change neither the basis of his bookkeeping nor the allocation of any item therein without the consent of the Commissioner. Appellant's argument for reversal is thus epitomized: "When the decisions are read we think the court will be satisfied that the use of a cash item in an accrual basis does not violate the Act or any regulation, and that to change that item, in the accounting system, and in the return, the Commissioner must so authorize, and that the courts cannot substitute their discretion for his, and unless they find that the Commissioner has abused his discretion, his decision must prevail."

Many cases decided by federal courts, construing the federal income tax law and regulations made thereunder, are cited in the excellent briefs filed by counsel for both sides. We have considered these cases and do not find that any of them is controlling in the instant case. However, these decisions all recognize the principle that the taxpayer has the right to elect whether he shall keep his

books and make his income tax return on the basis of "cash receipts and disbursements" or on the basis of "accrual."

In the case at bar the taxpayer, up to 1943, used the "accrual" basis, except as to one item—that of federal income tax—and in 1943 changed its books as to that item so as to make its accounting entirely on the "accrual" basis. It is not contended that in making this change the taxpayer was guilty of fraud or evasion.

The gravamen of appellant's contention seems to be not so much that the change was wrong or resulted in a faulty system of accounting, but that appellee failed to obtain permission therefor from the Revenue Commissioner. Now, if the change had resulted in an illegal deduction, permission of the Revenue Commissioner would not have legalized it; and, if such was not the result, the Commissioner could not have properly refused his permission and his refusal would not have prevented the taxpayer from taking the deduction to which he was entitled. *State, ex rel.,* v. *Burnett,* 200 Ark. 655, 140 S. W. 2d 673.

The purpose of the law is to require the taxpayer to make a return that fairly reflects his actual net income; and, if a return accomplishes this purpose, it satisfies the law. Mr. Mertens in his recent work "Law of Federal Income Taxation," vol. 2, p. 144, discussing requisites of a proper return for federal income tax, says: "There must not be a too strict regard for insignificant errors or too slavish adherence to prescribed theories or methods. The controlling intendment of the statute must be kept in mind that a method of accounting should be followed if it substantially reflects true income." In the same volume, at page 162, this statement occurs: "In other words, the usual method of accounting employed by the taxpayer may be departed from with respect to deductions and credits, if income will be more clearly reflected by shifting the item to another year or accounting period."

Appellee did not change its method of accounting so as to create a new *basis* for taxation. It did not change from the "accrual" method of keeping its books to the "cash receipts and disbursements" method. It merely changed one item previously entered as required under the "cash receipts and disbursements" system and entered this item conformably to the "accrual" system, which appellee had theretofore been using as to all other entries except this one. The effect of what appellee did was to make all items in its accounting system conform to the "accrual" basis. This correction tended to harmonize the taxpayer's scheme of accounting, and, since it did not violate any statutory provision, and, since there is no intimation of any attempt by appellee to evade fraudulently a tax liability, we conclude that the lower court properly upheld the right of appellee to make the change.

The decree of the lower court is accordingly affirmed.

MONDIER *v.* STATE.

4432 198 S. W. 2d 177

Opinion delivered December 16, 1946.

Rehearing denied January 13, 1947.

Rains & Rains and *Hardin, Barton & Shaw,* for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

ROBINS, J. Appellant, Bill Mondier, Orville Wayne Sloan and Jerry McCabe were jointly charged in information filed by the prosecuting attorney with the offense of murder in the first degree, it being alleged that on March 18, 1946, Jerry McCabe feloniously, after premeditation and with malice aforethought, stabbed Gerald Bradley to death with a knife, and that Sloan and appellant were present and unlawfully assisted Jerry McCabe in committing said murder. Motions for severance and for bill of particulars were filed by appellant. The motion for severance was sustained; and the prosecuting attorney filed bill of particulars alleging, among other things, that appellant, Sloan and McCabe, by common agreement, assaulted Gerald Bradley, Vernon Bradley and James Bradley, and that while they were engaged in

this common difficulty appellant aided Jerry McCabe in the slaying by attacking Vernon Bradley.

Sloan was tried first and his conviction of murder in the second degree, with sentence to imprisonment in the penitentiary for five years, was affirmed by us on November 25, 1946. See *Sloan* v. *State, ante,* p. 739, 197 S. W. 2d 757.

Appellant was found guilty by a trial jury of the crime of voluntary manslaughter and from judgment sentencing him to confinement for five years in the penitentiary he prosecutes this appeal.

For reversal it is argued by appellant: 1. That the testimony is insufficient to support the verdict. 2. That the court erred in its instructions to the jury.

1.

The testimony on behalf of the State tended to establish these facts: On the night of the fatal difficulty appellant, in company with McCabe and Sloan, attended a dance at the V.F.W. hall in Fort Smith. Appellant and his two companions left the dance and went to a nearby place called "The Spot," presumably to obtain drinks. They were denied admittance because, on account of the lateness of the hour, the doors had been closed. Jack Barker, son of the proprietor, went to the door, and was invited on the outside by someone standing in front of the door and as soon as he went out he became engaged in a fight with some person in the crowd. The three Bradley brothers, James, Vernon and Gerald, were drinking beer on the inside of "The Spot," where they were when the front door was closed. After Barker left the Bradley brothers also went out, and as they went out they were attacked. James Bradley testified: "Someone kicked and pounded on the door after it was closed and the boy behind the bar went to the door and stepped outside and shoved and came back in. We went outside. Vernon went outside and then Gerald and I came. When we got out Vernon was in the middle of the street and his head was cut on the side. Gerald and I went to his

side and some man hit me in the stomach. It was Sloan and he had cut me. At the same time Gerald was fighting with McCabe and was cut. I was hit and knocked about twenty feet. None of us provoked any difficulty and me and my brothers were sober. The fight lasted about two minutes after I arrived. Sloan cut me and McCabe cut my brother Gerald and Mondier engaged Vernon." The testimony of Vernon Bradley was to the same effect.

While appellant testified that he went from the dance hall to his car and did not engage in the difficulty at all, this contradiction of the testimony of witnesses for the State was one for the jury to settle. The jury saw fit to accept the testimony of the two brothers of deceased and this determination is binding on us. *Blankenship* v. *State,* 178 Ark. 1199, 10 S. W. 2d 25; *Patterson* v. *State,* 179 Ark. 309, 15 S. W. 2d 389; *Maloney* v. *State,* 181 Ark. 1035, 27 S. W. 2d 94; *Blevins* v. *State,* 182 Ark. 109, 30 S. W. 2d 851; *Shank* v. *State,* 189 Ark. 243, 72 S. W. 2d 519; *Burnett* v. *State,* 197 Ark. 1024, 126 S. W. 2d 277.

It is earnestly insisted by appellant that there is no proof of any concert of action between appellant and his two companions, and that, even if the testimony of appellant is disbelieved and the version of James and Vernon Bradley accepted, it was shown that the difficulty between appellant and Vernon Bradley was in no way connected with the attack of McCabe on Gerald Bradley. It was not required, in order that the concert of action be established, that the State prove the plan for such action by direct testimony. "It is not necessary, however, in order to establish a conspiracy, to prove the unlawful combination between the parties by direct evidence. This may be shown by circumstances. In the case of *Chapline* v. *State,* 77 Ark. 444, 95 S. W. 477, it was held that a conspiracy might be inferred, although no actual meeting among the parties is proved, if it be shown by testimony that the persons pursued by their acts the same unlawful object, each doing a part, so that their acts that were apparently independent were in fact connected.

Parker v. *State,* 98 Ark. 575, 137 S. W. 253; *Dickerson* v. *State,* 105 Ark. 72, 150 S. W. 119.

We conclude that the jury was justified in finding, as the verdict indicates it did, that the fights between the different participants were but a part of a mutual plan on the part of appellant, Sloan and McCabe to engage in combat with those coming out of "The Spot," and that when, as James Bradley put it, "Mondier engaged Vernon," he was carrying out a part of the mutual effort and his attack on Vernon was calculated to put Vernon "*hors de combat,*" and thereby render him incapable of going to the aid of his brother, Gerald, who was slain by McCabe. This being true, appellant was guilty of the unlawful killing of Gerald, even though he may not have had a specific design to take the life of deceased. In the case of *Carr* v. *State,* 43 Ark. 99, this court quoted with approval from Bishop, Criminal Law, § 636: " 'When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminate in a criminal result, though not the particular result meant, all are liable.' "

2.

Appellant urges that the lower court erred in its instructions to the jury in not confining the "aiding and abetting" for which appellant might be found guilty to the specific act charged in the bill of particulars, that is, assaulting Vernon Bradley. In instruction No. 18, given by the court at the request of appellant, the court said: "You are instructed that before you can convict the defendant, Bill Mondier, as an accessory before the fact of any homicide or any degree of unlawful killing, you must find beyond a reasonable doubt the following: First, that a homicide or unlawful killing was committed at the time and place alleged in the information by the said Jerry McCabe and, second, that there existed between the defendant, Mondier, and Orville Wayne Sloan and Jerry McCabe, prior to said unlawful killing, if any, a common agreement and understanding to provoke and bring on a difficulty and to assault Gerald Bradley, and his compan-

ions, Vernon Bradley and James Bradley, and, third, that in pursuance of said common agreement and understanding, if any, the defendant, Bill Mondier, assaulted Vernon Bradley and in so doing was aiding, abetting and assisting in a common design and purpose to provoke and aggravate an assault on the deceased, Gerald Bradley, and his companions. Unless you find each and all of the above propositions beyond a reasonable doubt you are instructed it is your duty to return a verdict of not guilty as to the defendant, Mondier."

In this instruction the court plainly told the jury that before the appellant could be convicted the jury must find that appellant committed the very acts with which he was charged in the information. The instructions given by the lower court fully and fairly presented to the jury the law applicable to the case.

No error appearing the judgment of the lower court is affirmed.

DROKE *v.* ROGERS.

4-8026 198 S. W. 2d 180

Opinion delivered December 16, 1946.

Vernon J. King and *E. Newton Ellis,* for appellant.

Schoonover & Steimel, for appellee.

McHANEY, Justice. Appellant says: "This is an action to recover broker's commissions alleged by appellee to have been earned on the sale of property of the appellant. We believe the record in this case shows the following to be the evidence given in the case." He then

sets out quite briefly what he says is the effect of the evidence. The pleadings have not been abstracted. The instructions are not set out or abstracted. The verdict and judgment are not set out. The motion for a new trial, if any, and the action of the court thereon, if it did act, are not mentioned in appellant's abstract and brief.

So, at the outset, appellant is met by appellee's motion to affirm the judgment for noncompliance with Rule IX, which motion must be and is sustained on the authority of numerous cases. See *Siloam Springs* v. *Broyles,* 87 Ark. 202, 112 S. W. 219, and the many cases there cited; *Queen of Ark. Ins. Co.* v. *Royal,* 102 Ark. 95, 143 S. W. 596; *Winn* v. *Schneider,* 207 Ark. 605, 182 S. W. 2d 216.

Appellee has not supplied the deficiencies in appellant's abstract, and the judgment is affirmed.

HARRELL *v.* DAVIS.

4-8029 198 S. W. 2d 180

Opinion delivered December 16, 1946.

J. G. Moore, for appellant.

Gordon & Gordon, for appellee.

Ed. F. McFaddin, Justice. The appellee recovered judgment for seven hundred dollars as damages for breach of contract, and appellants have appealed, urging as grounds for reversal: (1) that the verdict of the jury is contrary to the evidence; and (2) that the verdict is based on conjecture rather than evidence.

Since the verdict was in favor of the appellee, this court on appeal accepts that version of the testimony most favorable to the appellee. *Potashnick Local Truck System* v. *Archer,* 207 Ark. 220, 179 S. W. 2d 696, and authorities there cited. Therefore, the question we now consider is, whether the evidence, as so viewed, is sufficient to show (a) defendants' breach of contract, and (b) plaintiff's consequential damages.

I. *Breach of Contract.* The defendants (appellants) were engaged in constructing a levee in Conway county, and they made a contract with the plaintiff (appellee) whereby, for an agreed price, the latter was to furnish men and materials, and complete the work of sodding the levee; which, in this case, was the process of placing grass-covered earth on the exposed top and slopes of the constructed embankment. It is admitted by both sides that a contract was made; but the question in dispute is, who first breached the contract. The plaintiff testified that he actually worked one day under the contract, and then delayed a few days, at defendants' request, because of bad weather conditions; and that when he started to resume operations, the defendants told him they had contracted with another person. On the other hand, the defendants claimed that the plaintiff started the work, but abandoned it, and that the defendants were forced to contract with another person to sod the levee. The testimony is in irreconciliable conflict, even as to dates. There was made a sharply disputed question of

fact as to who first breached the contract; but the plaintiff's evidence was sufficient to support the jury's verdict as rendered.

II. *Consequential Damages.* The plaintiff sought damages, not only for (a) money paid in assembling equipment, and a crew of men to do the work, but also for (b) the profits he would have made under the contract. Regarding the profits: the plaintiff testified that he would have received a gross amount of $2,267, and that his total expenses for all labor, materials, etc., (duly itemized) would have been $1,312. He thus claimed a net profit of $995. His figures were strongly disputed, and severely challenged, but we cannot say that the jury committed error in awarding the plaintiff a total of $700 for all damages. The plaintiff had worked one day under the contract, and had collected and banked the sod along the base of the levee, in several places, and had already secured his crew and all equipment. Therefore, he had removed some of the doubtful and speculative elements inherent in profits as the basis of recovery. The court charged the jury that profits, to be recoverable as damages, "must be found from the testimony to be certain, both in their nature and in respect to the cause from which they proceed." That instruction is not complained of in this court, so we presume it is as favorable to the appellants as they desire. The rule of the cases on this point is stated in *Ford Hardwood Lbr. Co.* v. *Clement,* 97 Ark. 522, 135 S. W. 343:

"'Where plaintiff entered into a contract to perform certain work for the defendant, which he was prevented from doing by the fault of defendant, plaintiff is entitled to recover the profits which the evidence makes it reasonably certain that he would have made had defendant carried out its contract.' *Beekman Lumber Co.* v. *Kittrell,* 80 Ark. 228, 96 S. W. 988; *Hurley* v. *Oliver,* 91 Ark. 427, 121 S. W. 920; *Singer Mfg. Co.* v. *W. D. Reeves Lumber Co.,* 95 Ark. 363, 129 S. W. 805. See, also, *Spencer* v. *Hall,* 78 Ark. 336, 93 S. W. 985; *Border City Ice & Coal Co.* v. *Adams,* 69 Ark. 219, 62 S. W. 591." See, also,

the cases collected in West's Arkansas Digest, "Damages," § 40.

On the whole case, we conclude that there was sufficient evidence to sustain the jury verdict, both as to breach of the contract and consequential damages. Therefore, the judgment of the circuit court is in all things affirmed.

OZAN LUMBER COMPANY *v.* TIDWELL.

4-8021 198 S. W. 2d 182

Opinion delivered December 16, 1946.

McRae & Tompkins and *S. Hubert Mayes,* for appellant.

William F. Denman and *Tom W. Campbell,* for appellee.

MINOR W. MILLWEE, Justice. Appellee, Clarence Tidwell, as plaintiff in the circuit court recovered judgment for $15,000 against appellant, Ozan Lumber Company, for personal injuries alleged to have been sustained in a collision between a truck driven by appellee and a truck and log trailer operated by C. M. Kirby as the agent and servant of appellant. At the conclusion of the testimony on behalf of appellee, and at the conclusion of all the testimony, appellant requested an instructed verdict in its favor. The refusal of the trial court to grant these

requests is the first assignment of error urged by appellant for reversal of the judgment.

In pursuance of this contention it is first insisted that the only conclusion warranted by the evidence, even when given its strongest probative force in favor of appellee, is that appellee was guilty of contributory negligence as a matter of law.

The collision occurred on a gravel highway known as the South Cale Road at a point about two and one-half miles south of Prescott, Arkansas. Appellee testified that on the afternoon of August 27, 1945, he was driving his light "pick-up" truck on the Blakely Mill Road which intersects the South Cale Road at the point where the collision occurred. As he approached within about 100 feet of the intersection to drive to Prescott, he saw the cab of a truck being driven by Kirby from Prescott at a fast rate of speed approaching the intersection. Another car had entered the intersection about 80 feet ahead of appellee going toward Prescott. After appellee passed some lumber stacked in the corner of a field near the intersection, and when he was about 20 feet from the intersection, he again saw the approaching truck about 100 feet up the road. He approached the intersection in second gear, stopped his truck and turned off the motor with the front end of the truck extending about 12 inches over the edge of the road Kirby was traveling. The log truck was about 60 feet away when he stopped, and there was nothing to obstruct the view of either driver at this point.

The log truck was equipped with rear dual wheels, which extended further out from the truck than the front wheels. The front wheel of the log truck missed the truck driven by appellee, but the right rear wheel caught the front part of appellee's truck knocking it around, and resulting in appellee's injuries. Appellee also testified that his brakes were in good condition and that he could have stopped his truck within 10 feet at the speed he was traveling as he approached the intersection.

John A. Davis, a Prescott merchant, testified he was walking to his car near the Blakely millyard when he stopped to talk with appellee shortly before he started toward the intersection. This witness corroborated the testimony of appellee as to the position of his truck immediately before the collision and the view of one approaching the highway. He also testified that the road was 18 feet wide where the collision occurred. The log truck stopped 50 or 60 feet from the intersection after the collision and the front end of appellee's truck was struck by the right rear dual wheel of the log truck.

It is earnestly contended by appellant that under this testimony we should hold appellee guilty of contributory negligence as a matter of law in proceeding to the edge of the highway when he could have stopped his truck at a safe distance from the road, and thereby avoided the collision. Appellants say this is especially true in view of the testimony of Kirby that the right wheels of the truck he was driving were 3 or 4 feet from the right edge of the road, and that appellee's truck struck the rear wheel of his truck. It is insisted that it must be deduced that appellee continued into the highway into the truck driven by Kirby, and that any other conclusion is contrary to the physical facts and in violation of the rule followed in *Mo. Pac. Railroad Co.* v. *Hancock,* 195 Ark. 414, 113 S. W. 2d 489.

We cannot agree with this contention. The deductions we are asked to make are dependent upon the truthfulness of the witness Kirby, who contradicted the testimony on behalf of appellee as to how the accident occurred. It was the province of the jury to consider this testimony along with all the other facts and circumstances in determining whether appellee was guilty of contributory negligence. We are unwilling to say that a driver is guilty of contributory negligence as a matter of law in stopping his truck with the front end 12 inches over the edge of a road 18 feet wide in full view of an approaching vehicle under the circumstances disclosed by the evidence on behalf of appellee.

This court has consistently held that where fair-minded men might honestly differ as to conclusions to be drawn from facts, whether controverted or incontroverted, the question at issue should go to the jury. *St. L. I. M. & S. Ry. Co.* v. *Fuqua,* 114 Ark. 112, 169 S. W. 786; *Coca-Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856; *D. F. Jones Construction Co., Inc.,* v. *Lewis,* 193 Ark. 130, 98 S. W. 2d 874. Whether plaintiffs were guilty of contributory negligence in stopping their buggy unequipped with tail lights on the shoulder of a paved highway at night when the buggy was struck by the automobile of defendant was held to be a question for the jury, in the case of *Duckworth* v. *Stephens;* 182 Ark. 161, 30 S. W. 2d 840.

In a discussion of the rule announced in the case of *Coca-Cola Bottling Co.* v. *Shipp, supra,* Mr. Justice BUTLER, speaking for the court in the Duckworth case, said: "The most this court decided, and the rule it there laid down was that one driving an automobile at night too fast to stop within the range of his own lights in case of a collision is not guilty of negligence as a matter of law, but that each case must be considered in the light of its own peculiar state of facts and circumstances, the test being what an ordinarily prudent person would have done under circumstances as they then appeared to exist; and that whether it was negligence to leave a car parked in the nighttime without lights was also not negligence *per se* but was a circumstance to be considered with the other attendant circumstances in determining whether it was negligence or not. We have frequently held that violations of the State traffic statutes are merely evidentiary of negligence and not conclusive of the issue. *Pollock* v. *Hamm,* 177 Ark. 348, 6 S. W. 2d 541; *Mays* v. *Ritchie Gro. Co.,* 177 Ark. 35, 5 S. W. 2d 728. And in the case at bar the failure of appellees to light their buggy was a question for the jury whether under the circumstances Duckworth was, or was not, guilty of negligence in failing to discover the appellees, and whether appellees were guilty of contributory negligence in stopping the buggy without displaying tail lights. These questions were sub-

mitted to the jury under proper instructions. In these particulars the failure to attach lights to the buggy was a matter of proper consideration, but it did not relieve Duckworth from the duty of acting as a reasonably prudent person in the operation of his car and of keeping such lookout as prudence for his own safety and humanity for the safety of others could dictate. We therefore hold that the court did not err in its declaration in this regard." See, also, *Bean* v. *Coffee,* 169 Ark. 1052, 277 S. W. 522; *Ocker* v. *Nix,* 202 Ark. 1064, 155 S. W. 2d 58; *England* v. *White,* 202 Ark. 1155, 155 S. W. 2d 576; *Lewis* v. *Shackelford,* 203 Ark. 500, 157 S. W. 2d 509. In the instant case, the fact that appellee stopped his truck on the edge of the road did not relieve Kirby from the duty of operating the log truck and trailer in a prudent manner, or keeping a proper lookout for other vehicles using the road. Under the testimony adduced on the issue, we cannot say that appellee was guilty of contributory negligence as a matter of law, but this question was one properly to be determined by the jury.

A more serious question is presented in appellant's second contention that the proof is insufficient to show that the driver of the truck was acting as the agent or employee of appellant at the time of the collision. Appellant says that all the evidence shows that it had no supervision or control over the activities of the driver, Kirby, who was engaged as an independent contractor and for whose negligence appellant is not liable.

The evidence discloses that the Negro, Kirby, worked for appellant as a log cutter from 1940 until February, 1945, when he started driving the truck involved in the collision. He testified that he bought the truck from appellant on June 1, 1945, and executed a purchase money note for $1,850 payable at the rate of $20 each Saturday. Under the terms of this note, appellant retained title to the truck until the note was fully paid, and in the event of repossession upon default of three weekly payments, all sums paid by Kirby would be deemed a reasonable rental for the truck and trailer during the time he had

held possession. Appellant exacted no down payment at the time of the purchase, and Kirby owned no other property. While no cash payments had been made on the truck at the time of the trial, Kirby was given credit on the note for what the company owed him from time to time for hauling logs. When he bought the truck it had another driver's name and a number on it, and appellant had these painted off while the truck was in a shop.

Kirby listed the names of his log cutters in a report of his haulings to appellant each week. He paid social security and unemployment taxes on the men who cut the logs hauled by him. He also paid all expenses of operating the truck. Kirby did not know how much he owed on the truck at the time of the trial, but the records of appellant showed credits of $887.56 on the note at that time.

Appellant introduced three separate logging contracts executed by Kirby and the company, after execution of the note on June 1, 1945, and before the collision. Two of these contracts were for cutting and hauling timber from separate tracts of land owned by appellant, while the other involved timber taken from the lands of another party, and delivered to appellant. These contracts, when considered alone, indicate the relationship of Kirby as that of an independent contractor. Kirby testified that, at the time of the collision, he was hauling timber from the Wren estate under an oral agreement with appellant to deliver the pine timber at the mill for $25 per thousand. The Wren estate was to receive $14 per thousand for pine timber and $11 for the oak. Appellant did not want the oak timber and this was delivered to another mill.

Norvelle Wren testified that she made the contract for the sale of the timber with Kirby, but understood that the pine timber was to go to appellant. She also testified that appellant paid her for the stumpage as the timber was cut and hauled by Kirby.

Appellant's manager made a thorough investigation at the scene of the collision soon after it happened. He

testified that this was done at the request of both Kirby and appellee. It was agreed at the trial in January, 1946, that the state license on the truck which had been paid by appellant prior to June 1, 1945, was never transferred and that Kirby had paid no license on the truck.

It has been said in many cases that the vital 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. Broadly stated the rule is that, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. *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; *Humphries* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492.

In 27 Am. Jur., Independent Contractors, § 60, p. 539, the general rule is stated as follows: "If a contract providing for the performance of certain work is in writing and is unambiguous, its construction is generally a question solely for the court. But where a written contract has been modified by the practice under it, or one not a party to it asserts that it does not express the real relation of the parties and produces evidence tending to show that the relation is that of master and servant, the question whether an independent contractor relationship has been created is generally for the determination of the jury. Similarly, where the nature of the relation between employer and employee depends upon the meaning of a written instrument collaterally introduced in evidence, and the effect of such instrument depends, not only upon its construction, but also upon extrinsic facts and circumstances, the inferences of fact to be drawn from the instrument must be left to the jury."

In *Wright* v. *McDaniel,* 203 Ark. 992, 159 S. W. 2d 737, this court approved the following statements of textwriters on the question: "It is frequently asserted that whether the relation of master and servant exists in a given case is usually a question of fact. Where the con-

tract is oral and the evidence is conflicting, or where the written contract had become modified by the practice under it, the question as to what relation exists is for the jury under proper instructions. If the contract is oral, and if more than one inference can fairly be drawn from the evidence, the question should go to the jury whether the relation is that of employer and independent contractor or that of master and servant. Moll, Independent Contractors and Employers Liability, p. 62, *et seq.*

"It is impossible to lay down a rule by which the status of men working and contracting together can be definitely defined in all cases as employees or independent contractors. Each case must depend on its own facts, and ordinarily no one feature of the relation is determinative, but all must be considered together. Ordinarily the question is one of fact. 31 C. J. 473, 474."

In the case of *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. 2d 320, an injury resulted from the operation of a truck engaged in hauling gravel in the construction of a public highway. The proof disclosed that those engaged in hauling the gravel paid all operating expenses of their trucks, worked when they desired, and were paid at a stipulated price per ton for the haul. The work was done for a firm of contractors engaged in the construction of the road, and the gravel was distributed along the road as directed by the contracting firm. It was held under this state of facts that the question whether the operator of a truck engaged in hauling the gravel was an independent contractor, or a servant of the firm of contractors was for the jury.

In the case of *Lion Oil Refining Company* v. *Smith,* 199 Ark. 397, 133 S. W. 2d 895, this court held (headnote 2): "The license number of the car together with proof that appellant held the license was *prima facie* proof that the defendant was the owner, and that the driver of the car was then engaged in appellant's service." In *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6, this court, in an opinion by Justice Wood, said: "Appellant owned, and paid the license for running the motor truck. This

was *prima facie* evidence, at least, that the truck was oeing operated for appellant at the time appellee was injured. It was a question for the jury as to whether the *prima facie* case had been overcome by evidence to the contrary. *Ferris* v. *Sterling,* 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D 1161."

When all the facts and circumstances in the instant case are viewed in the light of the foregoing authorities, we think the question whether Kirby was acting as an employee of appellant, or an independent contractor, was one properly to be determined by the jury. He was not operating under a written contract with appellant in hauling the timber from the lands of the Wren estate at the time of the collision. The fact that Kirby was paid by the thousand for hauling the timber, paid social security and unemployment taxes on the men who cut the logs, and other circumstances in evidence tend to show that he was operating as an independent contractor. On the other hand, the fact that appellant retained title to the truck which was sold for $1,850 without a down payment, and the fact that the license number was never transferred to Kirby, together with other circumstances, would tend to indicate that the lumber company retained a degree of control over the work of Kirby which is consistent with his status as that of an employee at the time of the collision. The evidence on this issue was substantial and sufficient to support the verdict and the trial court did not err in submitting it to the jury. *Vaughn* v. *Herring,* 195 Ark. 639, 113 S. W. 2d 512.

We agree with appellant's final contention that the judgment for $15,000 is grossly excessive. The duty resting upon this court on this phase of the case is stated in *Missouri Pacific Railroad Co., Thompson, Trustee,* v. *Newton,* 205 Ark. 353, 168 S. W. 2d 812, where this court said: "This question of when a verdict is grossly excessive is one of the many perplexing problems that an appellate court has to consider. A trial jury views the plaintiff first-hand, and determines the amount of the verdict, and under our system of jurisprudence that ver-

dict should not be disturbed unless it is grossly excessive. The right of trial by jury is guaranteed by our Constitution, and by the very nature of our government, trial by jury is a bulwark against oppression and radical changes; so an appellate court should consider the case most seriously before reducing any verdict. Yet, appellate judges have a sworn duty to perform; and when, after reviewing all of the evidence in a case, the appellate court reaches the conclusion that the verdict is grossly excessive, then it is the sworn duty of the appellate court to indicate the correct amount of the verdict. Just as we would reverse a case because of errors in instructions, so, the case should be reversed if the verdict is grossly excessive. That is the recognized practice."

Appellee is 51 years of age and has been a cripple since early childhood, walking with the aid of crutches. Appellee first consulted a physician four days after the accident when he was taken to Dr. Walter Carruthers at Little Rock, Arkansas, by his attorney. Dr. Carruthers did not testify, but the report of his examination was introduced in evidence by agreement of the parties. This report, after describing bruises to appellee's foot, shoulder and back, concludes as follows: "Anteroposterior X-ray film was made of the pelvis including the lower lumbar spine. This film reveals a fracture on the top of the sacrum just above the top part of the sacroiliac joint, and a fracture to the transverse process of the 5th lumbar vertebra in this same area.

"Impression: As results of this examination, it is definitely shown that this man has recently received injuries as above described, both on the physical examination and by the X-ray. This will require the patient to wear a supportive brace about his pelvis and lower back for as much as three months; however, I think that his recovery will be without any permanent disability."

Appellee consulted Dr. A. L. Buchanan about three weeks after the collision and complained of much pain. Dr. Buchanan testified that he examined appellee a few days before the trial, which was about four months after

the examination by Dr. Carruthers, and found no evidence of injuries to appellee's back or sacroiliac joint. An X-ray picture made at that time failed to show the fractures as found by Dr. Carruthers, but did show a misplacement of the sacrum. Dr. Buchanan also testified that a fracture disclosed soon after the accident could have healed and, if so, probably would not show in the X-ray picture made by him. He also testified that appellee had fully recovered from any injuries that he might have sustained in the accident, and agreed with the prognosis of Dr. Carruthers as to permanent disability.

Appellee testified that he was still suffering pain at the time of the trial and was unable to walk without use of the brace which Dr. Carruther's advised him to wear for three months. Appellee also insists that he sustained damages in a considerable sum in loss of earnings and damages to his truck. There was no prayer in the complaint for property damages nor was there any proof offered as to the amount of damages to the truck. Instruction No. 4 given at the request of appellee reads: "You are instructed that if you find for the plaintiff, your verdict will be for such an amount of damages as you find from a preponderance of the evidence will reasonably compensate him for his physical pain and mental anguish, suffered or endured by him on account of the injuries sustained, if any; also any future physical pain and mental anguish which the evidence may show with reasonable certainty the plaintiff will suffer and endure on account of the injuries sustained by him." This was the only instruction given on the measure of damages and the jury's consideration was thus limited to the physical pain and mental anguish suffered by appellee.

A majority of the court has concluded that a judgment for any sum greater than $4,500 would be grossly excessive under the evidence in this case. If, therefore, a remittitur of $10,500 is entered by appellee within fifteen days, the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded for a new trial.

4-8027 198 S. W. 2d 161

Opinion delivered December 16, 1946.

[redacted]

Roy Mullen and *S. L. Richardson,* for appellant.

Vernon J. King, for appellee.

HOLT, J. This is an action in replevin.

February 16, 1945, C. W. Guerin, a resident of Lawrence county, Arkansas, borrowed $240 from the First National Bank of Lawrence County, and executed his note therefor, with M. V. Neece and O. W. Davis, appellants, as his sureties thereon. As security for the payment of the note, Guerin executed a chattel mortgage on

an automobile and ten acres of cotton. This mortgage was filed by the bank with the Clerk and Recorder of Lawrence county on February 21, 1945. The note became due on November 1, 1945, was paid by appellants, the sureties, and the note and mortgage were properly assigned by the bank to them.

Shortly before the note became due, Guerin sold the automobile described in the mortgage to appellee, Mack Holder, who in turn sold it to appellee, Rue Agee, both of whom resided in Randolph county. Appellants located the car in the possession of Agee, demanded possession, which was refused, whereupon this suit was filed.

Appellees defended on two principal grounds, (1) that the description of the automobile in the mortgage, *supra,* was insufficient to put a third party on notice, and (2) that appellants gave their consent to Guerin to sell the mortgaged car.

Upon a trial, and at the conclusion of the testimony, the court on appellees' motion declared, as a matter of law, that the description of the automobile set out in the mortgage was insufficient to put appellees, third parties, on notice, took the case from the jury, and directed a verdict in favor of appellees.

This appeal followed.

We think the trial court erred.

On the record presented, it is our view that the description of the automobile, when considered in the light of the evidence, was sufficient to put third parties on inquiry,—therefore a jury question was made.

The mortgage provided that the mortgagor, Guerin, "sold and conveyed . . . the following described property, situated in the Eastern District of Lawrence county, Arkansas, to-wit: One 1936 Model 2-Door Chevrolet Sedan and 10 acres of cotton to be grown during the spring and summer of 1945 on the Dr. Hatcher farm 5 miles north of Walnut Ridge, Arkansas. . . . To have and to hold the same unto the party of the second

part. . . . In case any default shall be made in the payment of said indebtedness as herein set forth, or should the party of the first part (C. W. Guerin) prior to the said maturity hereof, sell . . . remove . . . the property herein conveyed, . . . without the consent of the party of the second part (bank), then, in either event the party of the second part . . . is authorized and empowered to take charge of said property on demand," etc.

On the record presented, the well established general rule appears to be as stated by this court in *Blankenship* v. *Modglin,* 177 Ark. 388, 6 S. W. 2d 531, where this court said: "This court has laid down the rule that a mortgage of personal property is sufficient as to description if it be such that a disinterested person, aided only by such inquiry as the instrument itself suggests, is able to identify the property. *Johnson* v. *Grissard,* 51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795."

C. J. S., vol. 14, "Chattel Mortgages," § 57, p. 665, (subdivision 3), d., announces the rule as follows: "A description of a motor vehicle is sufficient if a third person aided by such inquiries as the mortgage suggests can identify the vehicle intended. A misdesignation of the motor or serial number is fatal. While a motor vehicle should be described in a mortgage by giving as fully as possible the details furnishing the means of identification, a description is generally held to be sufficient if it will enable a third person, aided by such inquiries as the instrument itself indicates and suggests, to identify the vehicle intended to be mortgaged. Thus an automobile has been held to be sufficiently described, for the purposes of an action to enforce a lien or as against purchasers and third persons, when it is designated . . . by make, model, and age," etc.

The description of the automobile as "one 1936 Model 2-Door Chevrolet Sedan," shows that the car was approximately nine years old when the mortgage was executed, and was a 1936 model. In addition to this description, we think the mortgage itself contained provi-

sions which a jury might have found sufficient to enable appellees, had they made inquiry, to identify the automobile as the one described.

The mortgagor, Guerin, was a resident of Lawrence county, and there was no evidence that he owned more than one car.

The mortgage provided that he should not "sell, or remove" the automobile from Lawrence county without the consent of the mortgagee, bank.

We think a jury might have found that this was sufficient to suggest to a third party that inquiry might disclose that the mortgagor, Guerin, retained possession of the automobile.

While the exact point at issue here appears not to have been passed upon by this court, we think the case of *Harkey* v. *Jones,* 54 Ark. 158, 15 S. W. 192, lends support to our views in this case. There, the property described in the mortgage was "a brindle cow about three years old and her increase." The mortgagor in that case owned two brindle cows. There this court said: "The description in the mortgage, though general, was sufficient to put a party intending to purchase it on inquiry, and the appellee purchasing from the mortgagor was bound to ascertain whether the property he bought was the same covered by the mortgage. *Johnson* v. *Grissard,* 51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795."

In support of the general rule announced in C. J. S., *supra,* there is cited in support of the text the case of *Hillery et al.* v. *Waurika Nat. Bank,* 100 Okla. 34, 226 Pac. 1051. In that case, it appears that a man by the name of Young mortgaged to the bank an automobile described as "one 1918 model Ford car, new," along with other chattels, as security for the payment of a note. The mortgage was duly filed in the office of the County Clerk of Jefferson county, where the mortgagor resided. Thereafter, Young sold the car to Hillery, a third party. The bank "brought suit for a conversion," and there was a judgment in its favor. It was alleged on appeal "that the

court erred in submitting to the jury the question as to whether or not the car in controversy was the one mortgaged to the plaintiff (bank)." The court said: "As we view it, there was ample evidence tending to show that the car in question was the identical car mentioned in the mortgage. The evidence shows that this car was purchased new by Young early in 1918; that it was the only car of like description owned by the said Young at the time he executed the mortgage to the plaintiff. . . . The car described in the mortgage was 'one 1918 model Ford Car, new,' . . . It appears that the mortgagor was a resident of Jefferson county, and the mortgage provided that the car should not be removed from Jefferson county. When read in the light of the evidence, the mortgage was sufficient to impart notice to the defendants. 'As against third persons the description in the mortgage must point out its subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggest inquiries or means of identification which, if pursued, will disclose the property conveyed.' . . . 11 C. J. 457."

We think the principles of law announced in this case are sound and apply with equal force here. Accordingly, for the error indicated, the judgment is reversed and the cause remanded for a new trial.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* ELLIS.

4-8032 198 S. W. 2d 196

Opinion delivered December 23, 1946.

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

O. A. Featherston, for appellee.

GRIFFIN SMITH, Chief Justice. October 20, 1943, H. F. Ellis purchased at Murfreesboro, Arkansas, a Dixie Sunshine Trailways ticket, good for bus transportation to Little Rock by way of Hot Springs where connection was with Missouri Pacific Transportation Company. Ellis procured a baggage check at Murfreesboro evidencing receipt by the carrier of what was later stipulated to be an Oxford bag, which with content of clothing was worth $100.

Missouri Pacific received the bag at Hot Springs. Subsequent loss was not accounted for. On appeal from a Justice of the Peace judgment for $100, a jury was waived in Circuit Court and the same amount was awarded the plaintiff.

Missouri Pacific bases this appeal on the right it thinks was conferred upon the Corporation Commission under Act 367 of 1941 to limit liability for loss of baggage, the Commission having been directed to "establish reasonable requirements with respect to continuous and adequate service and the transportation of baggage and express." Part of Sec. 16 (a) enjoins upon carriers of passengers the duty of putting into effect just and reasonable regulations and practices relating to the issuance, form, and substance of tickets, "the carrying of

personal, sample, and excess baggage, the facilities for transportation, and all other matters relating [to] or connected with the transportation of passengers."

A stipulation is that as an incident to his ticket Ellis was given a check upon which was printed: "Dixie Sunshine Trailways, General Office. From Murfreesboro to Little Rock via Hot Springs. Baggage liability limited to $25."

Ellis did not declare a valuation greater than $25. His testimony was that he put the claim check in his pocket without looking at it. After the loss occurred, Missouri Pacific's tender of $25 was declined.

Although "Motor Carrier Act of 1941" became effective with the Governor's approval March 26th, the carriers affected did not file their Rules and Regulations until June 1, 1943. However, appellee's cause of action occurred in October of that year, so the statute had been complied with when Ellis received the baggage check.

Appellee relies upon *Southwestern Transportation Company* v. *Poye,* 194 Ark. 982, 110 S. W. 2d 494, and *Strickland* v. *Missouri Pacific Transportation Co.,* 195 Ark. 950, 115 S. W. 2d 830. Both cases were decided before the General Assembly authorized the State Commission to promulgate regulations with which we are concerned.

While the Poye case involved responsibility for loss of baggage by a motor carrier, it cites *Railway Company* v. *Cravens*, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230. Cravens sued for the value of cotton destroyed by fire after its delivery to the railroad. The bill of lading limited liability, but this Court, speaking through Mr. Justice HEMINGWAY, held that the carrier could not, by special contract, relieve itself by the restriction where the shipper was not afforded an opportunity to contract for transportation with full coverage.

In the Poye case Mr. Justice HUMPHREYS summarized the Court's views when he said that the statute

under which suit was brought "reënacted the rule at common law relative to initial and connecting carriers," a comprehensive discussion of which is contained in the Cravens decision. In conclusion it was held in the Poye appeal that the transportation company was not relieved by regulation of the Corporation Commission, ". . . for the reason that [the Commission] has no power or authority to change the statutory rule fixing the carrier's liability at the actual value of the baggage."

The Strickland case involved acceptance by the carrier of unchecked baggage in circumstances contrary to its own rules. It was again held that the Commission's regulations did not protect the defendant.

Missouri Pacific Transportation Company v. *Williams,* 207 Ark. 750, 182 S. W. 2d 762, deals with bailor and bailee. It was held that failure of the bailee to call the bailor's attention to restrictive conditions on a claim check did not deprive the transaction of contractual characteristics—this because the bailor was charged with knowledge of what the receipt recited.

Since we have held that the common law liability of a carrier may be limited by contract if supported by a consideration, we do not know of any fundamental inhibition that would prevent the General Assembly from directing a commission of its own creation to prescribe rules if the rules are not legislative, but merely measures in the administrative plan the lawmaking body thought necessary to public welfare.

Rules eight and nine, Local and Joint Baggage Tariff No. 500-F, are copied in the margin.[1] It will be ob-

Rule 8—Free Baggage Allowance.

(a) Except as noted below and subject to limitations shown in Rules 5, 6 and 7, 150 pounds of baggage or property not exceeding $25.00 in value, may be checked without additional charge for each adult passenger and seventy-five (75) pounds not exceeding $12.50 in value, for each child traveling on a half fare ticket.

Rule 9—Charges for Baggage of Excess Weight and/or Value.

(c) EXCESS VALUE: Unless a greater value is declared by a passenger and charges paid for excess value at time of delivery to carrier, the value of property belonging to, or checked for a passenger, shall be deemed and agreed to be not in

served that provision is made for greater valuations (and for recovery to the extent of such declaration, or actual value) if the worth of the baggage tendered is stated, and ten cents is paid for each additional $100.

We think the Legislature intended by its 1941 Act to invest the Commission with regulatory authority; and while the Commission could not adopt a rule in conflict with statutory provisions requiring transportation of baggage, it could delegate purely ministerial acts. The paramount question is, Did Act 367 repeal Sec. 1173 of Pope's Digest requiring that "All carriers of passengers in this State shall transport and carry the baggage of passengers, weighing not more than 150 pounds, free of charge"?

The section is a part of Act 252, approved May 4, 1911. By its terms all common carriers of passengers are included. Since 1911, however, a tremendous increase in motor vehicle transportation has developed, involving new and complex problems. Seemingly it was the legislative purpose to deal exclusively with this class of service; hence the Motor Carrier Act.

This construction is strengthened by Sec. 2, which declares that it is necessary to the public interest ". . . to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor." Other purposes mentioned are development and preser-

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excess of the amounts specified in Rule 8, and carriers parties to this tariff will not accept liability for a greater sum in case of loss or damage.

(d) If passenger declares, according to the form prescribed by checking carrier, a greater value than specified in Rule No. 8, there will be a charge, at the rate of ten cents for each additional $100.00 valuation, or fraction thereof, total valuation not to exceed limitations in Rule 7. (See Exception No. 1). The minimum charge for excess value will be ten cents (10 cents).

(e) Charges for excess value must be prepaid and are separate and distinct from the charges for excess weight.

vation of a highway transportation system adapted to the needs of Arkansas commerce.

The 1941 measure covers approximately thirty printed pages of the Fifty-Third General Assembly Acts. It deals at length with motor carriers as distinct from railways, and it authorizes the Commission in the broadest sense to regulate intrastate transportation of passengers, baggage, freight, and express. This being true, it follows that the Act of 1911, passed at a time when travel was mostly by rail, has been superseded in respect of motor transportation.

The Judgment is reversed with directions to limit the recovery to $25.

Mr. Justice ROBINS and Mr. Justice MILLWEE dissent.

GOODMAN *v.* POWELL.

4-8034 198 S. W. 2d 199

Opinion delivered December 23, 1946.

W. F. Reeves, for appellant.

J. E. Simpson, for appellee.

HOLT, J. This action was begun by appellees against "the Unknown Heirs of the Estate of W. L. Crockett, deceased, Loy Coxsey, Administrator of the Estate of W. L. Crockett, Albert Clark and George Goodman." They alleged in their complaint, among other things, that appellee, Jesse Powell, "as representative of Carroll county, is the duly elected, qualified and acting County Judge of Carroll county, Arkansas." That the appellees, A. B. Collier, Bob Travis and Efton Smith, are residents of Carrollton, Carroll county, Arkansas, and are citizens and taxpayers of Carroll county.

"That in the years of 1869 to 1871 petitions were presented to the county court of Carroll county for the Incorporation of the Town of Carrollton and as reflected by Mortgage Record 'A,' page 39, Deed Record 'A,' page 81, dated April 9th, 1869, and 1876, respectively, the Town of Carrollton was incorporated and the public square and the streets and alleys as indicated upon said plat were dedicated to the town of Carrollton as a public square and as public streets, and all property adjoining said streets, alleys and public square has since been conveyed by lots and blocks and the streets, alleys and public square have been used for public purposes and are public property. . . ."

That "this tract of land was carried on the tax books as Block 8, Public Square, and no taxes were assessed against it and none collected from the incorporation of the Town of Carrollton, as aforesaid, until and including the year of 1908. In the year of 1909, as indicated by the tax records, this tract of land was placed on the tax records as block 8 of the Town of Carrollton in the name of W. L. Crockett at a valuation of $5.00, and W. L.

Crockett paid the taxes on it from that date until 1940, and since then has been paid by Clark and Goodman, the defendants herein."

They further alleged that the property involved here, block 8, dedicated as a "Public Square" had been since its dedication public property, has been so used by the public to the present time, was never subject to taxation, was erroneously and illegally placed upon the tax books, that the deed from the State to W. L. Crockett (now deceased) of May 10, 1909, the deed from Crockett's executor to appellant, A. B. Clark, and the deed from Clark to appellant, George W. Goodman, to this public square, are all void, and prayed for their cancellation and for all other proper and equitable relief.

Appellant, Goodman, filed demurrer in which he alleged in effect that plaintiffs were improper parties to bring the suit and that the trial court was without jurisdiction. The court overruled the demurrer whereupon appellants, Goodman and Clark, filed separate answers interposing a general denial and affirmatively setting up the defense that the property involved, block 8, had long since ceased to be used by the public as a public square, for which it had been dedicated, and had been abandoned.

Upon a trial, the court found all issues in favor of appellees, and from the decree comes this appeal.

The following facts were stipulated: "It is agreed that block 8 of the Town of Carrollton, is the identical property upon which a county courthouse for Carroll county, Arkansas, was erected and maintained from 1836 to 1868, and that during that time Carroll county exercised control of that portion of the property on which the courthouse stood; that in 1868 a survey was made of that tract of land known as the Town of Carrollton and a plat carrying streets, alleys, lots and blocks was filed for record in Carroll county, Arkansas, Mortgage Book A, page 39, and Mortgage Record Book A, page 81. That incorporating petition and order incorporating the Town

of Carrollton as per the plat and survey was entered and recorded, filing as indicated by the certified copy hereto attached.

"It is agreed that the courthouse in Carrollton was destroyed by fire in 1868, and there has been no courthouse on this ground since that date. It is agreed that a copy of the record of the plat of the Town of Carrollton be attached to this agreement as Exhibit B.

"It is also agreed that since the date of the filing of the plat and the record of the incorporation of the Town of Carrollton the property entered as Exhibit B has been recognized by lots and blocks on the tax record of Carroll county and that all property conveyances within that area has been conveyed by lots and blocks to and including the present time; that the tax records of Carroll county indicate that for the year of 1908, and prior thereto, this property block 8, was carried as the public square in the Town of Carrollton, without an assessed valuation thereon, being indicated as not owned by any person; that in 1909, the same property appeared on the tax books in the name of W. L. Crockett, assessed at a valuation of $5, and that W. L. Crockett and his grantees have continuously paid the taxes on this property from 1909 to and including 1945.

"It is agreed the records reflect that in 1896, said block 8 was assessed for taxes and taxes were extended against it, and was sold for taxes for the year 1896, in June, 1897, to the State of Arkansas and thereafter duly certified to the State of Arkansas as forfeited for the nonpayment of taxes. It is agreed that on May 10, 1909, W. L. Crockett purchased said block 8 from the State of Arkansas, which deed is on record in Deed Record Book 48, page 543, of the records of Carroll county, and copy thereof may be used as exhibit herein, and that a copy of any and all records indicated by this stipulation may be attached to and become a part hereof."

For reversal, appellants first contend that appellees were not proper parties to institute the suit. We cannot agree. We think it clear that the right of appellees to

sue is provided under § 1314 of Pope's Digest, which is as follows: "Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all." Such was the effect of our holding in the recent case of *Conner* v. *Heaton*, 205 Ark. 269, 168 S. W. 2d 399.

They next question the jurisdiction of the court below. We think this contention untenable for the reason that the allegations of appellees' complaint are to the effect that the public square involved here was dedicated for a public use, or for the public interest, which presents a trust relationship, or a matter that savors of a trust. The principles of law announced in the *Conner* v. *Heaton* case, *supra,* apply with equal force here. We there said: "In the case of *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729, this court, quoting with approval from Pomeroy Eq. Jur., § 181, said: 'If the controversy contains any equitable features, or requires any purely equitable relief, which would belong to the exclusive jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights, and grant legal remedies, which would otherwise be beyond the scope of its authority,' and in vol. 8, R. C. L. 911, § 37, the author says: 'Inasmuch as a court of equity has jurisdiction of all matters which savor of trusts, it is the proper tribunal in which to seek to enforce or preserve the beneficial interest of the public obtained through a dedication,' and the rule is well settled that 'when equity acquires jurisdiction of a cause for one purpose under *bona fide* allegations, all matters at issue will be adjudicated and complete relief afforded.' "

In *Davenport* v. *Buffington et al.,* 97 Fed., p. 234, 46 L. R. A. 377, the Circuit Court of Appeals for the 8th Circuit, in considering the rights of a resident and taxpayer in a city or town in property used by the public for park

purposes, said: "Has he no interest in the right of the public to the free use of these commons sufficient to enable him to maintain a suit in equity to prevent the destruction of his right to use them, the spoliation of the parks, and their appropriation to private use? Let us see. The title to the lands in these parks, subject to the right of the inhabitants and taxpayers of the town to use it forever for park purposes, is without value. It is nothing but a naked legal title held in trust for the people who use, or have a right to use, the parks. The real value of the lands in the parks is the value of the right to use it, . . . Thus, by the sale of the parks, the resident taxpayer . . . is deprived of his share in the valuable right to use them. . . . Now the enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts of equity always interfere at the suit of a *cestui que trust* or a *cestui que* use to prohibit a violation of the trust, or a destruction of the right of user, . . . and the inevitable conclusion is that his interest in them is ample to enable him to maintain a suit in equity to prevent their diversion to private uses."

Finally, appellants argue that the public square has been abandoned for public use. This is a fact question, and unless we can say, under our long established rule, that the findings of the trial court were against the preponderance of the testimony on this issue, we must affirm. In *Frauenthal* v. *Slaten,* 91 Ark. 350, 121 S. W. 395, this court said: "The law bearing on the question of dedication of property to the public use is well settled by the decisions of this court. An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable. . . . The word 'square' as used on a plat to designate a certain portion of ground within the limits of a city or town, indicates a public use. This is said to be the proper and

settled meaning of the term in its ordinary and usual signification."

The general rule on Abandonment is thus announced in 26 C. J. S., under the general topic "Dedication," § 62, p. 150, as follows: "While prescription does not run against the right of the public to the use of land dedicated for such use, see Adverse Possession, § 14, yet it may by abandonment relinquish its rights to the land dedicated. Where there has been an abandonment or forfeiture of all rights to dedicated property, an injunction will lie against a municipality to prevent it from taking possession of and using the property for the purposes for which it was dedicated. The question of abandonment is one of fact to be determined by the circumstances of each case, or, according to some decisions, a mixed question of law and fact. The burden of proving abandonment is on the party who asserts it; and it should be established by a preponderance of the evidence."

It appears that there is little, if any, dispute as to the material facts in addition to those above stipulated.

The trial court made certain findings, from which we quote: "Since the filing of the plat, dedication order and since the last courthouse was destroyed by fire in 1868, the town of Carrollton has had possession of the Public Square, exercised control over it as public property, used it exclusively for public and school purposes, for a public parking ground, public athletic ground, for a place of public religious worship, for public shows, and in connection with the school grounds of School District No. 15, as an athletic ground for the school, and no individual has ever since 1836 exerted any ownership or claimed any ownership or possession of said lands, except such as had been, as hereinbefore stated, as a result of the tax deed of W. L. Crockett."

Without attempting to detail the evidence, it suffices to say that after reviewing it, we think the preponderance thereof is not against these findings of the trial court, which are to the effect that no abandonment has

been shown. The court further found "that the property never was subject to taxation and should never have been placed upon the tax books as taxable property, and that the tax sale of 1897 for nonpayment of taxes of 1896 was void, the tax deed from the State to W. L. Crockett in 1909 was void, the deed from Loy Coxsey, as Executor of the Estate of W. L. Crockett was void, and A. B. Clark to defendant, Goodman, was void and Goodman acquired no title to said lands by reason of said deed."

There was a decree accordingly.

We find no error and the decree is in all things affirmed.

BROWN *v.* ANDERSON.

4-8129 198 S. W. 2d 188

Opinion delivered December 23, 1946.

Sidney S. McMath, Nathan L. Schoenfeld, David B. Whittington, and *C. Floyd Huff, Jr.,* for appellants.

Jay Rowland, Curtis L. Ridgway, Lloyd E. Darnell, Fred Johnson, and *James R. Campbell,* for appellees.

ED. F. MCFADDIN, Justice. This appeal involves four election contests stemming from the Democratic Primary election held in Garland county on July 30, 1946. In Case No. 6991 in the Circuit Court, I. G. Brown was contestant, and Marion Anderson and Charles Dugan were contestees. Each of these three parties was a candidate for the Democratic nomination for Sheriff of Garland county; and, as a result of the July 30th election, the County Democratic Central Committee on August 2, 1946, certified Anderson to be the nominee, as having received a clear majority of all votes. On August 12th, Brown filed this contest, alleging illegal votes and other irregularities and claiming, *inter alia,* that Brown received the nomination. It is not necessary to detail any of the allegations, as the case was not tried on these allegations. With the complaint, there was filed the affidavit signed and sworn to by 10 or more Democratic electors before Frank Carpenter, as a notary public. The qualification of the notary public is one of the issues here.

In case No. 6992 in the Circuit Court, Q. Byrum Hurst was contestant, and Elza T. Housley and Barney H. Roark were contestees; and there was involved the Democratic nomination for County Judge of Garland county. In case No. 6993 in the Circuit Court, Leonard R. Ellis was contestant, and John E. Jones and Billy I. Dale were contestees; and there was involved the Democratic nomination for Circuit and Chancery Clerk of Garland county. In case No. 6990 in the Circuit Court, Clyde H. Brown was contestant, and Earl Witt and Morris Hecht were contestees; and there was involved the Democratic nomination for Circuit Judge of the 18th Judicial District of Arkansas.

In each of the four cases there was the affidavit signed and sworn to by 10 or more Democratic electors

before Frank H. Carpenter as notary public. In each case, the contestees filed motion to dismiss the contest; and, in each case, the trial court—after hearing evidence—sustained the motion to dismiss on the sole ground that "the notary public was not qualified to administer an oath, being neither a *de jure* nor a *de facto* notary public." From the said orders of dismissal, the four contestants have prosecuted appeals; and all four of the circuit court cases are consolidated in one case in this court, since the issues in each case are identical. We will now refer to the contestants as appellants, and the contestees as appellees.

During the pendency of the appeal there occurred the general election on November 5, 1946, wherein appellees Anderson, Housley, Jones and Witt were shown as the Democratic nominees for the offices of Sheriff, County Judge, Circuit Clerk and Circuit Judge, respectively; and wherein the appellants were their respective opponents. The general election resulted in a victory for the appellants in each instance; and, as a result thereof, the appellees have filed a motion in this court to dismiss the appeal as moot. There are thus presented two questions: (1) is the appeal moot?; and (2) was the notary public qualified to act. We dispose of these questions in the order listed.

I. *Is the Appeal Moot?* The appellees say: that, since each of the appellants won in the general election the same office for which he seeks the Democratic nomination in the case at bar, therefore, the question of who was entitled to the Democratic nomination has become of no importance. In *Pearson* v. *Quinn,* 113 Ark. 24, 166 S. W. 746, we quoted this sentence from a North Carolina case:

"The court will not go through the record merely to decide who would have won, if the cause of action had not died pending appeal; that it will not decide the merits of a controversy which no longer exists, merely to determine who shall pay the costs."

The quoted statement emphasizes the application of the term "moot" in the case at bar. Has the cause of

action of each appellant ceased to exist by virtue of the result of the general election, in which each appellant was successful? Our own case of *Cain* v. *CarlLee,* 171 Ark. 155, 283 S. W. 365 is full authority for our negative answer to this question. Obtaining the office in the general election is one thing; but obtaining the Democratic nomination in the primary is quite another thing. Cain and CarlLee were rival candidates for the Democratic nomination for County Judge of Woodruff county in the primary election of 1924. CarlLee was certified as the nominee, and Cain filed a contest. The case, in one phase or another, appears four times in the reports of this court. See 168 Ark. 64, 269 S. W. 57; 169 Ark. 887, 277 S. W. 551; 171 Ark. 155, 283 S. W. 365; and 171 Ark. 334, 284 S. W. 40. After the second opinion of this court, and while a third appeal was pending, CarlLee resigned the office of County Judge, and then moved this court to abate the cause as moot. But we held that Cain's right to be declared the Democratic nominee, if he honestly won the primary election, was a right that could not be taken from him. We pointed out that, under the Arkansas election laws, Cain had a "right of action" to contest CarlLee's Democratic nomination; and we said of Cain's right:

"He was entitled to prosecute this cause of action so long as CarlLee resisted, or until there had been a final decision determining the case against him."

It is true that there was a dissenting opinion in the case; but we still adhere to the holding of the majority. That case was decided in 1926. Eight regular sessions of the General Assembly have intervened from then until now. No law has been enacted seeking to change the rule there announced, which was to the effect that the right to prosecute a contest for the Democratic nomination was a cause of action. We do not change that rule now.

To see that the Democratic nomination is a valuable privilege, we have only to read the case of *Terry* v. *Harris,* 188 Ark. 173, 64 S. W. 2d 324. There, certain persons were allowed to be interrogated as to whether

they had supported the Democratic nominees in the most recent state election. Likewise, in the case of *Trussell* v. *Fish,* 202 Ark. 956, 154 S. W. 2d 587, there was detailed how a lack of party loyalty was urged against electors. So, in the case at bar: in the general election of 1948 some of these appellants might be questioned as to their party loyalty, if appellees are left to be the Democratic nominees, since appellants opposed them in the 1946 general election. In Arkansas the right to the Democratic party nomination is a valuable thing; and even if appellants won in the general election, still they have the continuing right to a trial to determine whether they were entitled to the Democratic nomination; and this to establish their party rights. So, we hold that the case is not moot.

II. *Was the Notary Public Qualified to Act?* This was the point on which the case was decided in the trial court. As previously stated, each contest petition was signed and sworn to by 10 or more Democratic electors before Frank Carpenter as a notary public in and for Garland county, Arkansas. This affidavit is required by § 4738, Pope's Digest; and we have held that it is jurisdictional. See *Lanier* v. *Norfleet,* 156 Ark. 216, 245 S. W. 498; and *Kirk* v. *Hartlieb,* 193 Ark. 37, 97 S. W. 2d 434. The trial court found that the affiants were qualified electors and members of the Democratic party; but that "the notary public was not qualified to administer an oath, being neither a *de jure* nor a *de factor* notary public."

The facts as regards Frank Carpenter's notarial status are these: He first moved to Garland county in 1938, and purchased and still owns "a lot to build a house on." He was a qualified voter, and voted in Garland county in 1940. In December, 1941, he went to Marche, Arkansas, and engaged in war work there and at various other places in Arkansas and Louisiana until "about the first of March," 1946, when he returned to Hot Springs. He paid a poll tax in Garland county on March 5, 1946, (but this did not allow him to vote in any election in 1946 prior to October 1st: Section 4697, Pope's Digest,

as amended by § 2 of Act 82 of 1939). He testified that he had all the time from 1940 maintained a residence at 306½ Orange Street, where he resided at the time of the trial. On June 21, 1946, the Governor of Arkansas appointed Frank Carpenter as a notary public in and for Garland county. He was issued a commission on that date, and duly filed his oath, and his bond as required by § 10362, Pope's Digest. He was possessed of a notarial seal which he used on each affidavit here involved; and on each affidavit there appears the statement that his commission as a notary public expires June 21, 1950.

Against all of this, there is the fact that on June 21, 1946 (when he was commissioned as a notary public), Frank Carpenter did not have a poll tax receipt which allowed him to vote in any election in 1946 prior to October 1st. It is this failure to have a then current poll tax receipt that caused the Circuit Court to hold that Carpenter was not a notary public either *de jure* or *de facto*.

We have held that a notary public is a public officer. *Sonfield* v. *Thompson,* 42 Ark. 46, 48 Am. Rep. 49; *State* v. *Hodges,* 107 Ark. 272, 154 S. W. 506. What is a *de jure* officer, and what is a *de facto* officer? In 46 C. J. 927 a *de jure* officer is defined:

"An officer '*de jure*' is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law."

Article XIX, § 3 of the Constitution forbids the appointment of anyone to office who does not possess the qualifications of an elector. Since Carpenter did not on June 21, 1946, have the right to vote in an election prior to October of that year, it must follow that he was not—on the date of his appointment—a *de jure* officer.

But was he a *de facto* officer? We have in many cases discussed *de facto* officers. Some of these cases

are: *Pierce* v. *Edington,* 38 Ark. 150; *Bank of Almyra* v. *Laur,* 122 Ark. 486, 184 S. W. 39; *Eureka Fire Hose Co.* v. *Furry,* 126 Ark. 231, 190 S. W. 427; *Faucette* v. *Gerlach,* 132 Ark. 58, 200 S. W. 279; *Stafford* v. *First National Bank,* 182 Ark. 1169, 34 S. W. 2d 759; *Forrest City Grocer Co.* v. *Catlin,* 193 Ark. 148, 97 S. W. 2d 910; *Trussell* v. *Fish,* 202 Ark. 956, 154 S. W. 2d 587.

In *Faucette* v. *Gerlach, supra,* Mr. Justice Hart, speaking for this court, quoted two leading authorities, as follows:

" 'A person who enters into an office and undertakes the performance of the duties thereof by virtue of an election or appointment, is an officer *de facto,* though he was ineligible at the time he was elected or appointed, . . .

" 'An officer *de facto* is one who by some color of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His color of right may come from an election or appointment made by some officer or body having colorable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed; or made in favor of a party not having the legal qualifications; . . . ' "

Under these definitions Frank Carpenter was certainly a *de facto* notary public when he swore the affiants in the case here involved. Then, as a *de facto* officer, what was the effect of his acts in swearing the affiants. In *Faucette* v. *Gerlach, supra,* we quoted from *Cooley on Constitutional Limitations,* as follows:

" 'But for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers *de facto* are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State, or by some one claiming the office *de jure,* or except when the person himself attempts to build up some right, or claim some

privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer *de facto* are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. This is an important principle, which finds concise expression in the legal maxim that the acts of officers *de facto* cannot be questioned collaterally.' ''

In *Stafford* v. *First National Bank, supra,* we sustained a writ of garnishment issued by a *de facto* deputy clerk. In *Forrest City Grocer Co.* v. *Catlin, supra,* there was challenged an acknowledgment taken by a *de facto* notary public. We sustained the acknowledgment, and held that one who has been appointed notary public, and is in possession of the office, and assumes to act as such, is at least a notary public *de facto* whose right to act cannot be questioned in a collateral proceeding. We held that the mortgage acknowledged before such *de facto* notary public was enforceable, although the notary had not qualified himself by making and signing the bond required by statute. Our other cases (as previously listed) on *de facto* officers show other situations, in all of which we have sustained the official action performed by a *de facto* officer; and the rationale of our cases leads to the inevitable conclusion that the affidavits made before Frank Carpenter as notary public should be sustained in the case at bar.

The general rule prevailing in other jurisdictions is in accord with this holding. In 47 C. J. 506, in discussing notaries *de facto,* this rule is stated:

''Generally a person acting as a notary under color of authority with public acquiescence is held to be a notary *de facto,* and as to the public and third persons his acts are valid and cannot be attacked collaterally. The principle that ineligibility to hold an office does not prevent the ineligible incumbent, if in possession under color of right and authority, from being an officer *de facto,* with respect to his official acts, insofar as third persons are concerned, has been applied to one who is

appointed and acts in good faith as notary, but who is ineligible or disqualified to act as such by reason of alienage, sex, or interest, . . . ''

Appellees insist, and most strongly rely on *Lanier* v. *Norfleet,* 156 Ark. 216, 245 S. W. 498. At first reading, that case might seem to sustain appellees; but a careful study of the case shows that it is based on facts which distinguish it from the case at bar. *Lanier* v. *Norfleet* was a contested election case in Crittenden county; and the attack on the affidavit was based on the disqualification of the notary public to act in Crittenden county. Templeton, while a citizen of Clay county, had been appointed as notary public, and had qualified and acted as such in Clay county. In 1921, he became a citizen and voter of Crittenden county, and acted as notary public in Crittenden county solely under the commission issued to him while he was a resident of Clay county. We held that when Templeton moved from Clay county he abandoned the office of notary public, and was, therefore, neither a *de jure* nor a *de facto* notary public in Crittenden county, as he never received any appointment of any kind after he became a resident of Crittenden county. Mr. Justice HART succinctly stated the case when he said:

''The undisputed evidence shows that Templeton had removed permanently from Clay county, of which he was a citizen when he was appointed a notary public, to Crittenden county, of which he was a citizen at the time he took the affidavits in question. Consequently, having abandoned his office by his permanent removal to another county, it became vacant, and he was no longer a *de jure* officer. An officer *de facto* must not only perform the duties of the office with public acquiescence, but he must also be in possession of it. *Faucette* v. *Gerlach,* 132 Ark. 58, 200 S. W. 279.

''It is true that the record shows that Templeton was exercising the function of notary public, taking affidavits, acknowledgments, etc., at the time he signed the *jurat* to the affidavits in question as a notary public,

but it cannot be said that he was in possession of the office.

"As we have already said, the act with regard to the appointment of notaries public and their duties must be read together and construed as a whole. When this is done, it is evident that the Legislature intended to make a notary public a county officer, and to create a vacancy in such office when he removed to another county."

Lanier v. *Norfleet* holds that, when a notary public moves from the county of his residence, he abandons his office of notary public, and does not become even a *de facto* officer in the county to which he moves. We do not have any such situation as that in the case at bar. So, as previously stated, *Lanier* v. *Norfleet* affords no support to the appellee.

The case at bar presents a situation similar in many respects to that which existed in *Trussell* v. *Fish,* 202 Ark. 956, 154 S. W. 2d 587. In that case certain votes were challenged in an election contest because Eastham (the deputy tax assessor who assessed the challenged voters) was not himself a qualified elector at the time he was appointed, and at the time he assessed the poll taxes challenged. We held that the votes could not be challenged on that ground, stating (in substance) that, even if Eastham was not an officer *de jure,* still he was an officer *de facto,* and his acts could not be questioned collaterally. We said:

"An assessor is a constitutional officer. No statute has been called to our attention declaring void the work of a deputy assessor who was not at the time his duties were being discharged a qualified elector and whose appointment had not been approved by the county court; nor do we know of any such provision of law. . . . In the instant case the assessor was clothed with appointive power. The fact that he proceeded irregularly, or that he appointed a man who was not eligible, cannot deprive voters of their franchise."

So, in the case at bar, the Governor was clothed with the power to appoint a notary public in Garland

county, and he appointed Frank Carpenter, who was commissioned and filed the bond and obtained a seal and used the seal and swore the affiants in the case at bar, all in the county for which he was appointed and commissioned. We, therefore, hold that Frank Carpenter was a *de facto* notary public, when he swore the affiants in the case at bar, and that the affidavits complied with the election law requirements found in § 4738, Pope's Digest.

It follows that the judgments of the Circuit Court dismissing the contests are each reversed, and the causes remanded for further proceedings.

SMITH and MCHANEY, JJ., dissent from that part of the opinion which holds that the case is not moot.

[redacted]

WELLS *v.* FLOYD, GUARDIAN.

4-8025 198 S. W. 2d 412

Opinion delivered December 23, 1946.

[redacted]

Northcutt & Northcutt and *Oscar E. Ellis,* for appellant.

P. C. Goodwin and *Ponder & Ponder,* for appellee.

SMITH, J. This is a direct appeal prosecuted, within the time allowed by law, from the order and judgment of the Fulton Probate Court refusing to vacate a probate order for the sale of a tract of land owned by Hugh Isbell, an incompetent person. There are, in fact, two appeals, one from the order of sale, the other from the judgment refusing to vacate that order.

The order sought to be vacated reads as follows:

"On this the 7th day of Feb., 1946, is presented to the Court the petition of Shelby E. Floyd, Guardian of Hugh Isbell, incompetent ward, asking for authority to sell the following lands belonging to said ward:

"The southwest quarter of the southwest quarter of section six (6); the west half of the northwest quarter and the southeast quarter of the northwest quarter section seven (7) all in township nineteen (19) north range seven (7) west of the 5th principal meridian, in Fulton county, Arkansas. And the purpose of said sale being to place the proceeds therefrom in government bonds. And it appearing to the court from the evidence under oath of the said guardian, Shelby E. Floyd, as well as of J. R. McCullough, and Ray C. Carter, three creditable and disinterested witnesses that said lands have long been unproductive and are depreciating in value and are more expensive to keep in repairs, pay taxes and insurance than the revenue produced from same would be, and that it would be to the best interest of said ward, that the sale of said lands be made and the proceeds therefor be invested in government bonds.

"It is therefore ordered by the court that said Shelby E. Floyd, guardian as aforesaid, be and he is hereby directed to sell said lands, to the highest bidder, after having advertised as the law directs, that said lands be sold for cash in hands and said Shelby E. Floyd, as guardian, is directed to report his action at the next term of this court."

The petition to vacate this order was filed by Lee Wells as next friend of the incompetent, whose right to thus appear is not questioned, and alleges the improvidence of the order.. Certain jurisdictional questions are also raised, questioning the validity of the order of sale. The one most strongly relied upon is that a sale of the land was ordered for investment of the proceeds of the sale in government bonds, the insistence being that the law does not authorize this investment.

The probate proceeding was had under the alleged authority of § 7586, Pope's Digest, which reads as follows:

"Though it be not necessary for the payment of debts or maintenance, when it shall clearly appear to the court that it would be for the benefit of a person of unsound mind that the real estate, or any part thereof, of such person should be sold or leased, and the proceeds thereof put at interest or invested in productive stocks, or in other real estate, or in the improvement of other real estate of such person, then the guardian or curator may sell or lease the same accordingly, upon obtaining an order for such sale or lease from the court of probate of the county in which said real estate shall be situate. To obtain such order the guardian or curator shall present to the court a petition duly verified, setting forth the condition of the estate, and the facts and circumstances on which the petition is founded. If, after a full examination on the oath of creditable and disinterested witnesses, it clearly appears to the court that it would be for the benefit of said ward that the real estate, or any part thereof, should be sold or leased, the court may make such order, as provided in § 7578, and the sale and the subsequent proceedings thereunder shall be in accordance with the provisions of from §§ 7579 to 7585, inclusive, the court first requiring the guardian or curator to enter into good and sufficient bond to make said sales or leases with fidelity to the interest of his ward, and to faithfully account for the proceeds of such sales and leases according to law and as the order of the court may require. Act March 14, 1891, p. 86."

This section authorizes the sale of the real estate of an incompetent person "when it shall clearly appear to the court that it would be for the benefit of a person of unsound mind that the real estate, or any part thereof, of such person should be sold or leased, and the proceeds thereof put at interest or invested in productive stocks, ..." Certainly money invested in government bonds has been put at interest, as such bonds bear and pay interest, and we would be unwilling to question the sufficiency of the security for the investment, as government bonds are, by common consent, regarded as the highest form of security known to the law. We, therefore, hold that the order is not void because of the direction that the proceeds of the sale of the land be invested in government bonds, which we understand to mean the interest bearing obligations of the United States.

It is objected also that the order is void for the reason that it directs the sale of the land for cash. Section 7586, above quoted from, provides that after approval of a petition to sell, the court shall make "such order, as provided in § 7578, and the sale and the subsequent proceedings thereunder shall be in accordance with the provisions of from §§ 7579 to 7585, inclusive, ..."

Section 7578, Pope's Digest, reads as follows:

"The court making such order shall direct the time and terms of sale, mortgage or lease of such estate, and the manner in which the proceeds shall be secured, and the income or produce thereof applied."

This section confers upon the court the discretion to "direct the time and terms of sale," and it is within the power thus conferred to direct that the sale be for cash. *Overton* v. *Porterfield,* 206 Ark. 784, 177 S. W. 2d 735. The other sections referred to "from §§ 7579 to 7585" relate to notice and manner of sale, and the report and the confirmation or disapproval thereof.

We hold, therefore, that if the order is otherwise valid, it is not rendered void because it directs the sale

for cash, for the reason that the court had the discretion to so order.

There is however, a jurisdictional defect in the order of sale, which renders it void. Section 7586, Pope's Digest, from which we have quoted, provides the findings which the court must make before ordering a sale, but when these findings have been made a condition precedent is imposed before ordering the sale, which is that "the court first requiring the guardian or curator to enter into good and sufficient bond to make said sales or leases with fidelity to the interest of his ward, and to faithfully account for the proceeds of such sales and leases according to law and as the order of the court may require."

It does not appear, nor is it contended, that the bond required by law was ever made, and there was therefore no authority to hold the sale prior to the execution of the bond.

The case of *Grogan* v. *Weatherby,* 196 Ark. 705, 119 S. W. 2d 552, is in point. That case involved the validity of a lease of a minor's land for oil and gas purposes. Section 6266, Pope's Digest, confers upon guardians and curators the authority to execute such leases, but prescribes the conditions under which the power may be exercised. This § 6266 was apparently patterned after § 7586, and like the latter section contains a condition precedent to the exercise of the power conferred, this being "first requiring the guardian or curator to enter into good and sufficient bond to make such lease with fidelity to the interest of his ward, and faithfully to account for the proceeds of such royalties and other consideration derived from such lease according to law and as the order of the court may require."

In the case last cited, as in the instant case, the bond required by law had not been executed. After a review of applicable cases, it was held, as stated in the headnote, that, "Before a valid sale by the alleged guardian of his ward's lands can be made, two jurisdic-

tional acts are necessary—the appointment of the guardian and the execution by him of a bond."

It is true here that the acting guardian, who filed the petition for the order of sale, was the duly acting and qualified guardian, at least that fact is not questioned; but even so, a bond in addition to the ones he executed to qualify as a guardian was essential to be conditioned as required by § 7586, Pope's Digest, which conditions are specific and not general as are the conditions of all bonds which guardians must execute before qualifying as such.

It follows from what has been said that the order of sale is void, and the decree will be reversed and the cause remanded with directions to vacate and set aside the order of sale.

JOHNSON *v.* GREENFIELD.

4-8006 198 S. W. 2d 403

Opinion delivered December 23, 1946.

Adams & Willemin, for appellant.

Yingling & Yingling and *Hugh Williamson,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, W. H. Johnson, is a carrier of passengers for hire and operates a line of motor coaches out of Jonesboro. Arkansas, known as Great Southern Coaches. Appellee, Mrs. Edna Greenfield, brought this action for damages to compensate for personal injuries allegedly sustained by her as a passenger on one of appellant's buses, while en route from Jonesboro, Arkansas, to Newport, Arkansas, on November 15, 1944.

It was alleged in the complaint that injuries to appellee resulted from a sudden breakdown of the bus when the left rear dual wheels ran off the bus. The complaint charged negligence on the part of appellant as follows:

"That the negligence of the defendants consisted in putting and placing said bus in service with defective equipment, defective axle, lug bolts, wheel hubs and hub machinery and equipment which keep the wheels on said bus in order and safe and which kept the wheels in question on this bus safe, which the defendants knew or could have known by the exercise of ordinary care were defective and which was unknown to plaintiff. That said negligence caused the said rear wheels of said bus to run off and thereby injure the plaintiff."

The answer of appellant denied the allegations of the complaint and alleged that appellant maintained a well equipped mechanical department where all buses were regularly and carefully inspected; that the bus in which appellee was a passenger was thoroughly inspected immediately preceding the trip on which the injury was alleged to have occurred; and that any defect in the wheels and lug bolts of the bus was a hidden or latent defect and not discoverable by the highest degree of care on the part of appellant.

Trial before a jury resulted in a verdict and judgment in favor of appellee for $2,000 from which is this appeal.

Appellee offered proof to the effect that she and her sister boarded the bus at Jonesboro, Arkansas, and occupied a seat in the rear of the crowded bus. They had proceeded to a point about 15 miles out of Jonesboro when the left rear dual wheels ran off the bus, throwing appellee out of her seat and resulting in injuries, which she described to the jury. After waiting for another bus about an hour, appellee and other passengers proceeded to Newport, where the bus driver gave her a card and advised her to go to a hospital, which she did the next day.

Testimony by witnesses for appellant, and photographic exhibits, show that rear dual wheels are attached to the traction mechanism by so-called lug bolts, six extending through on either side, and presumptively

made secure through use of conveniently accessible nuts. Following the bus breakdown it was found that three bolts on the left wheel had broken "in a row" and the threads of the remaining three were "stripped" and the nuts came off.

Luther Coble testified on behalf of appellant that it was his duty to check the fuel, water and wheels of the 14 buses operated by appellant before each trip. He gave the buses about the same inspection that is given when a person drives into a filling station except that the lugs were always checked. He remembered that he inspected this bus on the day of the accident because the general mechanic, Hardin, cautioned him to be sure all the lugs were tight. They were getting inferior materials at this time, and he had twisted a lot of the bolts off in trying to tighten them.

Bill Hardin testified that it was his duty to check all mechanical parts of the buses before each trip. He went to the scene of the accident and inspected the hub and wheel of the bus. It was his opinion that three of the lug bolts had first broken "in a row" which caused the threads of the other three to be "stripped." New lug bolts had been placed in this particular wheel about a month before the wheels ran off. It was not unusual for the bolts to break and it happened every few days. If the lugs are tightened too much, the threads will usually strip, and if the bolt is defective, it will break off when tightened. They had considerable trouble getting bolts made of good material about the time of the accident and used the best they could get at that time. It would ruin the lug bolts to take them out of the wheel for inspection.

On cross-examination Hardin first testified that he did not caution Coble to check the lugs on the bus immediately preceding the accident, but later testified that he remembered giving such instructions because this was done every time a bus was brought in for inspection.

The case was tried under the doctrine of *res ipsa loquitur*. At the request of appellee the trial court gave

instructions Nos. 4 and 5 as follows: "No. 4—You are instructed that where the defendant owes a duty to the plaintiff to use care and an accident happens causing injury, and the accident is caused by the thing or instrumentality that is under the control or management of the defendant, and the accident is such that in the ordinary course of things it would not occur if those who have control and management use proper care, then, in the absence of satisfactory evidence to the contrary, this would be evidence that the accident occurred from the lack of proper care by the defendant.

"No. 5—You are instructed that in this case the happening of the accident from which the injuries resulted is *prima facie* evidence of negligence of the defendant, and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part."

Appellant earnestly contends that the doctrine of *res ipsa loquitur* does not have the effect of shifting the burden of proof as distinguished from the burden of going forward with the evidence, and that the trial court committed reversible error in giving instruction No. 5, *supra.* Imminent authority cited by appellant in support of this contention demonstrates the wide divergence of opinion on the question. 38 Am. Jur., Negligence, § 311. See, also, Mark Shain's treatise on the subject in his recent book, "Res Ipsa Loquitur, Presumptions and Burden of Proof."

The principles embodied in instructions Nos. 4 and 5, *supra,* have been approved by this court in a long line of decisions. Many of these cases are collected and analyzed in an exhaustive treatment of the doctrine of *res ipsa loquitur* in the case of *Chiles* v. *Fort Smith Commission Co.,* 139 Ark. 489, 216 S. W. 11, 8 A. L. R. 493. One of our first cases applying the doctrine where liability of a common carrier for injuries to a passenger was involved, is that of *Railway Company* v. *Mitchell,* 57 Ark. 418, 21 S. W. 883, where Mr. Justice HUGHES, speaking for the court, said: "It is true that the burden was upon

the appellee to show by proof that the railway company was guilty of negligence. The mere fact that the appellee was injured, without more, was not sufficient to raise a presumption of negligence on the part of the railway company. But the derailment of the car and its overturning, and the injury to the appellee thereby, being in the usual course, a logical inference of negligence might be drawn therefrom; hence they were sufficient to cast upon the appellant the burden of proving that the injury was not caused by any want of care on its part. In such a case the maxim '*res ipsa loquitur*' applies."

In *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581, 117 S. W. 564, plaintiff was burned by a wire which the telephone company strung across a vacant lot. Instructions like those in the case at bar were there approved, and this court said: "And, where the defendant owes a duty to plaintiff to use care, and an accident happens causing injury, and the accident is caused by the thing or instrumentality that is under the control or management of the defendant, and the accident is such that in the ordinary course of things it would not occur if those who have control and management use proper care, then, in the absence of evidence to the contrary, this would be evidence that the accident occurred from the lack of that proper care. In such case the happening of the accident from which the injury results is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part."

The case of *Ark. Light & Power Co.* v. *Jackson,* 166 Ark. 633, 267 S. W. 359, involved the electrocution of an employee of the company while opening an electric switch and the doctrine of *res ipsa loquitur* was held applicable. The trial court in that case gave the following instruction over the objection of defendant: "You are instructed that, where injury or death is caused by a thing or instrumentality that is under the control or management of the defendant, and the injury or death is such that, in the ordinary course of things, would not

occur if those who have such control or management use proper care, the happening of the injury is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through lack of care on defendant's part." In passing on the correctness of the instruction this court said: "The doctrine of *res ipsa loquitur* does not relieve the plaintiff of the burden of proving negligence; it merely declares the conditions under which a *prima facie* showing of negligence has been made, and, where this has been done, the defendant having the custody and control of the agency causing the injury and the opportunity to make the examination to discover the cause, must furnish the explanation which this opportunity affords to overcome the *prima facie* showing made by the plaintiff. Such is the purport of the instruction, as we understand it, and no error was committed in giving it under the facts of this case."

In *Pine Bluff Co.* v. *Bobbitt,* 168 Ark. 1019, 273 S. W. 1, similar instructions were under attack by the appellant, but the court said: "Appellant contends that the instructions given by the trial court as a guide to the jury were erroneous because they placed the burden upon appellant to justify or excuse itself from transmitting the current of electricity through its guy wire which burned the child. Under the circumstances of the injury a *prima facie* case of negligence on the part of appellant was made, which entitled appellee to go to the jury, and placed the burden on appellant to justify or excuse its negligence." This rule was also followed in *Jacks* v. *Reeves,* 78 Ark. 426, 95 S. W. 781, and *St. L. I. M. & S. Ry. Co.* v. *Armbrust,* 121 Ark. 351, 181 S. W. 131, Ann. Cas. 1917D 537.

Insofar as the doctrine of *res ipsa loquitur* is applicable to carriers, the holding of our cases seems to be in accord with the rule generally followed as it is stated in 13 C. J. S., Carriers, § 764, pp. 1448-1451. At p. 1460 of the same work, it is said: "Where an accident causing injuries to a passenger occurs through the breaking, or the defective condition of some portion, of the machinery

or appliances by which the passenger is carried, a *prima facie* case of negligence on the part of the carrier is made out. It is then incumbent on the carrier, in order to prevent a recovery, to show that the injury occurred without any negligence on its part, and that it was the result of an inevitable accident. The passenger does not have the burden of proving latent defects in appliances and defendant's knowledge thereof."

Appellant also contends that the giving of instruction No. 5 was erroneous because it assumed that injury to appellee resulted from the accident without telling the jury that they must first find that appellee was, in fact, injured as a result of the accident. The instruction, standing alone, would be subject to this objection. However, in instructions No. 1-A, requested by appellant, and No. 2, requested by appellee, which were given by the court, the jury were required to find by a preponderance of the evidence that appellee was in fact injured as a result of the breakdown of the bus, and the burden was placed on appellee to prove the negligence of appellant as alleged in the complaint. The court further told the jury that they were not to take one instruction alone as the law of the case, but must consider them together and as an harmonious whole. When thus considered, the instruction is not subject to the objection made by appellant. Tested in the light of our former decisions, instructions Nos. 4 and 5, *supra,* correctly stated the law applicable to the facts in the instant case, and there was no error prejudicial to appellant in giving them.

Appellant also contends that the trial court erred in refusing to direct a verdict in his favor. It is insisted that the evidence is undisputed that the defective equipment which caused the accident was a hidden and latent one, which was impossible of discovery by the highest degree of care. It is argued that the presumption of negligence arising from the doctrine of *res ipsa loquitur* was completely dispelled by the proof offered on behalf of appellant, and appellee, therefore, did not meet the burden of proof resting upon her on the whole case. We

cannot agree with appellant in this contention. The presumption of negligence raised by the *res ipsa loquitur* doctrine will ordinarily carry the plaintiff's case to the jury and does not take flight on the presentation of rebutting evidence. The rule supported by the great weight of authority is stated in 38 Am. Jur., Negligence, § 355, p. 1062, as follows: "In those cases in which the doctrine of *res ipsa loquitur* applies and an inference of negligence is permissible from the mere happening of an accident, or where a presumption of negligence results from the acts of the defendant, it is generally deemed sufficient evidence to take the case to the jury, and the case may present a question of fact for the jury and not one of law for the court, even though the evidence of the defendant would, if true, be sufficient to rebut the presumption of negligence. It is said that the presumption of negligence raised by the *res ipsa loquitur* doctrine will carry the plaintiff's case to the jury, even where there is strong rebutting evidence."

The question whether the evidence offered by appellant in explanation of the breakdown of the bus outweighed the presumption of negligence raised by the doctrine of *res ipsa loquitur* was for the jury under the facts presented on this issue. It is not enough that the evidence offered on behalf of appellant would, if true, be sufficient to rebut the presumption, because it is the province of the jury to pass on the credibility of the witnesses and the truthfulness of their testimony. In instruction No. 2 given at the request of appellant the trial court told the jury that appellant would not be liable for hidden or latent defects in the equipment which were not discoverable by careful inspection. We think different inferences might reasonably be drawn from the testimony of the two employees of appellant regarding the degree of care exercised in making the bus safe, and that the jury was warranted in finding that the explanatory evidence did not overcome the presumption arising from the proof made by appellee.

In the oral argument before this court, appellant advanced the view taken by some courts that where a plaintiff makes one or more specific allegations of negligence in his complaint, he cannot rely upon the presumption arising under the *res ipsa loquitur* rule. Under our decisions, the pleadings do not limit to any extent the employment of the doctrine of *res ipsa loquitur* in those cases in which the doctrine is otherwise applicable. In *Biddle et al., Receivers,* v. *Riley,* 118 Ark. 206, 176 S. W. 134, L. R. A. 1915F 992, Chief Justice McCulloch, speaking for the court, said: "It is true, there are cases cited on the brief of counsel for defendant, holding that a specific allegation of negligence waives the general presumption arising from the maxim. . . . , but that rule has never been adhered to in this State. On the contrary, this court, in the recent case of *St. Louis & San Francisco Rd. Co.* v. *Coy,* 113 Ark. 265, 168 S. W. 1106, reiterated the rule long observed in this State that pleadings are treated as amended to conform to the proof in the case, and it necessarily results from the operation of that rule of practice here that the plaintiff can take advantage of the general presumption which arises in the jurisdiction where the injury occurred, even though there are one or more specific allegations of negligence in the complaint. The just rule on the subject, and the one which we prefer to follow, is that 'a plaintiff who proves the happening of an accident, and is otherwise entitled to certain presumptions arising therefrom, does not lose the benefit of such presumptions because he has alleged what he conceives to be the specific cause of the accident.' *Kluska* v. *Yeomans,* 54 Wash. 465, 103 Pac. 819, 132 Am. St. Rep. 1121."

Appellee offered substantial testimony as to the nature and extent of the injuries sustained by her as a result of the breakdown of the bus. Since appellant does not contend that the verdict is excessive, we deem it unnecessary to detail this testimony.

We find no prejudicial error in the record, and the judgment is affirmed.

GRAY *v.* FORD, BACON & DAVIS, INC.

4-8035 198 S. W. 2d 508

Opinion delivered December 23, 1946.

U. A. Gentry, for appellant.

James T. Gooch and *Warren E. Wood* and *Griffin Smith, Jr.,* for appellee.

ROBINS, J. Appellant brought this suit to recover from appellee $1,602.67, which he claimed as "reasonable compensation" for certain overtime work. By amendment to his complaint he averred that he did not seek the benefit of the Federal Fair Labor Standards Act, that his contract was not in writing and that he could not state the name of the representative with whom he had made his contract of employment.

The answer was a general denial.

The case was tried before the lower court, a jury being waived. The evidence disclosed that about October 9, 1941, appellant was employed by appellee as "zone foreman" at the ordnance plant at Jacksonville, Arkansas, at a weekly salary of $70. On November 24, 1941, he was promoted to the position of "area supervisor" at a weekly salary of $80, which was, on February 2, 1942, increased to $85 per week, and on March 16, 1942,

was increased to $95 per week. He was paid each week by check on the back of which, immediately above appellant's endorsement, there was printed the following: "Endorsement of this check by payee constitutes a receipt in full of the sum appearing under the head of net amount due for wages covering the period and class of work performed as shown on the face of this check."

Appellant's version of the employment agreement was as follows: "I talked to Mr. Green and at first—the day I went out there I didn't accept—or didn't put in an application for employment for the reason that it was seventy dollars a week and they told me it was only forty hours a week and later on they thought the work hours would be increased and our pay accordingly and I told him I would let him know the next day and the next morning on those bases, being here near home and all, I decided I would accept all those conditions and I went back out and Crowley got me into the employment office and I filled out the regular application, showing the experience and qualifications and so forth, and as far as the contract, I didn't see any contract, any written contract, just an application for employment and I was accepted, notified immediately it was acceptable and I reported to Mr. Crowley and Mr. Green. . . . Q. Did anyone ever talk to you and tell you the number of hours that you were supposed to put in other than the information you got from Crowley and Green? A. No, sir. . . . Q. All right, Mr. Gray, what I am talking about, at the time you began you had this information as to when you would check in and check out, which was eight hours? A. Yes. Q. And after that they increased the hours by notification and it was suggested you increase your hours from fifty to fifty-four, or whatever it was. Did all of your men work those hours when it was increased? A. Yes. Q. Do you know whether they were paid overtime when it was increased? A. I don't think the weekly men were; the hourly men were. Q. The laborers were paid overtime? A. Carpenters. Q. And you men who were construction foremen were not paid for overtime; is that right? A. Yes."

Appellant admitted signing what was designated as an "Assignment Authority" at the time he began work. This instrument was addressed to appellant, signed by appellee and the body of it was as follows: "You are to report for work at once to J. J. Green, Foreman in area, General, as Zone Foreman, Rate, $70 per week."

Appellant introduced as a witness Frank Whittle, who was in charge of appellee's Little Rock office. This appears in his testimony: "Q. What was the salary rate that he was employed, Mr. Whittle? A. Seventy dollars a week for seven day week."

Mr. Roy H. Donnell, witness for appellee, introduced a record showing the actual number of hours appellant worked, which was, in some instances, more than forty hours per week, and further showing that as to several weeks, when appellant worked for only part of a week, he was paid less than $70, the calculation for his pay apparently having been made on the basis of forty hours for a week's work.

In testifying in rebuttal appellant stated: "Q. Mr. Gray, there has been introduced in evidence—I don't know what to call this—Exhibit '4'—which purports to show the names of certain employees, including your own, the base salary and the base hours per week in which you are classified under a symbol marked 'A' and the testimony is to the effect that that classification given to you meant that you were subject to call seven days a week. Please state if you ever had any information substantially to that effect at the time or before or since your termination with the defendant in this case. A. I didn't have any information at all to that effect at the time I was hired in and for quite a while after. . . . Q. The information, was it just limited to the fact that you were not supposed to get any pay for any overtime? A. That is right. Q. Were you informed at that time, as stated here by the witness, that you were subject to call seven days a week, if they wanted to require it every day of the week? A. Not when I hired in, no, sir."

The lower court made findings of fact to the effect that appellant was employed for a work week of unspecified hours and that by accepting the weekly salary checks appellant "acquiesced in or ratified the work week of unlimited hours." On these findings of fact the lower court made conclusions of law that acceptance by appellant of the weekly salary checks constituted "full accord and satisfaction" and by reason thereof appellant was estopped from claiming further compensation.

For reversal appellant argues that the defense of accord and satisfaction was not available because it was not pleaded by appellee and further that the evidence was not sufficient to establish such defense. We do not find it necessary to determine whether either of these contentions of appellant is well founded.

Appellant had the burden to show that his contract of employment was for a work week of forty hours, with the right on his part to additional compensation for overtime. The lower court, in its first finding of fact, found against appellant as to this essential element of his case. This finding, not being without support in the testimony, has the conclusive effect of a jury verdict. *Obermier, Freidlander & Co.* v. *Core, Thompson & Co.*, 25 Ark. 562; *Bell & Carlton* v. *Welch*, 38 Ark. 139; *Jones* v. *Glidewell*, 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831; *Dixon-Rogers Trading Company* v. *O. O. Scroggins & Company*, 136 Ark. 33, 206 S. W. 49; *Connelly* v. *Swilling*, 167 Ark. 677, 266 S. W. 266; *Johnson* v. *Spangler*, 176 Ark. 328, 2 S. W. 2d 1089, 59 A. L. R. 899; *Harvell* v. *Matthews*, 189 Ark. 356, 72 S. W. 2d 214; *Friedman* v. *Short*, 201 Ark. 723, 147 S. W. 2d 11.

Since, according to the lower court's finding, appellant failed to establish any liability to him, on the part of appellee, for additional compensation, it was unnecessary for the lower court to determine whether the defense of accord and satisfaction was available or was sustained by the evidence; nor is it necessary for us to consider these questions here.

The judgment of the lower court is affirmed.

The Chief Justice did not participate in the determination of this case nor attend that part of the Court's conference at which the appeal was discussed and decided.

NOE *v.* SCHUMAN.

4-8033 198 S. W. 2d 510

Opinion delivered December 23, 1946.

J. Fred Jones, for appellant.

Wm. J. Kirby, for appellee.

McHaney, Justice. The title to the west 45 feet of the east 90 feet of lots 7, 8 and 9, block 10, Mountain Park Addition to the City of Little Rock is involved in this appeal, and, as appellant says, "the question for determination is whether appellant's or appellee's title is paramount."

Appellant claims title by virtue of a deed from the State Land Commissioner dated May 4, 1940, based on a forfeiture and sale to the State in 1933 for the 1932 taxes and certified to it in 1935, which title was confirmed in the State by decree of the Pulaski Chancery Court on April 28, 1938, and he also claims under a deed from the original owner, dated August 16, 1940.

Appellee claims title by virtue of a deed from Street Improvement District No. 508 of Little Rock, dated May 14, 1945, the District's title being based on the following proceedings: The district was created by ordinance of the Little Rock City Council on December 10, 1928; the property here involved and a large amount of other real property was included in the district; assessments of benefits were levied against all the real property in the district; the assessments due for 1930, 1931, 1932, 1933 and 1934 became delinquent on the property here involved and suit for foreclosure was brought which resulted in a decree dated January 6, 1938, for said delinquent assessments in favor of the District; on October 19, 1938, the property here involved was sold to the District for $332.25; after the five-year period of redemption had expired and on December 17, 1943, the District petitioned the court for a commissioner's deed to the property as of November 29, and on the same day an order was entered as of November 29, directing such conveyance by the commissioner, and on the same day an order was entered approving the conveyance and entry of acknowledgment, which deed was filed for record January 11, 1944.

On April 16, 1945, the District filed a petition in said court stating that all its debts had been paid, and that it had solicited offers for all of its interest in all its lands, and that appellee had made an offer of $5,000 which was the highest offer, and prayed an order directing it to sell all its lands to appellee for said sum. On the same day the court entered an order directing the District to advertise the fact for one insertion in the Arkansas Gazette that appellee had offered $5,000, and inviting further bids for all such lands in one lot and ordered the district's commissioners to report to the court on April 30, 1945, at 10 a. m. On May 1, 1945, a report was filed and presented to the court that no offer greater than that of appellee had been received, and the court, thereupon, entered an order approving the sale to appellee, and the District executed and delivered to him a deed on May 14, 1945, for all the lands, lots and parcels owned by it for a consideration of $5,000.

On November 28, 1945, appellee brought this action against appellant and two others to quiet his title to said property. He set out his claim of title by deed from the district as above set out. Appellant answered admitting the deed to appellee from the district, but denied that it conveyed the paramount title. By way of cross-complaint he set out his title from the State as above set out and also a deed from the other two defendants named in the complaint and asserted that the lien of the State for its taxes is paramount to that of the District for its assessments. He offered to pay appellee the proportionate amount of the $5,000 paid by him or the amount due the District for delinquent assessments. Appellee answered the cross-complaint of appellant and alleged that the forfeiture and sale to the State as above set out were void because there was levied and charged against said lot an illegal and void tax for the Policemen's and Firemen's Pension Fund of the City of Little Rock, and that said lot was sold for an excessive amount of taxes because of said illegal levy; and that although said lot had been certified to the State prior to said foreclosure decree for the District, said foreclosure and

subsequent sale by the District was validated by Act 329 of 1939.

Trial resulted in a decree holding that the forfeiture and sale to the State in 1933 for the taxes of 1932 were void because of an excessive levy of one-third of a mill for the police fund of the city, which was in excess of the constitutional limit, and said lot was sold for an excessive amount of taxes. The State's deed to appellant was declared void and canceled, and the title to said lot was quieted and confirmed in appellee. This appeal followed.

Act 329 of 1939, § 1, authorizes any improvement district to enforce its lien against lands for delinquent taxes or assessments even though such lands may have previously been forfeited and sold to the State for the nonpayment of general taxes, "without waiting until said lands are redeemed from or sold by the State," but "subject to the paramount lien of the State." Section 2 validates such foreclosure sales in improvement districts made prior to the passage of the act, and "subject to the paramount lien of the State." Section 3 confers the right of redemption from the State on any purchaser at an improvement district foreclosure sale. Appellee did not acquire the District's title until May 14, 1945, and at that time the State had parted with whatever title it had to appellant, and he could not redeem from the State. The act is permissive only and not mandatory in this regard, but § 2 of said act cured and validated the sale here in question, subject to the State's paramount lien. *Deniston* v. *Burroughs,* 209 Ark. 436, 190 S. W. 2d 623. The facts are not in dispute and it is conceded that a levy of one-third of a mill was made in 1932 which was that much in excess of the constitutional limit of five mills for the City General Fund. We held in *Adamson* v. *City of Little Rock,* 199 Ark. 435, 134 S. W. 2d 558, that this identical levy was void. We have also held that the inclusion of such an illegal tax defeats the State's power to sell and that confirmation does not cure the defect. *Fuller* v. *Wilkerson,* 198 Ark. 102, 128 S. W. 2d 251; *Smart* v. *Alexander,* 201 Ark. 211, 144 S. W.

2d 25; *Sherrill* v. *Faulkner,* 200 Ark. 1006, 142 S. W. 2d 229. Therefore, the deed from the State to appellant passed no title and his deed from the original owner was, of course, subject to the lien of the District for its assessments. He knew the property was delinquent for these assessments and attempted to redeem from the District during the period for redemption, but did not have a sufficient sum of money to do so. His offer to redeem now, after the expiration of the time allowed by law therefor and after the District has parted with its title, comes too late.

Another assignment of error suggested is that the court erred in ordering or authorizing the District to advertise for submission of offers or bids for all its holdings in one unit, or *en masse,* in competition with appellee's offer of $5,000 for the whole, instead of advertising for bids on each unit separately. We know of no decision or statute, and none is cited, sustaining this contention. No contention is made that the sale to appellee for $5,000 was for a grossly inadequate consideration. See *Eddy* v. *Schuman,* 206 Ark. 849, 177 S. W. 2d 918. The sale was made, not for the purpose of paying debts of the District, all of which had been paid, but to equalize the burden borne by taxpayers who had paid their assessments with those who had not. See *Papa* v. *Kitchens, Sheriff,* 204 Ark. 616, 164 S. W. 2d 439.

We find no error and the decree is accordingly affirmed.

BELL *v.* LACKIE.

4-8039 198 S. W. 2d 725

Opinion delivered January 13, 1947.

George F. Hartje, for appellant.

Russell C. Roberts and *Clark & Clark,* for appellee.

McHaney, Justice. On August 13, 1945, appellee purchased from Mrs. Elmer Hunter, a defendant below and daughter of appellant, a 79-acre farm in Faulkner county, and received from her on said date a warranty deed thereto, without any restrictions or reservations therein and under an agreement to deliver possession in 30 days. Appellant was living in a house on his daughter's farm at the time and had been for a number of years, but was not farming it himself. The farm was rented for 1945 by O. C. Coker who grew hay and cotton thereon. Appellant rented the land to Coker for a portion of the crops—one-half the hay and one-fourth of the cotton and seed.

Appellee demanded the rent from Coker and, being unable to collect same as the crops were harvested, brought this action on October 2, 1945, to enforce his landlord's lien on said crops against Coker, appellant and Mrs. Hunter. Coker answered that he had already paid to appellant 200 bales of hay, as hay rentals, and that he was holding, subject to the orders of the court $291.61 as cotton rentals, same being one-fourth of all cotton and seed grown on said lands for said year, which sum was later paid into the registry of the court. Mrs. Hunter did not answer, but appeared and testified in the case for her father. Appellant answered that he had rented the land from his daughter for the year 1945, and had paid the rentals to her for said year in advance prior to her sale of said lands to appellee, and had subrented same to Coker, excepting the residence thereon

occupied by him, and that he was entitled to all the rents due by Coker.

Trial resulted in a decree for appellee and the clerk of the court was ordered to pay appellee the $291.61, deposited with him by Coker, and judgment was rendered against appellant for $100 representing the hay rents collected by him, and appellee was ordered to pay the costs in the court below from such rentals. This decree was based on the finding that appellant was estopped by his conduct from claiming the 1945 rentals. This appeal followed by Bell alone.

Whether appellant was estopped to claim the 1945 rents, because he was present and participated in the discussion about the sale and purchase between his daughter and appellee and particularly the statement undisputedly made that possession would be delivered to appellee in thirty days, and the statements made by appellant as to the good condition of the crops, we do not decide. There was no plea of estoppel by appellee to appellant's answer, and, generally, estoppel must be pleaded to be available as a defense to a claim.

We think the trial court correctly held that appellee is entitled to the 1945 rents, because the relation of landlord and tenant did not exist between appellant and his daughter, but only the relation of principal and agent existed between them. We think the facts and circumstances very strongly show that appellant, for three years prior to 1945, at least, was not a tenant of his daughter, but lived on the land and rented it to tenants as her agent, keeping the place up and in repair from the proceeds of the rentals. It is true that both he and his daughter testified that she rented the land to him and that he subrented it to Coker. They are both parties to this action and interested in the result, and so their testimony cannot be regarded as undisputed. Appellant testified that he paid the 1945 rent in July or August 1944, by having the barn on the place recovered at a cost of $108.50. Also, he said he paid the 1944 rent by doing some fencing and making some repairs at a cost of $50 or $60. The actual rents for 1945 paid by Coker

amounted to nearly $400. So, we are of the opinion that these facts, and others in the record, together with the relationship of father and daughter, outweigh their statements that the relation of landlord and tenant existed between them.

Of course, the language of Judge Hemingway, in *Crane* v. *Patton,* 57 Ark. 340, 21 S. W. 466, quoted by appellant, that: "The rights of the lessee are vested, not determinable at the will of the lessor; and a sale during the term of the lease, to one having notice of it, could not extinguish it," is correct, and the same would be true of an ordinary tenant, such as Coker is here, but appellant was not cultivating the land, only occupying a house on it, and he was instrumental in promoting the sale for his daughter in which possession was to be given in 30 days.

The decree is correct and is accordingly affirmed with costs of this court to appellee.

CISCO *v.* CAUDLE, COUNTY JUDGE.

4-8159 198 S. W. 2d 992

Opinion delivered January 13, 1947.

Suzanne Lighton, for appellant.

Clifton Wade and *Virgil Ramsey,* for appellee.

SMITH, J. Many electors of Washington county petitioned the County Court of that county to submit the question of the construction of a County Hospital, and to levy a building tax to pay bonds to be issued and sold in payment thereof. The proceeding was had under the authority of Amendment No. 17 of the Constitution, as amended by Amendment No. 25. Amendment No. 17 authorized the issuance of bonds upon the vote of the electors of a county for the purpose of building court houses and jails, and was amended by Amendment No. 25 to authorize the issuance of bonds to build county hospitals.

The petition stated the location of the proposed hospital and recited that the tax to be voted for the payment of the costs of the hospital should not exceed one and

one-half mills on the assessed valuations of the county to be levied annually.

On October 5, 1946, the petition was heard by the County Court and an order was entered declaring the necessity for the construction of the hospital, and an architect was employed with directions to prepare and file plans for the proposed hospital with an estimate of its cost. The architect filed plans and specifications, which he had previously prepared, and estimated the cost of the hospital at $424,440. These plans, specifications and estimate of cost were approved on the same day, and an order was entered directing that the question be submitted at the next ensuing general election to be held November 4, 1946, whether the hospital should be erected and a building tax not exceeding one and one-half mills be levied. The court directed that the ballot to be used at the election should contain an explanatory paragraph, showing the estimated cost to be $424,440, and the proposal to levy the tax, not to exceed one and one-half mills to retire bonds issued in payment of the cost of the hospital. The court directed that the question of the building tax be stated on the ballot as follows: "For the Levy of a Building Tax Not to Exceed One and One-Half Mills", and "Against the Levy of a Building Tax Not to Exceed One and One-Half Mills."

The county clerk delivered a certified copy of the court order to the sheriff, who gave public notice by posting copies of the order throughout the county, of the time and several places of holding the election, and posted a copy of the proclamation in each of the places fixed for holding the election, and at two or more public places in each township.

Pursuant to the court order and the proclamation of the sheriff, the question was submitted at the ensuing general election. The ballots used contained the following recitals:

"Proposed Initiated Act of Washington County, Arkansas (Initiated by Petition of the People and by Order of the County Court).

"Authorizes the construction of a County Hospital at an estimated cost of $424,440 and the levy of a building tax not to exceed one and one-half (1½) mills to pay bonds issued therefor.

"For the Construction of County Hospital.

"Against the Construction of County Hospital.

"For the Levy of a Building Tax.

"Against the Levy of a Building Tax."

It will be observed that the ballot referred to the question submitted to the electors as an "Initiated Act," which it was not, but we think this error did not affect the validity of the election.

At the election 2,414 votes were cast for the construction of the hospital, and 749 against its construction, and 2,120 votes were cast for the levy of the tax, and 889 against the tax levy. The County Board of Election Commissioners duly certified the results of the election, and on November 19, 1946, the County Court entered an order showing the results of the election, which order was duly published on November 29, 1946, in a county newspaper and this suit was filed within thirty days of that date.

The records of the Quorum Court at its meeting subsequently held, recited that "Motion made and duly seconded to levy a one and one-half mill hospital tax" and that "upon roll call said tax of one and one-half mills duly levied for hospital."

Appellant, a citizen and taxpayer of Washington county, filed suit in Chancery Court in which it was alleged that the county judge was about to let a contract for the construction of a hospital which could not be paid for out of the proceeds of a tax levy of one and one-half mills, disregarding the limitation of cost filed by the electors at the election.

This appeal is from the decree of the court sustaining a demurrer to this complaint and the principal question presented is, whether a hospital can be built which

a tax levy of one and one-half mills would not suffice to pay.

For the reversal of the decree dismissing the complaint it is argued that the election is void because the required notice thereof was not given. The law in regard to the notice was not strictly complied with, but upon the authority of the case of *Whitaker* v. *Mitchell,* 179 Ark. 993, 18 S. W. 2d 1026, and cases there cited, we hold that the election was not void on that account. Our leading case on this question is *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161, where Chief Justice Cockrill said that the voice of the people is not to be rejected for a defect or want of notice, if they have in truth been called upon to speak and have spoken.

The real question in the case is whether the county, pursuant to the election, may erect a hospital from the proceeds of the sale of bonds, which a tax levy of only one and one-half mills will not pay, or otherwise stated, may the tax levy exceed one and one-half mills for this purpose.

Amendment No. 17, as amended by Amendment No. 25, unlike Amendment No. 10, confers a power which may be exercised only when authority for its exercise has been conferred by a vote of the electors of the county. The power conferred by Amendment No. 25 amending Amendment No. 17 is quiescent until quickened into life by a vote of the people.

Unquestionably a tax, not exceeding five mills, may be authorized by the electors for the building of a court house, a jail, or a hospital, not for each of them, but for any one or all of them. The entire power might be exhausted in the construction of any one of the three, but the amendment does not require that it shall be. The electors might vote for any one or all three purposes such tax levy as they please, subject to the limitation that they may not vote for any one or all three purposes a tax levy exceeding five mills. The authority conferred by Amendment No. 25 is "to authorize the levy of a tax not to exceed one-half of one per cent (or five mills) on

the dollar of the valuation of all the properties in such county subject to taxation to defray the costs and expenses thereof, etc.''

Bonds may not be issued to construct a court house, jail or hospital, unless the consent of the electors is first obtained at an election held for that purpose. But may the electors limit the tax levy to a rate less than five mills? They may, if they have the power to exercise the discretion conferred to levy a tax not to exceed five mills. Why were they given the discretion as to the amount of tax to be levied if they do not have the power to exercise that discretion? We have no hesitancy in saying that the electors do have this discretion.

But did they exercise this discretion and did they limit the tax levy to one and one-half mills? We think they did. The electors might not know what a hospital would cost, but they would know what they are willing to pay in taxes to get one. The court order from which the authority to hold the election was derived is entirely unambiguous. It specifies a tax not of one and one-half mills, but a tax ''not to exceed one and one-half mills.'' The County Board of Election Commissioners followed the court's order in so far as the explanatory paragraph was concerned, but in stating the tax question they omitted the limiting phrase, ''not to exceed one and one-half mills'' and simply submitted the question ''For the Levy of a Building Tax,'' and ''Against the Levy of a Building Tax.'' Did the failure to follow literally the court order remove the limitation as to the tax voted?

Counsel for appellee says the sentence appearing on the ballot limiting the tax to one and one-half mills does not govern and is mere surplusage and in support of this contention cites the case of *Wisconsin Power & Light Co.* v. *Public Service Comm.*, 232 Wis. 59, 286 N. W. 588, 122 A. L. R. 1135. This case has an extended annotation on ''Validity of special election as affected by publication or dissemination of matter or information, extrinsic to the question as submitted, regarding nature or effect of the proposal.'' The cases on the subject are

summarized by the annotator in a note, which appellee quotes, reading as follows:

"Although of course the extent and deceptive nature of any particular inclusion of extrinsic or foreign matter in a notice of a special election are largely determinative of the question whether such inclusion may be regarded as being so immaterial or harmless as not to affect the validity of the election, or as being so misleading as to vitiate the election, it may be noted that in practically all of the cases involving the point, the extraneous matter has been of a sort which has not been so objectionable as to mislead the voters, or at least has not been shown to have done so."

We are dealing here not with a notice of the election, but with a recital on the ballot relating to the question submitted to the electors on the ballot used in the election. The recital reminded the electors that they were voting on the question whether a tax not exceeding one and one-half mills should be voted for a hospital.

If the recital were treated as surplusage, appellee's position is not improved. The court order made on the petition of the electors conferred such power as the electors had. There was no question as to the issue upon which the electors were voting, that question being whether a tax not exceeding one and one-half mills should be voted for a hospital, and the recital as to the purpose of the election was at least a reminder as to the tax being voted for. Certainly it cannot be disregarded as unimportant, as it tended to influence the action of the electors in casting their ballots.

The result of the election was to authorize a tax levy of not to exceed one and one-half mills to construct a hospital, and the petitioners had the right to limit the amount of the taxes for this purpose.

Amendment No. 3 to the Constitution confers upon the electors "the power to levy not exceeding three mills on the dollar on all taxable properties of their respective counties," for road purposes, and in the case of *Wallace*

v. *K. C. So. Ry. Co.*, 169 Ark. 905, 279 S. W. 1, Judge Hart said: "It will be noted that the three-mill road tax is a voluntary self imposed tax by the electors of the respective counties of the State, and the electors themselves are made the exclusive judges of the necessity for levying the tax and as to the amount to be assessed not exceeding three mills on the dollar."

So here the electors had the right to limit the levy for hospital purposes not to exceed one and one-half mills.

The complaint in the case alleges, and the demurrer admits, that the hospital which the county judge now proposes to build cannot be erected and paid for with the proceeds of a tax of only one and one-half mills. If this be true, the hospital may not be built, as bonds may not be issued in excess of an amount which a tax levy of one and one-half mills will not suffice to pay.

In the case of *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006, it was proposed to build a court house, to be paid for in annual installments derived from the county general revenue. A taxpayer sought to enjoin the letting of a contract for the construction of a court house, upon the ground that the proposed annual installments of payments could not be met after the county had paid the necessary expenses of government. The finding was made, however, that the county could meet the annual installments after paying the necessary expenses of government, and the relief prayed by the taxpayer was denied. The implication is clear, however, that the relief prayed would have been granted had the showing been made that the county could not meet the annual installments after paying the necessary expenses of the county government.

Here we have the allegation, admitted by the demurrer, that the county cannot build the hospital proposed and pay the bonds with a tax levy of only one and one-half mills. If this cannot be done, the county will proceed beyond and in excess of the power conferred by the electors if it attempts to build a more expensive

hospital. The county, under the election, may build a hospital for which a levy of one and one-half mills will pay, but this is the full extent of the power conferred at the election.

The decree from which is this appeal will, therefore, be reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

[redacted]

BATES *v.* STATE.

4435 198 S. W. 2d 850

Opinion delivered January 13, 1947.

Rehearing denied February 10, 1947.

[redacted]

J. F. Quillin and *Hal L. Norwood,* for appellant.

Guy E. Williams, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

ED F. MCFADDIN, Justice. Vollie Bill Bates was convicted of murder and sentenced to death; and has appealed. This being a capital case, § 4257, Pope's Digest, prescribes the extent of the review. The motion for new trial contains 36 assignments; and, in addition, the transcript discloses other objections made by the defendant in the course of the trial. We group and dispose of all of the assignments and objections in the following headings:

I. *The Filing of the Information and the Swearing of the Jury.* The defendant was tried and convicted in July, 1946. The transcript, as originally filed in this court, failed to show that the information was filed and that the jury was sworn. But by *nunc pro tunc* order of November 12, 1946, the record of the Circuit Court was supplemented and amended to show these essentials. The order *nunc pro tunc* was made after a hearing at which the defendant and his counsel were present, and after the introduction of substantial evidence. There is ample authority in this state to sustain the validity of such *nunc pro tunc* proceedings. Many of our earlier

cases on this point are cited in *McPherson* v. *State,* 187 Ark. 872, 63 S. W. 2d 282. *In Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80, Mr. Justice Hart cited the opinion written by Chief Justice English in *Sweeney* v. *State,* 35 Ark. 585, to the effect that the record could be amended by order *nunc pro tunc* made in the trial court while the appeal was pending in this court, and the amended record could then be brought to this court by *certiorari.* Such was the practice pursued in the case at bar. In *Goddard* v. *State,* 78 Ark. 226, 95 S. W. 476, this court, speaking through Mr. Justice Riddick, held that a *nunc pro tunc* order could supply the omission in the original record to show that the jury was sworn. We, therefore, conclude that the *nunc pro tunc* proceedings of November 12, 1946, cured the omissions in the original record in this case.

II. *Qualifying of Certain Prospective Jurors.* Two of the veniremen—C. A. Cummings and W. E. Townsend—after having been held qualified by the trial court over the objections and exceptions of the defendant, were peremptorily excused by the defendant, whose peremptory challenges were afterwards exhausted prior to the completion of the jury. This exhaustion of the peremptory challenges before completion of the jury allows the defendant to question here the correctness of the ruling of the trial court in qualifying each of these prospective jurors. *Collins* v. *State,* 102 Ark. 180, 143 S. W. 1075. But, when we attempt to ascertain whether the trial court erred in holding the prospective jurors to be competent, we are met by the fact that we do not have the full record of the examination of each such prospective juror. On all other matters, the bill of exceptions is complete; but on the examination of the jurors, the record shows on its face that it is not complete. As regards Cummings, the record recites:

"Mr. C. A. Cummings, a prospective juror, after being first duly sworn to answer questions touching his qualifications, testified *in part* as follows: . . . " (italics our own).

Likewise, as to Townsend, the record discloses:

"Mr. W. E. Townsend, a prospective juror, after being first duly sworn to answer questions touching his qualifications, testified *in part* as follows: . . . " (italics our own).

Thus, insofar as these prospective jurors are concerned, we do not have *all* of the questions asked or *all* of the answers given by either of them. In *Mathews* v. *State,* 84 Ark. 73, 104 S. W. 928 the bill of exceptions showed on its face that it did not contain *all* of the evidence and we there said: "We are precluded by this statement from inquiring into the sufficiency of the evidence to sustain the verdict of the jury all of the evidence adduced at the trial not being before this court."

The same rule applies with equal force to the ruling of the trial court on the qualifications of prospective jurors. The language used by Chief Justice McCulloch in *West* v. *State,* 150 Ark. 555, 234 S. W. 997 is apropos:

"The examination was had by the trial judge, and he was in situation to correctly determine whether or not the jurors entertained settled or fixed opinions which would likely influence them in the trial of the case. A due amount of deference ought, under the circumstances, to be given the finding of the trial judge on that issue, and his conclusions should not be discarded unless it appears that he erroneously accepted a juror who had a fixed opinion on the merits of the case, based on a narrative of facts traceable to a definite source and not based merely on rumor. *Hardin* v. *State, supra* (66 Ark. 53, 48 S. W. 904); *Reynolds* v. *United States,* 98 U. S. 145, 25 L. Ed. 244."

So, in the absence of all the examination, we cannot determine from the record that either prospective juror was erroneously qualified.

III. *The Sufficiency of the Evidence.* The defendant was accused of the murder of Thomas Lee Dugan. The proof showed that at about 11:00 p. m. on Saturday, June 22, 1946, defendant called a taxicab in Mena, Arkansas.

The deceased, Dugan, was a taxicab driver, and—accompanied by a young woman named Mrs. Billie Edwards—responded to defendant's call. The young woman professedly had never seen the defendant prior to that time. The defendant agreed to pay Dugan $15 to be transported from Mena to DeQueen; and the three started on the trip. Dugan and the young lady were on the front seat, and the defendant was on the back seat. Before they reached DeQueen, the defendant changed his mind as to his destination, and persuaded Dugan to return towards Mena, and then leave the highway and travel several miles over neighborhood roads, ostensibly to go to the home of defendant's sister. Finally, defendant had the car stopped and alighted to see if he could locate any familiar landmarks. He went a short distance back of the car, and Dugan went to see what the defendant was doing. The young woman remained in the car, and could hear "mumbling," but could not hear the conversation between the defendant and Dugan. The defendant then shot Dugan, who staggered back and fell in the car, pursued by the defendant, who shot Dugan twice in the back before he expired. In all, defendant fired five shots into Dugan's body.

After some alleged threats by the defendant, the young woman held the flashlight while the defendant dragged Dugan's body into the bushes, rifled the pockets of his clothes, and took a purse containing over $50. Defendant also wiped up the blood from the car, tore off the "for hire" signs, and told the young woman that he had to kill Dugan to get the car in order to escape from the officers, as he was sought for another offense. At all events, defendant did use the car in an attempt to escape, but was apprehended the following day, while still accompanied by the young woman.

Defendant admitted the killing, but pleaded self-defense, claiming that Dugan threatened him in the conversation behind the car, and that defendant believed Dugan was going to the car to obtain a gun. A search later revealed that there was no gun in the car. The State claimed that the defendant not only killed Dugan

with premeditation and malice aforethought, but also killed him in the commission of robbery—*i. e.*, the stealing of the car. From this brief synopsis, it is clear that the evidence offered was sufficient to sustain the verdict.

IV. *The Instructions.* The trial court gave the usual instructions fitting such a case; and we find no error in any of them. The defendant insists most vigorously that the trial court committed error in instructing the jury both as to killing with premeditation and malice aforethought, and also as to killing in the commission of robbery; it being the defendant's contention that he was only being tried for killing in commission of robbery, and not for killing with premeditation and malice aforethought. The defendant's contention is settled adversely to him by the case of *Noble* v. *State,* 195 Ark. 453, 112 S. W. 2d 631. The rule of law announced in that case answers the defendant's contention here made.

V. *Statements to a Sheriff.* On one occasion shortly after being arrested, the defendant was being transported in a car by Sheriff John Howell of Howard county; and Sheriff Howell testified to this conversation at that time:

"A. I asked him about the killing of the boy and he said he did it. I asked him why he had killed the boy and he said, "Well,' he was 'hot' in Mena and the officers were looking for him and he had to get away; that he had just been released some time before from the penitentiary in North Dakota; and that he had to have an automobile to get away with.

"Q. Did you ask him anything about any trouble he might have previously had with Lee Dugan?

"A. I asked him about that and why he had killed the boy. He just said that he had to have an automobile and there had been no argument or anything take place."

These statements to Howell, and others of a similar nature, were objected to by the defendant, as made to an officer while under arrest and at a time when the defendant was not informed of his constitutional rights.

We hold the trial court committed no error in admitting Howell's testimony and other testimony of a similar nature. What was said on this point in *Thomas* v. *State, ante,* p. 398, 196 S. W. 2d 489, applies here. Statements freely and voluntarily made are admissible; and the conversation between Sheriff Howell and the defendant was in that category.

VI. *Comments by the Trial Court as to Certain Evidence.* The state called the young woman, Mrs. Billie Edwards, as a witness. The prosecuting attorney had previously obtained a statement from her as to what her testimony would be. On cross-examination of this witness, the following occurred:

"Q. Was that a sworn statement?

"A. Yes.

"Mr. Quillin: Your Honor, we would like to call upon the Prosecuting Attorney to let us see that statement.

"The Court: You have asked the Court to order the Prosecuting Attorney to turn over to you a statement that this woman made to him. The Court is refusing to do that.

"Mr. Quillin: We except.

"Mr. Norwood: I know Your Honor's ruling, but we want to make this further request for the further reason that 'The Star' undertook to publish these statements. We read those statements; and when we come here she makes statements we have never heard of before. Then, I think the best evidence is her written sworn statement.

"The Court: *The best evidence is what she is giving you now from the witness stand.* If they hadn't brought her here, then you would be demanding the best evidence."

(Mr. Quillin, continuing:—)

"Q. Mrs. Edwards, are you testifying to today exactly the same things you told the Prosecuting Attorney in that written statement?

"A. Yes.

"Q. Have you told everything today that you told in that statement?

"A. I probably went into more details in it.

"Q. Did you tell him all of the fundamentals that you have told here today?

"A. Yes.

"Mr. Quillin: Your Honor, since we have her on cross-examination, I think that lays the foundation to produce that statement for impeachment purposes.

"The Court: *I can't help what you think, the Court disagrees with you.*

"Mr. Quillin: We except."

(Italics in the above excerpt are our own, as subsequently explained.)

(A.) The defendant complains of the refusal of the court to require the prosecuting attorney to show Mrs. Billie Edwards' statement to the defendant in advance of the trial. We fail to see why the state should furnish the defendant with a statement made by the witness to the prosecuting attorney. No authority is cited to sustain such a position, and we know of none. The prosecuting attorney had taken a statement from Mrs. Billie Edwards before calling her as a witness. The defendant had just as much right to interview the witness, and take a statement in advance of the trial.

(B.) The defendant contends that the remarks of the trial court as first italicized above (*i. e.,* "The best evidence is what she is giving you now from the witness stand") were a comment on the weight of the evidence, in violation of Art. VII, § 23 of the Constitution. When the whole excerpt is read, it is clear that the court was not telling the jury that the testimony of this witness was the best and most trustworthy evidence in the entire case.

What the court was saying, was that the testimony of the witness from the witness stand, rather than the sworn statement she had previously made, was the competent testimony of this particular witness. The court used the words "best evidence" just as the law books use the words—*i. e.,* primary evidence as distinguished from secondary evidence. In 20 Am. Jur. 363 in the chapter on "Best and Secondary Evidence," this appears:

"It is an elementary principle of the law of evidence that the best evidence of which the case in its nature is susceptible and which is within the power of the party to produce, or is capable of being produced, must always be adduced in proof of every disputed fact. Secondary evidence is never admissible unless it is made manifest that the primary evidence is unavailable, as where it is shown that it has been lost or destroyed, . . . "

We are convinced that the trial court used the expression, "best evidence," just as it is used in the quotation above, and not in the light of commending the witness to the jury, as was done in *Williams* v. *State,* 175 Ark. 752, 2 S. W. 2d 36. So, we hold that the first italicized words were not a comment on the weight of the evidence.

(C.) The defendant contends that the second italicized remark of the court (*i. e.,* "I can't help what you think, the Court disagrees with you"), was unduly harsh and prejudicial. We think this remark by the trial court comes within the purview of the cases of *Vasser* v. *State,* 75 Ark. 373, 87 S. W. 635; *Tuttle* v. *State,* 83 Ark. 379, 104 S. W. 135; *Benson* v. *State,* 112 Ark. 442, 166 S. W. 549; and *Bridger* v. *State,* 122 Ark. 391, 183 S. W. 962, where we held that somewhat similar remarks were not sufficient to constitute reversible error.

VII. The *Evidence of Mrs. Roxie Bruce.* The defendant called as a witness his sister, Mrs. Roxie Bruce, to testify as to when and where the defendant was born, how many children in the family, and the domestic and financial conditions prevailing in defendant's childhood. The court sustained an objection to all of this evidence; and that ruling is assigned as error. We are not required

to decide whether any of this evidence was relevant and competent, because (a) the trial court later permitted Mrs. Bruce to testify as to the paucity of defendant's education, and (b) the trial court permitted the defendant to testify as to his early life, environment, etc. So, even if the court was in error in excluding Mrs. Bruce's first testimony—which point we do not decide—never-the-less, the court later allowed the evidence to come into the record, and thereby cured any possible error in the earlier refusal.

VIII. *The Conduct of the Trial Judge.* In the motion for new trial, the appellant, for the first time, mentioned that the trial judge was disqualified by reason of previous participation. The foundation for this assignment was laid by defendant's counsel in the state's cross-examination of defendant. The prosecuting attorney had a written statement from the defendant in the form of questions and answers. The circumstances leading to, and the reasons for, the making of such questions and answers were not shown. These questions and answers were not introduced by the state in its case in chief, but the prosecuting attorney, on cross-examination of the defendant, several times asked him if he had not stated a certain fact. Finally, this occurred:

"Mr. Quillin: Wait just a minute. If Your Honor please, we want to again renew our request that the Prosecuting Attorney be required to read that entire statement to the jury.

"Mr. Steel: If the Court please, let me make a statement.

"The Court: He requests you to read the statement to the jury, and the Court is not objecting.

"Mr. Steel: I didn't want to introduce it in the record, because I thought it would be a reversible error in the Supreme Court to do so. It is being read to the jury at the specific request of the defendant.

"Mr. Quillin: Of course, Your Honor, it should be introduced in the record before it is read in the record.

"The Court: The defendant has asked that it be read to the jury."

Thereupon, the said questions and answers were read to the jury; and it was disclosed that the trial judge had been present and interrogated the defendant at the time of these questions and answers, which was some four or five days after the defendant was arrested. There is nothing in the record to indicate that the defendant made the answers other than entirely voluntary; and no explanation was made as to why the trial judge was present and assisted in the interrogation of the defendant. The presence of the trial judge could have been in the line of his judicial duties, that is, these questions and answers could have been in a *habeas corpus* proceeding to consider bail, or they could have been in a hearing to see if the defendant should be committed to the State Hospital to determine his sanity. In the absence of any definite proof, we refuse to join the defendant's counsel in speculation. If the trial judge had been guilty of any impropriety in being present when the defendant was being interrogated, such impropriety should have been made to appear by some degree of proof, rather than left entirely to innuendo and speculation—as is the case here. The trial judge's participation in a previous proceeding would not, *ipso facto,* render him disqualified to preside at this trial of the defendant. See 30 Am. Juris. 790.

Furthermore, we point out that it was not until the motion for new trial that the defendant raised any question about the participation of the trial judge in the previous interrogation as constituting any grounds for disqualification. Under the circumstances in this case, such motion came too late. Appellant, having been interrogated by the trial judge on the previous occasion, certainly knew of such fact before and at all times during the trial. When the questions and answers were brought into the record by defendant's insistence, then, certainly, that was the time to raise the question of the judge's disqualification. In the recent case of *Byler* v. *State, ante,* p. 790, 197 S. W. 2d 748, in discussing waiver of

disqualification of a judge by proceeding after knowledge thereof, we said:

"If appellant had been aware of this fact before the trial, he could not thereafter raise the question, as the law would not allow one to speculate on the outcome of the trial, and thereafter take advantage of a fact known to, but not raised by him until after an adverse verdict had been returned. *Morrow* v. *Watts,* 80 Ark. 57, 95 S. W. 988."

In the case at bar it was not shown that the trial judge was disqualified, and furthermore the point was not raised in apt time, and was waived.

We have examined the entire record, and all objections, and find no reversible error; so the judgment is in all things affirmed.

PINKERT *v.* SPOON.

4-8043 198 S. W. 2d 838

Opinion delivered January 13, 1947.

Wm. J. Kirby, for appellant.

George W. Shepherd, for appellee.

MINOR W. MILLWEE, Justice. Appellees, J. R. Spoon and Eva Spoon, were the owners of lots 3, 4, and 5, block 2, Holt's Industrial Addition to North Little Rock, Arkansas, having purchased said property from Mrs. George Rogers Beard on March 2, 1937. The lots are

contiguous and appellees have maintained their home on lot 5 since their purchase from Mrs. Beard.

The property forfeited and was sold to the State for the nonpayment of the 1941 taxes. At the expiration of the redemption period, the lots were certified to the State and on January 2, 1945, appellant, Manie Schuman, purchased the lots from the State in the name of appellant, Ed Pinkert, and received a deed from the State Land Commissioner upon payment of $137.66.

On March 10, 1945, the State brought suit to confirm its title to certain lands in Pulaski county including the property in controversy. Appellees filed their intervention in the suit brought by the State, alleging that the purported sale to the State for the 1941 taxes and the conveyance from the State to appellant Pinkert were void because the county clerk wrongfully listed the three contiguous lots as three separate calls or items on the delinquent list published by him; that each of said lots was charged with a fee of 25 cents for advertising, when under §§ 2 and 9 of Act 170 of 1935 said lots should have been listed for publication as one call or tract and only one fee of 25 cents charged against said lots. On appellees' motion, appellants were made parties to the suit and filed separate answers denying the allegations of the intervention.

The case was tried on an agreed statement of facts in which it was stipulated that the three lots were contiguous and were listed on the tax books in the name of Mrs. George Rogers Beard and advertised by the clerk as three separate calls, and there was included in the costs charged against each lot an advertising fee of 25 cents.

The chancellor followed the recent case of *Moses* v. *Gingles*, 208 Ark. 788, 187 S. W. 2d 892, in finding that said lots sold for excessive costs, rendering the 1941 tax sale void. The decree set aside the 1941 sale and the deed from the State to Pinkert was cancelled and title vested in appellees. The only difference in the case of

Moses v. *Gingles, supra,* and the case at bar is that the former involved three contiguous 40 acre tracts of land listed on the tax books in the name of the same person, while in the instant case three contiguous city lots are involved.

Section 2 of Act 170 of 1935 requires the County Clerk to publish the list of delinquent taxes on real estate each year and contains the following proviso: "Provided that within any section, a section, quarter section, eighty acres or less contiguous acreage owned by one person shall be listed and published as one tract. All contiguous city lots in any city block owned by one person shall be listed and published under one item and as one tract." In *Moses* v. *Gingles, supra,* it was held by a divided court that this proviso was not repealed by Act 282 of 1935 and that compliance with its terms by the County Clerk was mandatory. In the majority opinion in that case it was said: "Obviously the reason the Legislature requires the county clerks to list contiguous tracts in any section, which are shown to be owned by one person, as one tract for publication, is to save costs of publication. The requirement is mandatory whatever the reason for its enactment, and these provisions were not repealed by Act 282 of 1935. *Thomas* v. *Branch,* 202 Ark. 338, 150 S. W. 2d 738. In fact, Act 170 of 1935 was the only authority for the publication of the delinquent land list and the legal fee for publication is 25 cents per tract as fixed by § 9, and the term 'tract' as there used means a tract as limited by the proviso in § 2. It necessarily follows that there was an excessive charge here of 50 cents for failure of the clerk to list the three contiguous calls under one ownership as one tract."

Appellants earnestly insist that the holding in *Moses* v. *Gingles, supra,* is erroneous and should be overruled. It is contended that § 2 of Act 170 of 1935 has been repealed, or amended so as to do away with the above mentioned proviso, by §§ 4 and 5 of Act 282 of 1935, which now appear as §§ 13845 and 13847 of Pope's Digest. These sections of the Digest were amended by §§ 2 and 3

of Act 64 of 1941, but the only change effected is the time within which the delinquent list is to be filed and published. The argument advanced by appellants in support of their contention that *Moses* v. *Gingles, supra,* should be overruled is based upon the dissenting opinion in that case. Since we decline to overrule that case, but follow it, the failure of the clerk to list the three contiguous lots as one tract resulted in excessive advertising costs of 50 cents being charged and rendered the tax sale and deed to appellant, Pinkert, void. The trial court correctly so held, and the decree is affirmed.

McFaddin, J., concurs.

Ed. F. McFaddin, Justice (concurring). The majority holds that the case at bar is ruled by *Moses* v. *Gingles;* and I agree with that conclusion. I dissented in *Moses* v. *Gingles,* and would continue to dissent in this case if any useful purpose could be served by so doing. But, when the majority of the court announces a deliberate decision, such becomes *stare decisis,* and a further dissent serves no useful purpose. This point is clearly stated in 15 C. J. 938: "Nevertheless a deliberate decision of the highest court of a state, although pronounced by a divided court, must be considered as *stare decisis* upon the questions involved; . . . ." To the same effect, see 21 C. J. S., Courts, § 189, p. 307.

So I concur in the present case, and indicate the reason therefor.

City of Melbourne *v.* Billingsley.

4-8154 198 S. W. 2d 840

Opinion delivered January 13, 1947.

Northcutt & Northcutt, for appellant.

W. E. Billingsley, for appellee.

GRIFFIN SMITH, Chief Justice. It is conceded that if Melbourne is a City of the Second Class, its unanimous vote of October 8, 1946, in favor of issuing waterworks improvement bonds under authority of Amendment No. 13 to the Constitution is valid. The question is, Was Melbourne a City of the Second Class, or an Incorporated Town?[1]

The municipality's demurrer makes these admissions: Melbourne was an Incorporated Town until March 1937. Under Ordinance No. 9 a proposal for classification as a City of the Second Class was submitted to the voters. By a majority of more than eight to one the higher status was approved at an election April 9, 1937. The County Board of Election Commissioners immediately certified the returns. The March ordinance provided the City should embrace all area formerly included in the Incorporated Town—that is, one ward. Section 4 directed that an election be held the first Tuesday in April 1938, and biennially thereafter, for selection of a Mayor, Recorder, Treasurer, Marshal, and five Aldermen, to hold office for a period of two years. Representation on the City Council (Section 2) was, until the 1938 election, to be "as now provided for by law".

Section 9801, Pope's Digest, is applicable to Cities of the Second Class. It authorizes election of two Aldermen from each ward. By Act 153 of 1923 (Pope's Digest, Sec. 9752) authority is given Cities of the Second Class

[1] W. E. Billingsley, a citizen and taxpayer of Melbourne, acting for himself and all others similarly situated, sought to enjoin issuance of $15,000 in bonds. The defendant, (City) through its officers, declined to plead further when its demurrer was overruled. The cause was brought here by appeal.

and Incorporated Towns to elect a City Attorney. Section 9793 of the Digest (Act 259 of 1937) invests administration of Incorporated Towns in a Mayor, Recorder, and five Aldermen. In *Harrison* v. *Campbell,* 160 Ark. 88, 254 S. W. 438, it was held that the Mayor and Recorder are members of the Council and entitled to vote in respect of Ordinances and other matters.

Act 334 of 1937, approved March 25—eight days after Act 259 was signed by the Governor—gives to any Incorporated Town *"which is a county seat"* the right to become a City of the Second Class. See *Lewis* v. *Tate, ante,* p. 326, 195 S. W. 2d 640.

Melbourne, a county seat, had the right under Act 334 to become a City of the Second Class. But Act 334 was not emergency legislation, hence it did not become a law until ninety days after adjournment of the General Assembly. In the meantime (March) an Ordinance submitting the proposal to the voters was passed by the Council; and the April election occurred before ninety days had elapsed after adjournment of the Legislature. Since, under Amendment No. 13, only Cities of the First and Second Class may issue bonds secured by a pledge of taxes, it is necessary to determine Melbourne's classification.

In *Lewis-Tate* an election was called under authority of act 211 of 1939,[2] the purpose being to "upgrade" Mulberry to a City of the Second Class. Before a Council could be chosen the succeeding April, municipal authorities of the Incorporated Town called an election, and in a January proceeding there was submitted to voters the question whether bonds should be issued for sewers, payable from a millage tax. We held that while the *de facto* status existed—that is, during the period between favorable action by the State Board of Municipal Corporations and a legal election—officials could only perform acts within the powers of an Incorporated Town.

[2] The Lewis-Tate appeal involved issuance of bonds by Mulberry under Amendment No. 13. Act 211 of 1939 amends Act 334 of 1937 by eliminating the prerequisite that an Incorporated Town must be a county seat in order to qualify as a City of the Second Class.

Different expressions are used in the opinions regarding Acts as to which there was failure to adopt the emergency clause; but all are to the same effect. The following serve to emphasize our holdings:

Foster v. *Graves,* 168 Ark. 1033, 275 S. W. 653: "The statute . . . did not go into effect until January 10, 1924, by reason of the fact that there was no separate roll call [on the emergency clause"].

Crowe v. *Security Mortgage Co.,* 176 Ark. 1130, 5 S. W. 2d 346: " . . . as Act 346 . . . did not contain the emergency clause, it was not a law for any purpose until ninety days after the adjournment of the session of the Legislature at which it was passed". (See earlier cases cited in this opinion).

School District No. 41 *et al* v. *Board of Education,* 177 Ark. 982, 8 S. W. 2d 501: "The Act was approved on the 16th day of March, 1927, but contained no emergency clause, and did not go into effect until ninety days after the adjournment of the Legislature".

DuLaney v. *Continental Life Insurance Co.,* 185 Ark. 517, 47 S. W. 2d 1082: "Act No. 235 was approved by the Governor March 27, 1931, and, as its emergency clause was insufficient to put it into effect upon its approval by the Governor, it is conceded that it did not take effect as a law until ninety days after the adjournment of the legislative session".

Lacefield v. *Taylor,* 185 Ark. 648, 48 S. W. 2d 832: "The Act was approved March 27, 1931, and as it contained no emergency clause, it did not become a law until ninety days after the adjournment of the session".

Gentry v. *Harrison,* 194 Ark. 916, 110 S. W. 2d 497: "Our conclusion is that the law is valid, but [for want of an appropriate emergency clause] it did not take effect until 90 days after the adjournment of the General Assembly".

Steele v. *Gann,* 197 Ark. 480, 123 S. W. 2d 520, 120 A. L. R. 754: "The General Assembly of 1935, after the

passage of [Act 135], adjourned March 14, . . . and therefore the Act [which did not carry the emergency clause] did not become effective until 90 days. . . . This provision of our Constitution providing that Acts without the emergency clause take effect 90 days after the adjournment of the Legislature gives parties 90 days and has the same effect that an Act would if passed and it were expressly stated in the Act that in causes of action that had already accrued parties should have 90 days after the adjournment of the Legislature in which to bring suit.''

Since Act 334 of 1937 was the only statute authorizing an Incorporated Town to be raised to a City of the Second Class by the process adopted, and the election was held in April; since the General Assembly of that year adjourned March 11, and Act 334 did not become a law for ninety days, there was no law under which the town could act until expiration of the ninety-day period.

Affirmed.

FERGUSON *v.* LEACH.

4-8133 199 S. W. 2d 305

Opinion delivered January 13, 1947.

W. F. Reeves, for appellant.

N. J. Henley, for appellee.

MINOR W. MILLWEE, Justice. Appellees are citizens of Searcy county, Arkansas, and filed a petition in the Searcy County Court September 7, 1946, praying that a county-wide local option election be called under the provisions of Initiated Act No. 1 of 1942 (Acts 1943, p. 998) to determine whether license should be granted for the manufacture, sale, bartering, loaning, or giving away of intoxicating liquors in the county.

After proper notice the county court ordered a hearing on the petition for September 16, 1946, when appellant, R. M. Ferguson, was permitted to file an intervention. This intervention charged various irregularities in the petition and alleged that it did not contain 15 per cent of the qualified electors of Searcy county as required by said Initiated Act No. 1. The County Court granted the petition and ordered an election to be held on October 15, 1946. An appeal was taken from this order to the Circuit Court on September 24, 1946, and the date of the election was postponed pending outcome of the appeal.

On October 22, 1946, the matter was heard *de novo* in the Circuit Court which found that there were 2,231 valid poll tax receipts issued as shown by the county records; that not more than 20 of the 919 names of electors who signed the petition were shown to be irregular, and the number remaining exceeded the 335 (15 per cent.) required by the initiated act. The petition was again sustained and the matter remanded to the County Court with directions to proceed with the election according to law.

In his motion for a new trial, appellant listed five separate assignments of error, none of which are now urged as grounds for reversal of the Circuit Court judgment. Appellant states in his brief that he has decided to press only one issue for reversal of the judgment,

namely, that appellees failed to prove by legal testimony the number of qualified electors in Searcy county, and that there is, therefore, no basis for the trial court's conclusion that 15 per cent. of the qualified voters of the county signed the petition.

The record reflects that the Sheriff and Collector of Searcy county on October 10, 1945, filed with the County Clerk a list of all persons who paid poll taxes between the third Monday in February, 1945, and first day of October, 1945. This list was duly authenticated by the personal affidavit of the Collector and contained 2,231 names. The list has since remained on file in the Clerk's office subject to public inspection. It was recorded by the County Clerk, but the affidavit of the Collector was inadvertently omitted from the record copy. When this omission was discovered at the trial, appellee offered in evidence the original list filed with the County Clerk. Appellant objected and saved his exceptions to the ruling of the court in permitting its introduction. But this objection and exception was not incorporated in the motion for new trial as grounds therefor. Under the long established rule of this court, an exception to the introduction of evidence which is not preserved in the motion for new trial will be considered waived and not subject to review in this court on appeal. *St. Louis Southwestern Railway Co.* v. *McNeil,* 79 Ark. 470, 96 S. W. 163; *Thomas* v. *Jackson,* 105 Ark. 353, 151 S. W. 521; *Kilpatrick* v. *Rowan,* 119 Ark. 175, 177 S. W. 893. See, also, West's Arkansas Digest, vol. 2, Appeal and Error, pp. 416-20.

It thus appears that appellant has waived his right to now object to the action of the trial court in admitting the list of electors, by failing to preserve his exception in the motion for new trial.

However, this court, in the recent case of *Shay* v. *Welch,* 209 Ark. 519, 191 S. W. 2d 253, held adversely to the present contention of appellant that the admitted list of voters was insufficient to establish the number of qualified electors of the county. In that case a list of voters had been certified by the acting Sheriff, but was not

sworn to by any officer. We there held that, while the list did not comply with the requirements of § 4696 of Pope's Digest, as amended by § 1 of Act 82 of 1939, and was not conclusive evidence of the listed voters' qualifications, the County Court had a right to accept the list as at least *prima facie* evidence of the identity and number of qualified electors in determining the sufficiency of the petition. We there said: "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 tax payers. *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257; *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335."

The case of *Trussell* v. *Fish,* 202 Ark. 956, 154 S. W. 2d 587, involved the contest of a primary election where the Collector certified the list of poll tax payers but failed to make the affidavit required by § 4696, Pope's Digest. This court held that presumptive verity of the list continued until something more than the failure to make the oath had been shown and that there was a substantial compliance with the statute. It was there said: "There would be a subversion of purpose and a sacrifice of popular will if we should say that in a primary election the unintentional failure of a ministerial officer to perform strictly all functions which are made mandatory with respect to verification of poll tax lists, continues to be imperative after the lists, unaffected by fraud, and substantially correct in all other essentials, have performed the service intended by the legislative authority."

The list of voters admitted in evidence in the instant case is alphabetically arranged according to voting townships as required by statute. It is not contended that it does not represent a true list of the qualified electors of Searcy county and there is no intimation of fraud. The trial court correctly accepted it as at least *prima facie* evidence of the identity and number of qualified electors of Searcy county in determining the sufficiency of the petition under the initiated act. We are also of the opin-

ion that good cause has been shown for the issuance of an immediate mandate (§ 2777, Pope's Digest).

No error appearing, the judgment is affirmed and immediate mandate ordered issued.

[redacted]

PATTILLO *v.* INTERNATIONAL PAPER COMPANY.

4-8040 199 S. W. 2d 307

Opinion delivered January 13, 1947.

[redacted]

J. B. Milham and *Gladys Wied,* for appellant.

Gaughan, McClellan & Gaughan, for appellee.

HOLT, J. Appellants are the only lawful heirs of Lee Smith, deceased. They brought suit to recover a tract of land which was a part of a 160 acres their father, Lee Smith, had homesteaded. Lee Smith made his homestead entry November 18, 1901, and received his patent from the U. S. Government July 1, 1903. December 8, 1902, Lee Smith and his wife executed a quitclaim deed to 120 acres of this land—except three acres—to S. W. Giles, and on May 9, 1903, they executed a warranty deed to the Wisconsin-Arkansas Lumber Company to 30 acres of the land in controversy, leaving 13 acres of his homestead. Lee Smith cleared and fenced this 13 acres, built a house thereon, and resided on it until 1942 when he moved away. He did not convey this 13-acre tract to any

one, but had mortgaged 10 acres of it, which he lost through foreclosure. He also owned 89 acres of land about a mile from the 13-acre tract, which he farmed while he lived on the 13 acres.

S. W. Giles and wife, on February 18, 1904, executed a warranty deed to the Wisconsin-Arkansas Lumber Company to the land described in the quitclaim deed, *supra,* and this land, together with that conveyed to the Wisconsin-Arkansas Lumber Company was by mesne conveyance conveyed to appellee, paper company.

It was the contention of appellants below, and here on appeal, that the deeds executed by Lee Smith and wife to S. W. Giles and the Wisconsin-Arkansas Lumber Company were void because issued prior to the date on which Smith received his patent from the Government, and also that Smith acquired title to the land involved by adverse possession.

Appellee (defendant below) pleaded estoppel, based on the deeds executed by appellants' ancestor, Lee Smith, laches and the statute of limitations, or adverse possession for seven years.

From a decree in favor of appellee comes this appeal.

The trial court, among other things, found: "There is no substantial testimony that Lee Smith, after executing the conveyances to S. W. Giles and the Wisconsin-Arkansas Lumber Co. ever claimed to own any part of these lands or held it adversely except the 13 acres, which he afterwards mortgaged, and which mortgage was foreclosed and the land sold. There is one outstanding fact in connection with the question of the alleged adverse holding of Lee Smith which clearly indicates that he never held any of the land adversely to the parties to whom he had sold same. The certificate of Reece A. Parham, circuit and county clerk of Dallas county, Arkansas, shows that continuously after the two deeds executed to S. W. Giles and the Wisconsin-Arkansas Lumber Co. he paid taxes only on 10 acres of this tract of land, which he was retaining as a homestead."

We think these findings were not against the preponderance of the testimony. A preponderance of the evidence also shows that the land involved was wild, unimproved and uninclosed, and had been owned by various lumber companies that have cut timber from it and paid taxes on it.

The decree contained this recital: " . . . The defendant (appellee) and its predecessors in title have paid taxes on said lands under color of title for more than seven years and thereby held adverse possession of said lands for more than seven years and plaintiffs' claim is barred by the Statute of Limitations and that plaintiffs' cause of action should be dismissed for want of equity."

Conceding, without deciding, that the deeds, *supra,* executed by Lee Smith and wife conveyed no equity in, or title to, the property involved as appellants argue, since the land was wild, unimproved and uninclosed, and appellee and its predecessors in title have paid the taxes thereon for seven years—in fact for more than forty years—in succession under color of title, it, appellee, has acquired title to the property involved by such payment of taxes.

Section 8920 of Pope's Digest provides: "Unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession, and not less than three of such payments must be made subsequent to the passage of this act. Act March 18, 1899."

This court, in *Union Sawmill Company* v. *Pagan,* 175 Ark. 559, 299 S. W. 1012, (at page 564 of the opinion) referring to § 6943, Crawford & Moses' Digest, now § 8920 of Pope's Digest, said: "In *Paragould Abstract & Real Estate Co.* v. *Coffin,* 100 Ark. 582, 140 S. W. 730, L. R. A. 1915B, 1006, quoting from *Updegraff* v. *Marked Tree Lbr. Co.,* 83 Ark. 154, 103 S. W. 606, we said: 'It

will be observed that the act merely declares that the person who pays the taxes on unimproved and uninclosed lands shall be deemed to be in possession thereof if he have color of title. The statute does not undertake to fix the period of limitation, but merely declares the continuous payment of taxes under color of title to be possession, and leaves the general statute of limitations applicable thereto. The only proviso or condition in the act is that the person who pays the taxes, before he can claim the benefits thereof, must have paid at least seven years in succession, three of which must have been since the passage of the statute. It follows from this that, where lands continue to be unimproved and uninclosed, and seven successive payments of taxes have been made, the possession continues and becomes complete, unless the possession be broken by adverse entry or by commencement of an action before expiration of the seven-year period from the date of the first payment. By such payment of taxes under color of title appellee acquired a valid title thereto as against appellants and all others, as has often been held by this court; (citing cases).' " See, also, *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193.

We conclude, therefore, that appellants have no title or right to possession of the land involved, and accordingly, the decree is affirmed.

DENNISTON, COUNTY JUDGE, *v.* RIDDLE.

4-8058 199 S. W. 2d 308

Opinion delivered January 13, 1947.

Rains & Rains, for appellant.

Wilson & Starbird, for appellee.

Ed. F. McFaddin, Justice. On June 27, 1944, there was a county-wide local option election in Crawford county, Arkansas, under the provisions of Initiated Act No. 1 of 1942 (Acts of 1942, p. 998); and a majority voted against the manufacture or sale of intoxicating liquors. There has been no subsequent county-wide election in Crawford county.

On August 3, 1946, a petition was filed in the Crawford County Court purporting to be signed by more than 15 per cent. of the qualified electors of Ward No. 1 in the City of Van Buren in Crawford county, praying for a local option election in said Ward No. 1, under the

provisions of said Initiated Act No. 1 of 1942. Appellees, Riddle *et al.*, appeared as remonstrants in the County Court, but their objections were disregarded. Then, Riddle *et al.* filed in the Circuit Court of Crawford county, their petition for writ of prohibition to prohibit the County Judge and County Court from ordering any election in said ward one, in the City of Van Buren. The Circuit Court issued the writ of prohibition; and the County Judge has appealed.

In legal phraseology, this appeal necessitates a construction of Article VII of Act No. 108 of 1935, and a determination of the effect of Initiated Act No. 1 of 1942 on the said 1935 act. In the language of laymen, this appeal presents for determination this question: If a county as a whole has ever once voted "dry," can any subdivision of the county ever thereafter have a separate vote on the "wet v. dry" issue independent of a county-wide vote? We answer the question in the negative; and now we proceed to give the reasons impelling such answer.

I. *We Borrowed Our Local Option Law of 1935 from the State of Kentucky.* Act No. 108 of 1935 is known as the "Thorn Liquor Law." It has been considered by this court in several cases, some of which are: *Mondier* v. *Medlock,* 207 Ark. 790, 182 S. W. 2d 869; *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713; *Winfrey* v. *Smith,* 209 Ark. 63, 189 S. W. 2d 615; *Johnston* v. *Bramlett,* 193 Ark. 71, 97 S. W. 2d 631; *McKeown* v. *State,* 197 Ark. 454, 124 S. W. 2d 19; *Phillips* v. *Mathews,* 203 Ark. 100, 155 S. W. 2d 716; *Bennett* v. *Moore,* 203 Ark. 511, 157 S. W. 2d 515. Article VII of Act 108 of 1935 consists of 16 sections, and is the Local Option Election Law. It may be found in §§ 14147-14169, inclusive, of Pope's Digest of 1937 (omitting only § 14155).

A comparison of these sections in Pope's Digest with § 2554 to § 2568, inclusive, of the Kentucky Statutes of 1909 leads to the inevitable conclusion that the Arkansas Local Option Election Law of 1935 was borrowed from

the Kentucky law. The aforesaid §§ 2554 to 2568, inclusive, of the Kentucky Statutes of 1909 were construed by the Kentucky Court of Appeals on December 16, 1910, in the case of *Edwards* v. *Porter,* 141 Ky. 314, 132 S. W. 582. Russellville was a city in Logan county, Kentucky. The entire county held a local option election on December 8, 1906, and voted "dry." Then, on December 9, 1909, the City of Russellville sought to have a local option election for the city, separate from the county. The Kentucky court held that the city could not have a separate election even after the lapse of the three-year period, citing the Kentucky statutes 2554 to 2568, inclusive, and saying:

"By § 2554, Ky. St., an election may be held in a county, city, town, district, or precinct for the purpose of taking the sense of the legal voters upon the proposition whether or not spirituous, vinous, or malt liquors shall be sold therein. By § 2563 (Russell's St., § 4062) it is provided that the election or elections provided for shall not be held in any county, city, town, district, or precinct oftener than once in every three years. Similar provisions are found in the local option statutes which have been adopted in many of the states, and the rule is that, when the law had been put into effect by the vote of the people of a certain territory, it can only be put out of force by the vote of the same territorial division which put it into effect. In 19 Am. & Eng. Encyc. of Law, 511, the rule is thus stated: 'When a statute provides that after the lapse of a specified time the question of revoking an order declaring prohibition to be in force by virtue of a prior adoption may be submitted, the resubmission must be to the voters of the entire territory embraced in the former election.' To same effect, see 23 Cyc. 105; 1 Woolen & Thornton on Intoxicating Liquors, § 549. This court adopted the rule in *Commonwealth* v. *King,* 86 Ky. 436, 6 S. W. 124, 9 Ky. Law Rep. 653, and that opinion was approved in *Lafferty* v. *Huffman,* 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203. Under the above authorities, when Logan county as a unit put the local option law in force, it remains in force until Logan county again votes on the question, . . ."

Thus, it is clear that, under the Kentucky statutes and the decision of the highest court of that state construing it, once a county votes "dry," no part of the county can thereafter have a separate local option election independent of the entire county.[1]

II. *When We Borrowed the Kentucky Statute, We Borrowed Also the Decisions of the Highest Court of That State, Already Rendered, Construing the Statute.* In the case of *Conn. General Life Ins. Co.* v. *Speer,* 185 Ark. 615, 48 S. W. 2d 553 (decided April 18, 1932), Chief Justice HART, speaking for this court, said: "It is the settled law of this state that, where the Legislature adopts the statute of another state, which has been construed by the courts of that state, it will be held that the interpretation was also adopted. *Neb. National Bank* v. *Walsh,* 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301; *Hanson* v. *Hodges,* 109 Ark. 479, 160 S. W. 392; *McIlroy* v. *Fugitt,* 182 Ark. 1017, 3 S. W. 2d 719, 73 A. L. R. 1223."

In the case of *State v. Ark. Brick & Mfg. Co.,* 98 Ark. 125, 135 S. W. 843, we said: "The case last cited comes with especial force, as it arose in Kentucky after her adoption of a code which was subsequently adopted in Arkansas. When one state adopts the law of another state, it is quite generally held that constructions of the adopted law go along with it."

The holding of the Arkansas Supreme Court on this point is the general holding. In 50 Am. Jur. 571, cases from many jurisdictions are cited to sustain this text: "In the case of a statute adopted from another jurisdiction, the Legislature may be presumed to have been familiar with decisions of the courts of the foreign jurisdiction having a bearing on the operation of the statute, and in the absence of an expression of legislative intention to the contrary, to have adopted the statute in view

[1] Persuasive—but not binding—is also the fact that the present law of Kentucky (Chap. 1 of the Acts of 1936 and Chap. 5 of the Acts of 1938) contains the provision as to local option elections, and the highest Kentucky court holds that a county-wide "dry" vote prevents a subsequent vote by any smaller unit thereof. *Murphy* v. *Menefee,* 288 Ky. 119, 155 S. W. 2d 753; *Neal* v. *Manning,* 289 Ky. 199, 158 S. W. 2d 129; *Nevels* v. *Commonwealth,* 290 Ky. 181, 160 S. W. 2d 351.

of the construction put upon it by the courts of such jurisdiction, and with the intention that the adopted statute should receive the same interpretation. It is therefore proper, in interpreting a statute adopted from another jurisdiction, to consider the interpretation of the act by the courts of the state or country from which it was adopted. Indeed, it is the well-settled general rule that when a statute is adopted from another state or country the judicial construction already placed on such statute by the highest courts of the jurisdiction from which it is taken is treated as incorporated therein so as to govern its interpretation."

So, it is clear that, under the Thorn Liquor Law of 1935, no part of Crawford county could have a local option election independent of the entire county, since the county voted "dry" in 1944.

III. *There Is Nothing in Initiated Act No. 1 of 1942 Which Repeals Those Parts of the Thorn Liquor Law of 1935 Here Involved.* This Initiated Act No. 1 of 1942 has been before this court in numerous cases, some of which were collected and listed in the recent case of *Tollett* v. *Knod, ante,* p. 781, 197 S. W. 2d 744, decided December 2, 1946.[2] A study of this Initiated Act No. 1 of 1942 shows that its purpose was to aid the cause of the "drys," and not to aid the "wets":

(a) It will be recalled that under the Thorn Liquor Law the sale of liquor was made legal in the entire state, and the burden of having local option elections was thus placed on the "drys." Under § 14147, Pope's Digest, 35 per cent of the qualified electors were required to sign the petition asking for the election; whereas, under § 1 of the Initiated Act No. 1 of 1942 the requirement was reduced to 15 per cent of the qualified electors.

(b) Section 2 of the Initiated Act No. 1 of 1942 says that, if a majority votes for the manufacture or sale of

[2] One of the cases involving this Initiated Act No. 1 of 1942 is *Van Gundy* v. *Caudle,* 206 Ark. 781, 177 S. W. 2d 740. In headnotes 1 and 3 in the official Arkansas Reports, the reporter has referred to this as "Initiated Act No. 1 of 1942 of Washington County." The words "of Washington County" should not have been included in the headnotes.

intoxicating liquors "within said designated territory," then it shall be lawful for the Commissioner of Revenues to continue to issue licenses "as if no election had been held"; but, if a majority votes against the manufacture or sale of intoxicating liquors, then it shall be unlawful for the Commissioner of Revenues to issue any licenses "for at least two years, and thereafter unless the prohibition shall be repealed by a majority vote . . ." The words "the prohibition" must certainly be construed to be the prohibition which had been voted "within said designated territory"; and, since it was a county-wide prohibition, it would necessarily follow that only a county-wide vote could repeal the prohibition. The words "within said designated territory" admit of no other construction.

As a further reason for our holding that Initiated Act No. 1 of 1942 does not repeal the Thorn Liquor Law on the point here at issue, we refer to the language of § 6 of the said Initiated Act No. 1, which says:

"It is hereby expressly declared that this act shall be cumulative to the liquor laws now in force in this state . . ."

IV. *The Question Here Presented Has Received the Attention of Courts of Other States, and the Weight of Authority, as Reflected by Decisions in Other States, Is in Accord With the Result in This Case.* In 33 C. J. 636, cases from many jurisdictions are cited to sustain this statement regarding local option elections: "Where the prohibitory law has been put in force in an entire county or other division of the state, it is generally held that a city or town therein cannot hold a separate election to repeal the law as to itself, that is, the election to repeal the law cannot be called for a territory forming only a part of that for which the first election was held."

And in 48 C. J. S. 222 many recent cases are cited to sustain this statement: ". . . it is generally held that a city or town cannot hold a separate election to repeal the law as to itself, that is, the election to repeal the law cannot be called for a territory, forming only a

part of that for which the first election was held, and, where such an election is ordered, the order is a nullity and the election void, notwithstanding the order has never been set aside."

And in 30 Am. Juris. 352, the rule is stated: "Likewise, when the unit has adopted prohibition, it remains in force until it is revoked by a vote of the adopting territory as a whole, unless the statute confers on some portion of the unit the right to revoke independently of the whole."

To summarize: There was a county-wide local option election in Crawford county on June 27, 1944, and a majority voted against the manufacture or sale of intoxicating liquors; and thereafter—even after the lapse of two years or any other period of time—no subdivision in Crawford county may ever have a vote on the liquor question independent of the entire county. So, we conclude that the Circuit Court correctly issued the writ of prohibition in the case at bar, and the judgment of the Circuit Court is in all things affirmed.

KITCHENS *v.* MACHEN.

4-8037 198 S. W. 2d 833

Opinion delivered January 13, 1947.

W. H. Kitchens, Jr., for appellant.

Jack Machen, for appellee.

GRIFFIN SMITH, Chief Justice. By complaint filed in May 1944 the State sought to confirm title to forty acres certified from Columbia County February 28, 1944, sale having been in November 1941 for 1940 taxes. Machen and others as coowners intervened. They alleged (a) that the Collector failed to give legal notice in respect of the sale; (b) the Collector did not attend "at the place of holding elections in the Township wherein said lands are located, for the purpose of making collections; and (c) that Machen applied to the Clerk for a certificate of redemption in October 1942 and tendered the amount required, but the Clerk erroneously certified that $18.98 was the sum necessary for redemption.

Relying, as he says, upon the Clerk's acts, and not having checked the records, Machen paid to the Treasurer the amount he thought was sufficient to effectuate a complete redemption; hence, say appellees, the 1940 forfeiture should be cancelled, and upon payment of all delinquencies title should be quieted in the interveners insofar as the transactions in question are involved.

It is also insisted that the Land Commissioner sold without advertising for bids—the property having been classified by the Land Use Committee as suitable for agricultural purposes. Act 331 of 1939. Value was fixed by the appraiser at $5 an acre.

Machen testified that after acquiring a half interest he applied to the Clerk for a redemption certificate. The land had forfeited in 1938; or, as the witness stated in open Court, "It forfeited in 1938 and in 1939 and again in 1940".[1] Insistence is that Machen relied upon the certificate to show what was due; or, in other words, since he sought to redeem, error he thinks the Clerk made should not be permitted to destroy his rights as they existed at that time.

There are two certificates in the record, printed on paper 8½ x 14 inches in size, with the Treasurer's receipt as a part of the form. Each is dated October 14, 1942,

[1] The land forfeited "unknown" as to ownership and was purchased by Lottie A. Davis. This must have been for the delinquency of 1938.

and they are alike with this exception: the first forfeiture is for 1938 taxes, while the second includes both 1938 and 1939. However, they are identical in that, following the dates given with the description, it is shown that assessments were for 1938 and 1939. After the first recital it is again stated (in typed figures) that " . . . the taxes for said year[s] 1938 and 1939 were as follows . . . "

When the land was bought by Lottie Davis it became subject to taxation, with the result that in 1940 there was an assessment, and when payment was not made in 1941 the Collector again sold, and the State became purchaser.

When it is considered that appellees did not intervene until September 1945, a question naturally arises as to relative negligence of owners upon the one hand and the Clerk upon the other. The Clerk's deed to the State was recorded in February 1944, and the State's deed to appellant October 10th of the same year. Although, as we have mentioned, the confirmation suit was filed May 1, 1944, appellees did not intervene until September 19, 1945. In the meantime, as presumptive owners, Machen and others knew that assessments for subsequent years had not been paid. The most casual investigation would have shown that 1940 taxes were delinquent. A mere reference to the redemption certificate held by the owners was sufficient.

There are cases holding that an attempt to pay taxes, made in good faith by owner or agent, and "frustrated by the act of the party entitled to perform", or through negligence of the official whose duty it is to render the service, entitles such person to do at a later date what he honestly thought was being done when the misleading official conduct occurred. See *Robertson* v. *Johnson,* 124 Ark. 405, 187 S. W. 439. There the landowner's agent attempted to pay levee taxes on the only realty owned by Johnson in Section 19. By mistake receipt was for payment on the south half instead of the north half. Analogous is *Forehand* v. *Higbee,* 133 Ark. 191, 202 S. W. 29. In that case the redemption

certificate properly described the land, but through error the Clerk failed to include a cost item of $6.[2]

Alleged carelessness of the Clerk was compared with negligence of the taxpayer's agent in *Gilley* v. *Southern Corporation,* 194 Ark. 1134, 110 S. W. 2d 509. The error complained of, says the opinion, was as obvious to Keeter (acting for Southern Corporation) as it was to the Clerk. The opinion says: "Keeter had been given a redemption certificate correctly describing only thirty acres of the land, the slightest examination of which would have disclosed the omission of the sixty-acre tract. . . . There was no mistake in the certificate issued; on the contrary, it was a correct and sufficient description of all the land which it described".

That is so in the case at bar. Of course Machen in testifying February 4, 1946—nearly four years after the certificate was procured—thought that he had applied to redeem, and he no doubt sincerely credits the Clerk with misunderstanding what he said, or with careless conduct. But the Clerk handed him typewritten and printed evidence of what took place. Not only that, but Machen went to the Treasurer's office and completed the redemption—redemption for the years the certificate authorized: 1938 and 1939. The records were available to this appellee; the transaction was open, obvious, and without deceit. In these circumstances it should not be held, as a matter of law, that the right to redeem for an additional year is an equitable phase of the conversation as Machen remembers it.

It is not contended that the Clerk or Treasurer, in executing the incomplete redemption, misled appellee Machen by any incorrect statement as to content or effect of the certificate, and the applicant was not ignorant of what is required for effectual redemption of delinquent property.

[2] Other cases cited by appellees are *Kinsworthy et al.* v. *Austin,* 23 Ark. 375; *Scroggin* v. *Ridling,* 92 Ark. 630, 121 S. W. 1053; *Gunn* v. *Thompson,* 70 Ark. 500, 69 S. W. 261; *Fleischer* v. *Wappanocca Outing Club,* 118 Ark. 287, 176 S. W. 312; *Gilley* v. *Southern Corporation,* 194 Ark. 1134, 110 S. W. 2d 509.

Allegations (a) and (b) have apparently been abandoned. What has been said disposes of the payment for 1938 and 1939, and the contention that 1940 taxes were to have been included.

Appellees insist that this Court "correctly stated the law" in *Plant* v. *Sanders,* citing 209 Ark. 108, 189 S. W. 2d 720. The quotation cited relates to effect of a sale made without appraisement by the Land Use Committee. On rehearing the opinion from which the excerpt is taken was withdrawn and another substituted where it was held that pending appraisal by the Committee the Land Commissioner was authorized to sell under Act 129 of 1929. This is an instance where the petition for a rehearing *was not* overruled.

In the case we are now considering evidence is sufficient to show that there was an appraisement; also that sale was made from entries on public records of the Land Commissioner's office, and to the highest bidder—Kitchens' offer having been the only one received, although the records were available to any interested person. Act 331 of 1939 does not designate the method of sale other than that appraised land shall go to the highest bidder. We are not authorized to supply what to us may appear to be deficiencies of detail.

The decree is reversed. The cause is remanded with directions to set aside the order cancelling the State's deed to appellant.

M. K. GOETZ BREWING COMPANY *v.* HILL.

4-8036 199 S. W. 2d 959

Opinion delivered January 13, 1947.

Rehearing denied February 17, 1947.

Granoff & Meyerhardt and *W. C. Rodgers,* for appellant.

Boyd Tackett and *George E. Steel,* for appellee.

RORINS, J. Appellant prosecutes this appeal from a judgment, responsive to trial jury's verdict in favor of appellee, rendered by the lower court in appellant's suit against appellee to recover $1,547.71 on an account for beer sold by appellant to a partnership composed of appellee and Agee Ball, doing business at Camden, Arkansas, under the firm name of Jax Sales Company.

The answer of appellee contained a general denial and a plea that the account was barred by the statute of limitations.

Appellant introduced in evidence a statement of its account showing sales to the Jax Sales Company. This account, which began on July 7, 1938, showed total debits for deliveries of beer to the partnership amounting to $7,397.45, and credits totalling $5,849.74. The last invoice was dated May 29, 1939, and after this date there were made certain payments, the last of which was on June 30, 1939. Appearing on the account, after this date, were certain credits for "empties" returned and for certain "allowances" on beer. The instant suit was filed on January 28, 1943; and the determining issue in the case is whether the credits entered on the account within the

period of three years before the institution of the suit reflected such payments as to toll the statute of limitations.

Witnesses for appellant testified that these credits were made with the knowledge and consent of appellee. Appellee testified that he sold his interest in the partnership to his partner Ball on March 15, 1939, and that Ball agreed to assume all obligations of the firm, including appellant's account. Appellee further testified that after he sold his interest he did not authorize or know of any of the credits appearing thereafter in the account. Ball corroborated appellee's version of the agreement between appellee and Ball, and he also testified that after July, 1939, at which time he went out of business, he did not return any "empties" to appellant and he denied knowledge of any credits on the account as of date later than July 1, 1939.

For reversal of the judgment below it is argued by appellant:

First, that the lower court erred in refusing to instruct the jury that proof of the account made a *prima facie* case for appellant.

Second, that payment is an affirmative defense and must be pleaded.

Third, that error was committed by the court in giving an instruction as to the nature of a mutual account.

Fourth, that the verdict is contrary to the testimony.

I.

While the lower court refused to instruct the jury that proof of the account made out a *prima facie* case for appellant, the first sentence in its instructions was: "Gentlemen, the account sued on shows total charges of $7,397.45 and total credits of $5,849.74, leaving a balance of $1,547.71." This, in reality, stated the matter more favorably to appellant than the requested instruction, and no prejudice resulted from its refusal.

II.

It is next urged that the lower court erred in refusing to instruct the jury that payment is an affirmative defense that must be pleaded. Since appellee did not claim that he had paid the debt sued on, and the only question as to payment involved was the question as to the credits or payments urged by appellant as tolling the statute of limitations, the refusal to give this instruction was not prejudicial to appellant.

III.

Appellant asked no instruction as to what constitutes a "mutual" account. Appellee asked several such instructions, only one of which was given. This instruction was not erroneous.

IV.

The burden is on a creditor, who asserts a payment to avoid the bar of limitation, to prove such a payment. *Armistead* v. *Brooke,* 18 Ark. 521; *Simpson* v. *Brown-Desnoyers Shoe Company,* 70 Ark. 598, 70 S. W. 305; *Clark* v. *Lesser,* 106 Ark. 207, 153 S. W. 112; *Taylor* v. *White,* 182 Ark. 433, 31 S. W. 2d 745; *Bank of Mulberry* v. *Sprague,* 185 Ark. 410, 47 S. W. 2d 601; *McNeill* v. *Rowland,* 198 Ark. 1094, 132 S. W. 2d 370. "When payments are relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence in addition to the endorsement that the payment was in fact made." *Slagle* v. *Box,* 124 Ark. 43, 186 S. W. 299.

There was a sharp conflict in the testimony as to the correctness of the credits for "empties" returned and for "allowances." The evidence given by appellee and his former partner was to the effect that these "empties" were not returned by them and that there was no basis for any of the credits entered on the account within three years before the suit was filed. While the testimony of two officials of appellant was contrary to this testimony adduced on behalf of appellee, the jury accepted the

version of appellee and his witness. The jury's finding on this disputed question of fact is conclusive.

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

FIELDS *v.* JARNAGIN.

4-8042 199 S. W. 2d 961

Opinion delivered January 20, 1947.

Wm. J. Kirby and *U. A. Gentry,* for appellant.

P. H. Dickerson, David L. Ford and *David S. Ford,* for appellee.

ED. F. MCFADDIN, Justice. The facts in this case are complicated. In 1939, appellee, Mrs. Minnie Jarnigan (a nonresident of Arkansas) was the owner of lot 10, block 105, Fitzgerald Addition to the City of Fort Smith, Arkansas, on which lot was located a house occupied by appellee's tenant. This lot was in the Sebastian County

Bridge District, and certain assessments of benefits (sometimes colloquially called "taxes") were unpaid on the lot. A foreclosure suit was instituted to collect these unpaid assessments; and on June 17, 1939, the Sebastian Chancery Court rendered a decree of foreclosure on this lot and many others. This was in suit No. 10668. At the commissioner's sale on September 11 to 13, 1939, pursuant to the said decree, this lot was sold to the Sebastian County Bridge District for $9.13, which was the total of the delinquent assessment, penalty and costs. The period of redemption allowed for property in this particular district is two years. See *Hopkins* v. *Fields,* 202 Ark. 890, 154 S. W. 2d 22; so the landowner (appellee) had until September 11, 1941, to effect a redemption.

On July 31, 1940, appellant, J. Fields, paid the collector of the bridge district the amount of $9.56, and received therefor a receipt, which reads as follows:

"No. 8502. Office of Collector of the Sebastian Bridge District, Fort Smith, Ark. July 31, 1940. Received of J. Fields $9.56. The same being the Annual Installment on account of Benefit Assessment against the following described real property in Sebastian Bridge District: Lot 10 Block 105 Fitzgerald Addition:

Attorney's fee	$2.00
Clerk's	1.50
Sheriff's	0.80
Commissioner's	2.00
Decree	0.08
Publishing	0.50
2 per cent. legal penalty for redeeming	0.45
	$7.33

DELINQUENT TAX AND PENALTY DETAIL

1937 tax	$1.88	$7.33
Penalty	0.38	2.23
	$2.26	$9.56

MABEL PAYNE PATTON, Collector."

Undoubtedly it was Fields' intention to purchase the property from the district (as will be subsequently mentioned), but—because it showed on its face a payment of 2 per cent. for redemption—this receipt was a legal redemption receipt. In pursuance with the tenor of this receipt, the collector of the district made an endorsement on the margin of the record where was recorded the decree of foreclosure on this lot in case No. 10668; which marginal endorsement reads: "Satisfied in full, August 6, 1940." We emphasize at the outset that this satisfaction of the decree of foreclosure on this lot is extremely important to our decision in this case.

As previously stated, it was Fields' intention to purchase the lot from the district; and in pursuance of this purpose, he received from the district (on September 17, 1940) a quitclaim deed describing this lot; and he placed the deed of record. On November 5, 1940, Fields obtained an order of the chancery court (in case No. 10668) approving the quitclaim deed from the district to Fields. Then, on December 6, 1940, Fields (without payment of any additional consideration) received a deed from the chancery commissioner who had made the sale to the district. This commisisoner's deed recited that the district had quitclaimed the lot to Fields, and therefore the commissioner made the deed to Fields as grantee instead of the district. This commissioner's deed was reported to the chancery court in case No. 10668, and approved by court order on December 6, 1940. We point out that both of these court orders were made (1) during the period of redemption; and (2) after the decree had been satisfield as to this lot; and (3) without any attempt to expunge or explain the record of satisfaction.

On December 15, 1942, appellee, Mrs. Jarnagin, filed suit No. 12549 in the Sebastian Chancery Court against the Sebastian County Bridge District and J. Fields, alleging that Mrs. Jarnagin was the owner of the lot, and that the 1939 foreclosure decree was void because it was rendered without notice to her, and that Fields' claims were void for various asserted reasons—one such reason

being the marginal satisfaction of the original decree. Mrs. Jarnagin made a tender of all assessments, penalties, costs, etc., and prayed that her title be quieted. After various pleadings and amendments, Mrs. Jarnagin, on March 27, 1946, took a voluntary nonsuit in her case without prejudice. Since the dismissal was a nonsuit, it is not *res judicata* here. See *Baughman* v. *Overton,* 183 Ark. 561, 37 S. W. 2d 81; *Jordon* v. *McCabe,* 209 Ark. 788, 192 S. W. 2d 538.

In the meantime, and on August 1, 1943, Fields began collecting the monthly rental from the tenant of the property. This present suit was filed in the Sebastian Chancery Court by Mrs. Jarnagin on April 4, 1946, against Fields and the tenant of the property. In her present complaint, the appellee alleged that Fields had redeemed the property on August 6, 1940, by the endorsement of satisfaction on the margin of the record as aforesaid, and that all subsequent orders of the Sebastian Chancery Court in the previously described foreclosure suit No. 10668 were therefore void. She made tender, and prayed that her title be quieted, and that Fields should reimburse her for all rents collected, less all amounts paid by him for redemption and taxes, etc.

The cause was heard on oral evidence; and the learned chancellor prepared a written opinion which has proved most helpful to this court. The chancery court granted Mrs. Jarnagin the relief prayed; and Fields has appealed, raising here these questions: (1) Fields' purchase from the district should be treated as an assignment of the certificate of purchase which the district should have—but never—received from the commissioner in chancery; citing *inter alia,* the following cases: *Duncan* v. *Board of Directors,* 206 Ark. 1130, 178 S. W. 2d 660; *Crow* v. *Security Mortgage Co.,* 176 Ark. 1130, 5 S. W. 2d 346; *Oliver* v. *Gann,* 183 Ark. 959, 39 S. W. 2d 521.

(2) This present suit is a collateral attack on the court orders made in case No. 10668 approving Fields' deeds; citing, *inter alia, State* v. *Wilson,* 181 Ark. 683, 27 S. W. 2d 106; *Black* v. *Burrell,* 175 Ark. 1138, 1 S. W. 2d

805; *Dowell* v. *Slaughter,* 185 Ark. 918, 50 S. W. 2d 572; *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10.

(3) The case at bar is not ruled by *Ferguson* v. *Fields,* 208 Ark. 839, 188 S. W. 2d 302.

Opinion

At the outset we agree with learned counsel for appellant that the case at bar is not ruled by *Ferguson* v. *Fields, supra.* In that case there was a dissent as to "collateral attack." Here we have a cornerstone fact which allows a collateral attack to be sustained. That fact is—as previously indicated—the endorsement of the satisfaction on the margin of the decree of foreclosure in case No. 10668. Whatever might have been Fields' intention in paying the district the $9.68 on July 31, 1940, the fact remains that he accepted a redemption certificate from the district; and, in keeping with that redemption certificate, the collector of the district on August 6, 1940, satisfied in full the decree of foreclosure on the face of the record insofar as the lot here concerned was involved. The entry of satisfaction was in accordance with § 8280, *et seq.,* Pope's Digest, which deals with the satisfaction of judgments and decrees; and § 8285 thereof says: "Satisfaction entered in accordance with the preceding provisions shall forever discharge and release the judgment or decree."

Thus, from August 6, 1940, the decree against this lot was discharged and released until the satisfaction should be set aside in a proper manner; and such satisfaction has never been set aside. In 34 C. J. 732, in discussing the fact of the entry of a satisfaction of judgment, many cases are cited to sustain these statements of the general rules:

"A satisfaction of a judgment, entered of record by the act of the parties, is *prima facie* evidence that the creditor has received payment of the amount of the judgment or its equivalent, and operates as an extinguishment of the debt and a bar to further proceedings which proceed upon the theory that the judgment remains a

subsisting obligation, except where the satisfaction was procured by fraud or without consideration or upon a condition which has not been performed, or was entered by the clerk without authority to do so. Thus, unless the case comes within such exceptions, no action lies upon a satisfied judgment, and no further execution can issue, even with the consent of the parties, until the satisfaction is vacated and a new execution awarded by an order of the court in which the judgment was rendered."

Our own cases of *Carter* v. *Adamson,* 21 Ark. 287, and *Lewis* v. *St. L. I. M. & S. R. Co.,* 107 Ark. 41, 154 S. W. 198, are among some of the cases cited to sustain the quoted statement. In *Kennedy* v. *Eder,* 79 Ind. App. 644, 139 N. E. 372, the Appellate Court of Indiana thus stated the question and decided the point:

"The first inquiry which therefore confronts us is as to the legal effect, if any, of the entry of satisfaction of said judgment; after such entry, and while the same remained of record, could execution be rightfully issued upon such 'satisfied' judgment?

"The rule which governs in such matters is thus stated in 23 Cyc. 1495: 'The payment and satisfaction of a judgment operate to extinguish it and to put an end to its validity for all purposes whatsoever, and also to extinguish the original debt or claim, except where the satisfaction was obtained wrongfully or fraudulently, in which case, on its being revoked or vacated, the judgment will again be in force.'

"Many authorities are cited as sustaining the rule thus announced, among which see *Boos* v. *Morgan et al.,* 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237; *Stout* v. *Vankirk,* 10 N. J. Eq. 78; *Cotter* v. *O'Connell,* 48 Iowa 552. In *Rochester, etc., Co.* v. *Devendorf,* 72 Hun. 622, 25 N. Y. Supp. 529, it was said: 'All of the plaintiff's claims arising out of the sale of the goods presumptively were merged in the judgment it obtained for the purchase price, and the judgment having been satisfied by the direction of the plaintiff without the intervention of an

order of the court, it was *prima facie* evidence that it was paid. . . . If for any reason the satisfaction of the judgment was voidable an order of the court vacating it should have been obtained. . . . Until set aside, the satisfaction of the judgment was *prima facie* evidence of a payment. Its legal effect is the extinguishment of the debt.' "

The satisfaction of the decree could have been set aside. *DeLoach Mill Mfg. Co.* v. *Little Rock Mill Co.,* 65 Ark. 467, 47 S. W. 118, 67 Am. St. Rep. 942; *Rutherford* v. *McDonnell,* 66 Ark. 448, 51 S. W. 1060; see, also, Freeman on Judgments, 5th Ed., § 1166; Black on Judgments, 2d Ed., § 1016; 31 Am. Juris. 382; and the annotation "Grounds for Vacation of Satisfaction of Judgment" in 115 Nebr. 260, 212 N. W. 431, 51 A. L. R. 243. The satisfaction could have been explained. See *State* v. *Martin,* 20 Ark. 629. But until the satisfaction is set aside, the effect of our statute—§ 8285, Pope's Digest—is to discharge and release the decree. The point here is that the satisfaction was never set aside, and remained on the face of the record as a bar to any further valid orders and proceedings until the satisfaction should be set aside. Fields cannot be heard to say that he did not know of any "redemption": because—as previously mentioned—the instrument he received from the district on July 31, 1940, showed on its face that he paid 2 per cent. for redemption.

So, all of the proceedings concerning this lot after August 6, 1940, were proceedings on a decree which showed on its face that it had been satisfied in full. Such further proceedings were therefore void by the face of the record. The situation in the case at bar is somewhat similar to that which existed in *Blanton* v. *Forrest City Mfg. Co.,* 138 Ark. 508, 212 S. W. 330. In that case a judgment attempting to decree specific performance showed on its face that the contract (which invoked the court's attempted exercise of jurisdiction) lacked mutuality. For that reason we held that the judgment was vulnerable on collateral attack. See, also, *Union Invest-*

ment Co. v. *Hunt,* 187 Ark. 357, 59 S. W. 2d 1039. In 31 Am. Juris. 200, in discussing when a collateral attack may be allowed on a judgment or order, it is stated:

"The rule permitting a collateral attack upon a judgment because of the absence of jurisdiction prevails where the want of jurisdiction appears upon the face of the record, or where the record affirmatively shows absence of conditions necessary to give the court jurisdiction to affect the rights of a party. In support of this rule, it has been declared that were the rule otherwise, it would never be possible to attack collaterally the judgment of a court of general jurisdiction, that the answer to the attack would always be that notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."

The proceedings in case No. 10668 after August 6, 1940, come within the rule that judgments and orders void on their face may be attacked collaterally. *Stahl* v. *Sibeck,* 183 Ark. 1143, 40 S. W. 2d 442; *Taylor* v. *O'Kane,* 185 Ark. 782, 49 S. W. 2d 400; *McClellan* v. *Stuckey,* 196 Ark. 816, 120 S. W. 2d 155; *Black* v. *Burrell,* 175 Ark. 1138, 1 S. W. 2d 805.

The foregoing holding necessarily results in an affirmance of the decree of the chancery court, without discussing any other questions. Fields' possession by virtue of an order void on its face, makes him chargeable with rents as a constructive trustee. Affirmed.

BARTLEY AND JONES *v.* STATE.

4429 199 S. W. 2d 965

Opinion delivered January 20, 1947.

Rehearing denied February 24, 1947.

Marcus Fietz, W. J. Stone and *J. L. Taylor,* for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Information filed by the prosecuting attorney in the circuit court of the Western District of Clay county charged appellants, Eugene Bartley and Harlan Jones, with murder in the first degree for unlawfully killing Fred Ivins on June 13, 1945, by "shooting, beating and drowning" him. J. B. Bartley, father of appellant, Eugene Bartley, was jointly informed against with appellants, but was granted a severance under § 3976 of Pope's Digest. The separate trial of appellants resulted in a verdict and judgment finding them guilty of murder in the second degree and fixing their punishment at seven years in the penitentiary from which is this appeal.

At the conclusion of all the testimony, appellants requested a directed verdict of not guilty, which was refused. The chief contention of appellants for reversal of the judgment is that the evidence is insufficient to sustain the verdict.

When viewed in the light most favorable to the State, the testimony discloses the following facts:

J. B. Bartley resided in the Delaplaine community in northwestern Greene county, while Fred Ivins lived across the county line in southwestern Clay county about 3 miles from Bartley. Appellant, Harlan Jones, who was 19 years old in 1945, worked for and made his home with J. B. Bartley and his son, Eugene Bartley, who was 17 years of age. Fred Ivins, J. B. Bartley and others had livestock running on the range in the lowlands of the vicinity in June, 1945, when backwater from an overflow of Black River covered these lands with the exception of a few scattered ridges.

On June 13, 1945, Fred Ivins and two neighbors, Dolph Crouch and Sig Young, were engaged in removing hogs from the high water area of southwestern Clay county. The hogs were caught and tied on the high ridges and removed by boats. Ivins was using his own boat and the other two were using Crouch's boat. They finished loading the hogs from "Turkey Pen Ridge" about 5 p. m. when they separated, Crouch and Young

going south in their boat, while deceased started north toward his farm on Dalton Island about three quarters of a mile away. They had been separated about 10 minutes, and Crouch and Young had proceeded a distance of about 100 yards, when they heard six or seven rifle shots. There were two series of shots which sounded differently. They heard a dog "holler" about the fourth or fifth shot.

After the shooting, they heard Ivins say, "What did you shoot me for?" and J. B. Bartley answered, "I thought you were a squirrel." Then Ivins said, "You get out from behind that tree and go on off and I will not bother you." Ivins then called, "Oh, Dolph," but Crouch did not answer, and Ivins said, "Oh, Dolph, come and get me." Young and Crouch both testified positively that the voices were those of Ivins and J. B. Bartley. They heard no other noises except the occasional squealing of the hogs. They heard no splashing of the water and did not hear Ivins threaten to kill anyone. They proceeded home with their load of hogs at Young's suggestion and did not respond to the call for assistance made by Ivins.

The following day the sheriff of Clay county questioned appellants who voluntarily told the sheriff that they had a fight with Ivins and where his body would be found. His best recollection was that appellants told him they killed Ivins.

A group of neighbors living in the vicinity went to the scene of the encounter on the morning of June 14th, where they found deceased's boat in which there were several hogs, a .22 caliber automatic rifle and a pair of boots belonging to deceased. Deceased's hat and boat paddle were floating within 15 or 20 feet of his boat. The sheriffs of Greene and Clay counties were summoned. The body of Ivins was recovered about 4:30 p. m. a short distance from the east edge of Turkey Pen Ridge in water variously estimated at seven to ten feet in depth. A large cypress log was found afloat and lodged in some brush and trees about 60 yards from the point where Ivins, Young and Crouch loaded their hogs.

The log was covered with moss and debris and there were indications that it had been trampled upon. A dead dog belonging to J. B. Bartley was found about 25 feet from the log.

The funeral director, who prepared the body for burial, testified that one bullet had entered the right buttocks about the center of the hip pocket area and had emerged at the upper juncture of the two pelvic bones. Another bullet had entered the back part of the right arm, emerged from the arm and reëntered above the ribs but below the skin. There were bruises about the face and throat. There was one bruise on the right side of the throat about the size of a man's thumb and three other dark marks on the left side of the throat. There was also a slight swelling about the center of the base of the skull. Blood was running from the nose, mouth and ears of deceased and parts of his body had been eaten by turtles or crawfish.

An open knife was found clenched in the right hand of deceased and his .22 caliber automatic rifle, which held 16 shells, had 12 shells in it. Dolph Crouch and Sig Young testified that Ivins had fired the gun twice during the day and they had not seen him reload it.

There was evidence of prior trouble and ill feeling between J. B. Bartley and deceased. In 1943, Ivins was convicted on an assault to kill charge for shooting J. B. Bartley. On June 12, 1945, the day before Ivins met his death, J. B. Bartley and a neighbor were driving their cattle on or near Ivins land when the latter ordered them off his property at the point of a gun and warned them to keep their cattle off his land.

Appellants testified in their own behalf and there were several discrepancies between their testimony at the trial and that given by them at a *habeas corpus* hearing held soon after the death of Ivins. According to their testimony, J. B. Bartley had sent them to look for hogs and they were in their boat near Turkey Pen Ridge when they were suddenly attacked by Ivins who was concealed

in some bushes about 20 feet away. Ivins first shot through the hat of appellant, Eugene Bartley, and then shoved his boat toward them firing the automatic rifle and cursing and threatening to kill them as he did so. They also testified that Eugene Bartley fired two shots from his .22 caliber rifle at Ivins as the latter advanced upon them. After forcing Eugene Bartley to place his gun and the shotgun of Harlan Jones in his boat, Ivins then shot Eugene in the hip and turned his gun to shoot Jones who grabbed Ivins' gun and threw it back in the boat as the three were thrown into the water when appellants' boat capsized. Appellants also testified that they were both attacked by Ivins in the struggle that ensued in the water in which Jones was struck in the chest with a knife by Ivins. After Jones had pushed Ivins away from him several times, the latter went down in the water and did not come up. They did not choke or beat Ivins, and J. B. Bartley was not with them.

It is earnestly insisted by appellants that their testimony to the effect that deceased was the aggressor and attacked, stabbed, and shot them is undisputed and that the testimony is therefore insufficient to support the verdict of the jury. The testimony on behalf of the State tends to show that deceased was shot in the arm and buttocks from the rear. This testimony is inconsistent with appellants' version of the difficulty and the jury would be warranted in concluding that Ivins could not have been shot from the rear if he was advancing toward appellants when Eugene Bartley shot at him twice, as appellants testified. Appellants' testimony was also inconsistent with that of Dolph Crouch and Sig Young as to who provoked the difficulty that resulted in Ivins' death, and the jury were warranted in believing that all the circumstances in evidence negatived the idea that deceased was the aggressor and met his death in an unlawful attack upon appellants. The jury being the exclusive judges of the credibility of the witnesses, and the weight to be given their testimony, were not required to accept the testimony of any witness as true. They might

accept one part of the testimony of any witness and reject another part.

We think the physical facts and circumstances surrounding the death of Ivins, the previous trouble between Ivins and J. B. Bartley, the testimony of Crouch and Young concerning the shots and statements heard by them, and the prior contradictory statements of appellants provided substantial evidence which was sufficient to support the verdict finding appellants guilty of murder in the second degree.

Appellants next insist that the court erred in giving instruction No. 8. This instruction is in the language of the statute (§ 2968, Pope's Digest) which reads as follows: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." It is sufficient to say that no objection was made to the giving of the instruction and no exceptions saved. An assignment of error is unavailable on appeal, even in capital cases, unless objection is made in the trial court. *Baine* v. *State,* 132 Ark. 416, 200 S. W. 999; *Sullivan* v. *State,* 161 Ark. 19, 257 S. W. 58; *Lesieurs* v. *State,* 170 Ark. 560, 280 S. W. 9.

On cross-examination of Eugene Bartley the State attempted to show that deceased was an expert marksman and Bartley was permitted to answer the question as to why deceased was unable to kill appellant with an automatic rifle when shooting at him from a distance of 20 feet or less as Bartley had testified. We have often held that the scope and extent of the cross-examination of a witness is largely discretionary with the trial court, and unless that discretion is abused, no reversible error is committed. *King* v. *State,* 106 Ark. 160, 152 S. W. 990; *Dawson* v. *State,* 121 Ark. 211, 180 S. W. 761; *Peterson* v. *Jackson,* 193 Ark. 880, 103 S. W. 2d 640. A general objection only was made to the question which tended to estab-

lish a contradiction of the defense offered by the appellant, Eugene Bartley, and to impeach the credibility of his testimony. We think there was no abuse of the trial court's discretion in overruling appellants' general objection to this question.

It is also insisted that whether deceased was an expert marksman was entirely a collateral matter and should have been concluded by the answer of appellant, Eugene Bartley, but that the state was erroneously permitted to recall the deceased's son and prove by him that deceased was an expert marksman. We have examined the record and find no objection made by appellants to this rebuttal testimony, and this assignment of error was therefore waived.

The State was permitted over the objection of appellants to introduce the trousers worn by deceased at the time of his death. The clothing of deceased had been in possession of the witness, John Crouch, who testified that they had to cut and rip the clothing from the body of deceased since rigor mortis had set in. He testified that a part of the front of the trousers had been removed since they had been taken from the body of deceased, and while the clothing was in Crouch's truck which was parked near the courthouse during the trial. The Kentucky court in *Mann* v. *Commonwealth,* 226 Ky. 296, 10 S. W. 2d 1094, held the clothing of deceased admissible in evidence under circumstances similar to those in the instant case. And, in *People* v. *Wallage,* 353 Ill. 95, 186 N. E. 540, it was held that the shirt of deceased from which a piece of cloth had been taken for experimental purposes was, nevertheless, admissible in evidence.

If it be asumed that the evidence was erroneously admitted because the garment was not in substantially the same condition as when removed from the deceased, we think no error prejudicial to appellants resulted therefrom. This court has repeatedly held that criminal cases will not be reversed for nonprejudicial errors. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *French* v. *State,* 187 Ark. 782, 62 S. W. 2d 976. In *Deatherage* v. *State,* 194

Ark. 513, 108 S. W. 2d 904, the clothing worn by deceased was introduced and the effect of its introduction was to show that the slayer was in close proximity to deceased at the time the fatal shots were fired. It was there held that it was harmless error to permit the introduction of the clothing without proper identification, since there was no dispute as to the location of the wounds and the distance from which the shots were fired. Apparently the only purpose for which the trousers were offered in evidence in the instant case was to show the location of the bullet hole in deceased's right buttocks. Several witnesses testified as to the location of this hole on the body of deceased and there was no dispute in the evidence on this point. Under these circumstances, the error, if any, in the admission of the trousers was harmless and does not call for a reversal of the case.

We have carefully examined the other alleged errors set out in appellants' motion for a new trial, most of which relate to the giving of instructions and admission of testimony to which no objection was offered at the trial. We find these assignments to be without merit. The trial court fully and fairly instructed the jury on reasonable doubt, credibility of witnesses and appellants' plea of self defense.

We find no prejudicial error, and the judgment is affirmed.

McGuffey *v.* McGuffey.

4-8044 199 S. W. 2d 969

Opinion delivered January 20, 1947.

Jay M. Rowland, for appellant.

Proctor & Snodgrass and *Scott Wood,* for appellee.

ROBINS, J. This is an appeal from an order of the lower court denying appellant any right to participate in the division of certain funds arising from the sale of property belonging to the estate of Charles D. McGuffey, Sr., deceased, held in the registry of the court. The suit was begun by the filing of a complaint by appellee, Gertrude McGuffey, claiming to be the widow of Charles D. McGuffey, Sr., deceased, and by appellees, Charles D. McGuffey, Jr., and Madeline Hoff, claiming to be his only heirs, against appellant, Nellie McGuffey. The pleadings in this suit do not appear in the transcript, but the decree is shown. From this decree it appears that the object of the suit was to partition certain property in Garland county, Arkansas, owned at his death by Charles D. McGuffey, Sr., and also to dispose of appellant's contention that she was the widow of the elder McGuffey and as such was entitled to a widow's share in his estate. The property was sold by agreement and the proceeds thereof deposited in the registry of the court pending determination of the issues.

The cause was heard by the lower court on May 23, 1945, and the decree rendered on that date recites this finding: "That Charles D. McGuffey, Sr., died intestate about the month of March, 1942; that the said Charles D. McGuffey, Sr., at the time of his decease, was the owner of the real property described in the complaint herein and he was occupying the said property as his homestead at the time of his decease; that the said Charles D. McGuffey left surviving him the plaintiff, Gertrude McGuf-

fey, as his widow, and the plaintiffs, Charles D. McGuffey, Jr., and Madeline Hoff, as his children and only heirs at law; that the property described in the complaint descended in equal parts to the plaintiffs, Charles D. McGuffey, Jr., and Madeline Hoff, as the only heirs at law of the said Charles D. McGuffey, Sr., subject to the dower and homestead rights of the plaintiff, Gertrude McGuffey . . .''; and the decree concludes thus: ''The court does, therefore, consider, order, adjudge and decree that the said Gertrude McGuffey shall receive out of the funds that are now in the hands of the Clerk of this court the full present value of her life estate, based on the mortality and value tables of old line standard life insurance companies, and figured on a six per cent. basis; and that the balance of the funds in the hands of the Clerk, after the payment to the said Gertrude McGuffey of her interest therein, shall be paid to the said Charles D. McGuffey, Jr., and Madeline Hoff in equal shares. The defendants except to the judgment and findings of the court herein and pray and are granted an appeal to the Supreme Court. The Clerk of this court is directed to hold all of the funds now in his hands for a period of six months from the date of this decree. The court retains control of this cause to finally determine the value of the interests of Gertrude McGuffey as herein decreed, also the value of the estate claimed by Nellie McGuffey, and to make final order of distribution, and such other orders as may be deemed necessary.''

Though she prayed and was granted an appeal from this decree, appellant failed to prosecute such appeal, so that the decree became conclusive as to all matters therein adjudicated.

Thereafter appellant filed what she designated as a ''Motion to Settle Property Rights,'' in which she set up that since the court had determined that she was not the widow of Charles D. McGuffey, deceased, appellant was entitled to ''property rights'' in the funds on deposit in the registry of the court, that she occupied the status of a surviving partner, and, as such, was entitled to $8,655

out of the funds on hand to repay her the amount she had advanced to the partnership. As shown by the decree a response to this motion was filed by appellees, but this response does not appear in the transcript.

The lower court heard this motion on March 13, 1946, on the depositions of appellant and two witnesses on her behalf and made a finding that the previous decree "finally and conclusively determines that the plaintiffs [appellees] were entitled to receive the funds" and decreed that the money in the registry of the court be paid over to appellees.

Appellant argues that the first decree in the instant proceedings is not conclusive as to her rights because the court retained control of the cause "to finally determine the value . . . of the estate claimed by Nellie McGuffey." Since the pleadings and testimony in the original suit are not brought up in the record before us we have no means of ascertaining just what property or "estate claimed by Nellie McGuffey" was thus referred to in the decree, but this language could not have had reference to the money in the registry of the court, because the court had in the preceding portion of the decree found that all this money belonged to the appellees and directed that it be paid to them. This amounted to a finding against any ownership by appellant of an interest in this fund, and was final and conclusive as to any claim asserted by her therein.

In the case of *Davie* v. *Davie,* 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170, Chief Justice COCKRILL quoted with approval this from the case of *Forgay* v. *Conrad,* 6 How. 201, 12 L. Ed. 404: " 'Where the decree decides the rights to the property in contest and directs it to be delivered up, or directs it to be sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final to that extent, although it may be necessary for a further decree to adjust the account between the parties.' "

We held in the case of *Branstetter* v. *Branstetter* (headnote 6), 130 Ark. 301, 197 S. W. 688: "Where a

judgment which finally settles the rights, title and interests of the parties under the issues raised by the pleadings, is in such form as to be complete and final, giving the right to have the same put into execution, the same is final and may be appealed from."

A decree directing that lands be partitioned by commissioners, who were directed also to report the value of permanent improvements and by whom made and the value of rents for certain years, and continuing the cause as to the rights of the parties in so far as rents, improvements and taxes were concerned was, in the case of *Simmons* v. *Turner,* 171 Ark. 96, 283 S. W. 47, held to be a final decree.

Other cases sustaining the same rule are: *Grinnell Company, Inc.,* v. *Brewer,* 153 Ark. 532, 240 S. W. 424; *Robertson* v. *Yarbrough,* 160 Ark. 223, 254 S. W. 492.

We conclude that the lower court properly determined that the first decree was decisive as to any claim by appellant as to the fund in the registry of the court; and therefore her remedy was by way of appeal from that decree, and not by way of the supplemental proceedings, which she elected to pursue.

The decree of the lower court is accordingly affirmed.

O'DELL *v.* YOUNG.

4-8045 199 S. W. 2d 971

Opinion delivered January 20, 1947.

Rehearing denied February 24, 1947.

Northcutt & Northcutt, for appellant.

P. C. Goodwin, for appellee.

McHaney, Justice. The 200 acre tract of land here in litigation forfeited and was sold to the State for the 1941 taxes due thereon. In due time, not having been redeemed, it was certified to the State. March 13, 1945, the State filed suit to confirm its title to this and other lands in Fulton county. Two weeks later the State sold and conveyed said tract to appellants. May 25, 1945, appellee intervened in the State's suit to confirm, alleging that he was the owner and that the tax forfeiture and sale to the State were void for certain reasons. He tendered $58.21 into court, which he alleged was the correct amount to redeem from said sale. He set up the conveyance by the State to appellants, asserted its invalidity, asked that the deed to them be canceled as a cloud on his title, and that title to said land be confirmed in him.

Appellants were made parties and answered with a general denial that appellee had not been seized or possessed of said lands for the past two years; that it had been lying out for the past fifteen years; and that appellee had not paid the taxes for the past five years. They prayed that the title to the lands be confirmed in them, but if not they be reimbursed in the sum of $321 paid by them to the State for their deed.

Trial resulted in a decree for appellee which canceled the State's deed to appellants and quieted and confirmed the title to said lands in appellee.

On this appeal, appellants do not contend that the court erred in holding the forfeiture and sale to the State were void. This holding appears to be conceded.

The only contention in the main brief seems to be that, since the State's deed was issued to them prior to appellee's intervention in the confirmation suit, he was neither in the actual nor constructive possession of said lands and could not prevail. They cite *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193, as controlling here, and emphasis is placed on what was there said of what is now § 8925 of Pope's Digest which provides, in effect, that no action for the recovery of lands forfeited for taxes "shall be maintained unless it appears that plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit," contemplates actual and not constructive possession.

We think appellants are misapplying the holding in that case. It is undisputed that appellee was the owner of the lands at the time of forfeiture and sale, but that they were not in his actual physical possession. It is not contended that appellants have had, for two years or any other time, the actual, physical possession thereof. We said in the recent case of *Johnson* v. *Johnson,* 207 Ark. 1015, 183 S. W. 2d 783: "Nor are said appellees entitled to the benefit of § 8925 of Pope's Digest, which prescribes a limitation of two years on actions to recover lands from purchasers at delinquent tax sales. This statute may only be invoked by a holder of a tax title who has held possession thereunder for two years. *Woolfolk* v. *Buckner,* 67 Ark. 411, 55 S. W. 168; *Towson* v. *Denson,* 74 Ark. 302, 86 S. W. 661; *Pride* v. *Gist,* 169 Ark. 1096, 277 S. W. 870."

In *Hixon* v. *Fulks, ante,* p. 204, 194 S. W. 2d 870, we held, to quote a headnote: "The only way the owner of land sold at a void tax sale can be disseized is by adverse possession by the purchaser for two years under his deed, and time is reckoned from the date of such deed." The statute, § 8925, contemplates actual possession by the tax purchaser and constructive possession follows the legal title. *Hixon* v. *Fulks, supra*; *Gates* v. *Kelsey,* 57 Ark. 523, 22 S. W. 162. See, also, *Nunn* v. *Mitchell, ante,*

p. 422, 196 S. W. 2d 576. It follows that appellants must fail. They have raised one or more questions in the reply brief not raised in their original brief which we cannot consider, since appellee has had no opportunity to reply to them.

Affirmed.

[redacted]

McCabe *v.* State.

4430 199 S. W. 2d 945

Opinion delivered January 20, 1947.

Rehearing denied February 17, 1947.

[redacted]

Harper & Harper, for appellant.

Guy E. Williams, Attorney General, and *Earl N. Williams,* Assistant Attorney General, for appellee.

Griffin Smith, Chief Justice. Jerry McCabe's association with Orville Wayne Sloan and Bill Mondier the night of March 18, 1946, and death of Gerald Bradley, were mentioned in appeals reviewed by this Court November 25th, and December 16th, 1946. See *Sloan* v. *State, ante,* p. 739, 197 S. W. 2d 757; *Mondier* v. *State, ante,* p. 933, 198 S. W. 2d 177. Sloan was sentenced to serve five years in the penitentiary for murder in the second degree. Mondier was convicted of manslaughter and given a prison sentence of five years. McCabe drew

the maximum sentence of twenty-one years for murder in the second degree and contends, in the main, that the judgment should be reversed because of erroneous admission of testimony.

On direct examination by the Prosecuting Attorney, Pink Shaw—Fort Smith Chief of Police—testified that he took Sloan, Mondier, and McCabe to a hospital where Gerald Bradley (who had been mortally wounded by knife cuts) was being treated. One of the first questions asked Shaw was whether McCabe "was in the hospital at the time you were showing these men to the boys?" There was an affirmative answer.

After having Shaw detail the identification made by Bradley, Prosecuting Attorney Barham asked, "What did [Bradley] say?" Answer: "He said that McCabe cut him; and he said that big boy in the crowd cut my brother, the soldier."

The subject then shifted to the kind of clothes the three defendants were wearing. While this inquiry was in progress one of McCabe's attorneys asked, "Was this [conversation held] while the defendant was there?" Answer, "No, sir." The Prosecuting Attorney then said, "He was in the room at the time [Bradley] made that statement?" Answer: "Not at the time: he was out in the hall."

There was a defense objection, coupled with a motion to exclude Shaw's testimony. The Court commented: "The statement made by Gerald Bradley at the hospital will be excluded from the jury. You will not consider it in passing on the guilt or innocence of the defendant."

Shaw was then cross examined, and at the conclusion (after having been asked about statements McCabe and Sloan were alleged to have made to him and his act in taking McCabe before Bradley in an attempt at verification) the witness was asked: "All you know about it is what you have told here?" Answer, "That is all I remember."

The defendant then moved for a mistrial as shown in the footnote.[1]

The record does not indicate want of good faith on the part of the Prosecuting Attorney; neither does it disclose a lack of diligence by attorneys for the defendant. Shaw had testified that the accused men were brought to the hospital where Bradley saw them and identified McCabe. As to conversations Shaw had with Bradley—some of the details of which were given—it was assumed by all when Shaw testified that McCabe was in the room where Bradley was dying, or so near as to create a presumption that what was said must have been overheard; and it may have been.

This is not a case where questionable testimony was offered, objected to, and admitted over the defendant's protests. Shaw had not in any sense intentionally deceived the Court regarding circumstances under which the Bradley statements were made; but, when the direct question was put whether McCabe was in the room when Bradley described the clothing worn by Sloan, then, seemingly, for the first time, it occurred to attorneys for the defendant that perhaps McCabe was not *at that time* in the room. Shaw answered very frankly that McCabe was not within the immediate enclosure, ". . . at that time, he was out in the hall."

We must assume that the Court, in instructing the jury to disregard Bradley's statements to Shaw, thought the evidence sufficient to create an inference that McCabe was not within hearing distance. But it must also be remembered that the Court did exactly what it was then asked to do—direct that the testimony be disregarded. There was no request by the defendant for a stronger admonition from the Court than that given; in

[1] "The defendant moves the Court to declare a mistrial . . . for the reason that [it] erred in permitting . . . Shaw . . . to testify, over the objections of the defendant, to statements purportedly made to him by the deceased, when such statements were not so made; and erred in merely perfunctorily admonishing the jury not to consider it, for such admonition cannot cure it; [and the Court erred] in admitting the testimony of . . . Shaw . . . as to the identification of the defendant by the deceased as the man [who] cut him".

fact, there was no immediate insistence other than that to which the Court explicitly responded. It is true that in making his motion for a mistrial the defendant mentioned the "merely perfunctory admonition to the jury"; but even then there was no motion that the so-called prejudicial nature of the evidence be explained to the triers of fact.

It would be difficult to direct attention to an instance where incompetent testimony got into the record in a more guileless manner than here. No one intended to procure an advantage; and it is equally clear that the courteous manner in which attorneys for the defendant met the issue discloses a conviction upon their part that the questions were asked in good faith, and answers accordingly given. In these circumstances the jury's common sense will be presumed. It is highly improbable that the verdict rested alone upon what Gerald Bradley said: that the jury convicted him without considering circumstances and facts within themselves sufficient. Neither may we consider Bradley's statement as a dying declaration, as no effort was made to have it introduced as such.

As has been said so often, prejudice or non-prejudice may result from the nature of testimony offered, the manner in which it is presented, the circumstances which give rise to questions or answers, the emphasis placed by witnesses upon collateral issues not intended by the trial judge to go before the jury, and incidental phases of many kinds.

What the Constitution guarantees, and a right Courts guard with meticulous care, is that every defendant against whom criminal accusations have been made is given "a fair and impartial trial." McCabe, Sloan, and Mondier, although jointly informed against, procured severance; and each was entitled to resulting benefits. But taking the reasonable man's viewpoint (assuming such exists) and considering the conditions under which objectionable testimony was brought out, we cannot believe that the jury regarded the identification by Shaw

as substantive evidence, or that its verdict turned upon this incident.

The extent to which a Judge must go in emphasis of admonition in order to erase memories from a jury's mind can never be determined with mathematical, scientific, or psychological precision: we can only take facts at their ordinary value, weigh them by known processes of reasoning, and from the result conclude that prejudice did, or it did not flow from the inadmissible matter. In the instant case we are unable to see how, as a matter of law, the appellant was prejudiced when the Court's emphatic direction was that Shaw's statement of what he heard Bradley say should not be regarded as evidence.

Other questions are raised, but we do not regard them as of reversible importance; hence the judgment is affirmed.

St. Louis-San Francisco Railway Company, Thompson, Trustee, *v.* Wacaster.

4-7971 199 S. W. 2d 948

Opinion delivered January 20, 1947.

Rehearing denied February 24, 1947.

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

Partain, Agee & Partain, for appellee.

HOLT, J. Appellee brought this suit against appellant, under the Federal Employers' Liability Act (45 U. S. C. A., § 51, *et seq.*) as amended August 11, 1939 (35 U. S. Statutes at L. 65, 45 U. S. C. A., § 51, *et seq.*), to compensate injuries received July 9, 1945, while employed by appellant in survey work near Hancock, Mo. It was alleged that while he was acting as a rodman and under the direct supervision of his foreman, Mr. Pratt, he was directed by his superior, Pratt, to raise the level rod

several feet above him (appellee) and in doing so came in contact with a power line wire charged with a heavy voltage of electricity. Negligence of appellee's superior, Pratt, appellant's employee, was alleged as the proximate cause of appellee's injury. Appellant interposed a general denial and specifically pleaded that appellee was guilty of contributory negligence such as would bar recovery, and at the time of his injury was not engaged in interstate commerce within the meaning of the act, *supra.*

From a judgment of $3,000, this appeal is prosecuted.

For reversal, appellant contends (1) that appellee, at the time of the injury, was not engaged in interstate commerce and therefore the Federal Employers' Liability Act would not apply; (2) that the evidence was not sufficient to support the verdict; (3) that the court erred in giving appellee's instructions 2 and 6; and (4) that the verdict was excessive.

We consider these assignments in their order.

(1)

Was appellee engaged in interstate commerce within the meaning of the amended act at the time of the injury? We think he was. The material facts were: In April, 1945, appellant maintained and operated one main line interstate railroad track at Hancock, Missouri. In order to avoid a steep grade around "Hancock Hill," and helper service for eastbound traffic, appellant began the construction of another track which left the old main line and extended 3.8 miles to a point where it again connected with the main line. This new track varied in its distances up to 1,000 feet from the old main line between the points where it connected with it. When completed, eastbound trains would use this new piece of track while westbound trains would continue to use the old main line. At the time of appellee's injury, the roadbed on this new track had not been completed. No rails had been laid and it had not been connected to the main line at either end. The survey was being made on a new right of way.

Appellee testified: "Q. You said you had been working 14 months? A. Yes, sir. Q. Generally, where did you work, what territory? A. I had worked on various jobs; at the time of this job we were working some two or three other places, as much as 40 miles from there where we had been making track raises. Q. During the period of your employment, during the 14 months, were you working generally on the main line or somewhere else? A. It was—I don't recall working off the main line; it was on or near it all the time. . . . Q. What would you be doing on these other jobs? A. Grading for track raises, staking for center lines, maybe just raising track, anything necessary for survey work needed on other jobs, maybe where there was a washout, we would go stake it out. Q. That would be on the main line of track? A. Yes, sir. Q. Repair and upkeep of main line track? A. Yes, sir. Q. How long immediately before you were hurt had it been since you were sent other places to do work on the main line track? A. Maybe two or three days before that we had been sent to places on the old track, four or six miles away or whatever, it didn't require all our time, say two or three days ahead of that, we had been over to Rolla, Missouri, where they had a slide, we were over there to survey for grade stakes."

Appellant's witness, Pratt, appellee's foreman, testified: "A. At that time, we had all the center stakes set; I'm not certain whether all the slope stakes had been set or not; we didn't always stay on one job long enough to complete it, we had to go back and forth to other jobs. Q. What per cent. of your time would be on the Hancock Hill job after May? A. Sixty to sixty-five per cent. of our time would be on the Hancock Hill job."

In these circumstances, on this issue we are unable to distinguish this case, in principle, from the recent case of *Missouri Pacific Railroad Company, Thompson, Trustee,* v. *Fisher,* 206 Ark. 705, 177 S. W. 2d 725, which we think is controlling. It will be observed that that case was decided long after the effective date of the 1939 amendment, *supra,* and we there held in effect that an

employee would come within the provisions of the amended act who, "while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations."

In the present case approximately 50 per cent. of appellee's time was spent on interstate operations.

We said in the Fisher case: "The question here presented is the effect of an amendment to this act, adopted August 11, 1939 (35 U. S. Stats. at L. 65, 45 U. S. C. A., § 51), which reads as follows: 'Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this act and of an act entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908), as the same has been or may hereafter be amended.'

"So far as we are advised, this amendment has never been construed by the Supreme Court of the United States, the final arbiter of all contentions concerning its meaning and effect; but it has been construed by several state courts of last resort, one of the most illuminating of which is that of *Southern Pac. Co.* v. *Industrial Commission,* 19 Cal. 2d 271, 120 Pac. 2d 880. There, a railroad employee was engaged in repairing engines in the railroad repair shop, some of which, when repaired, would be used in interstate commerce, and others not. While so employed, he sustained an injury which resulted in the loss of an eye, and he brought proceedings under the State Workmen's Compensation Law, to recover the compensation provided by that act. The Commission entered an award granting compensation, and the employer railroad company filed a petition to review that order. The decision of the case turned upon the con-

struction of the 1939 amendment to the Federal Employers' Liability Act, and the finding of the State Commission was reversed upon the ground that the amendment was applicable to the injured employee's cause of action, and had rendered inapplicable the State Compensation Law.

"The opinion so holding recites the report of the Judiciary Committee of the United States Senate, explaining the amendment and its purpose, and, in holding the report competent for that purpose, said: 'In *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, at p. 589, 42 S. Ct. 232, (237), 66 L. Ed. 371, 22 A. L. R. 1086, Chief Justice TAFT, speaking for the court, said: 'Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (16 A. L. R. 196).'

"This report recites the practical difficulty, in many cases, of determining whether the injured employee, at the time of his injury, was engaged in interstate or intrastate commerce, and states that: 'This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.' . . .

"Other state courts which have construed the 1939 amendment and whose opinions are in accord with those from which we have quoted are: *Piggue* v. *Baldwin,* 121 Pac. 2d 183, 154 Kan. 708; *Shanks* v. *Union Pacific R. R. Co.,* 127 Pac. 2d 431, 155 Kan. 584; *Louisville & N. R. Co.* v. *Potts,* 158 S. W. 2d 729, 178 Tenn. 425; *Thompson* v. *Industrial Commission,* 44 N. E. 2d 19, 380 Ill. 386, and *Wright* v. *New York Central R. R. Co.,* 263 App. Div. 461, 33 N. Y. S. 2d 531. In the last of these cases the headnote reads as follows: 'Under amendment to Fed-

eral Employers' Liability Act extending the coverage of the act to include any employee of a carrier any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, the New York State Industrial Board has no jurisdiction of a claim for disability compensation made by railroad employee who usually worked five days a week in intrastate commerce and one day a week in interstate commerce, notwithstanding he was engaged in intrastate commerce when injured. Federal Employers' Liability Act, § 1, *et seq.*; 45 U. S. C. A., § 51, *et seq.*' "

This case of *Wright* v. *New York Central R. R. Co.* reached the Supreme Court of the United States as the *Industrial Board of the State of New York, Petitioner,* v. *The New York Central Railroad Company,* employer, which denied certiorari, 317 U. S. 668, 63 S. Ct. 73, 87 L. Ed. 537.

(2)

Having concluded that the act applies, as we examine the evidence, we must keep before us the rule that assumption of risk on the part of appellee, (or "non-negligence" as it is sometimes called), is no defense to a recovery (*Tiller, Executor,* v. *Atlantic Coast Line Railroad Co.,* 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967), and the defense of contributory negligence of appellee will not bar recovery, but may only be considered in diminishing the amount of recovery (§ 53 of the act, *supra*). To sustain a recovery in a case of this nature, the burden is on the appellee to show, by substantial testimony, negligence on the part of appellant, or the employer, as the proximate cause of the injury.

On this issue, the testimony is to the following effect: Appellee, at the time of his injury, was 37 years old, an experienced civil engineer and was acting as a rodman. The survey party consisted of Pratt, appellee's foreman and instrument man in charge of the party, and three others. Center line stakes, right of way stakes, grade stakes and cross section stakes had been set in order to determine the amount of dirt used for fills on the right

of way. Elevations were being taken and Pratt was operating a level instrument to read and record the elevations on a level rod held by appellee at the designated stakes. The rod which appellee was using was seven feet long, but could be raised as high as 13.37 feet. A metal strip extended on the front side of the rod and it had numbers on a graduated scale. On July 9th, the work of reading levels had proceeded for approximately two hours when appellee moved to a stake with Pratt, about 250 feet north and east of him, on higher ground, with his instrument set for reading appellee's rod. A rural electrification high power line extended overhead east and west. When appellee took his position at the stake with his level rod, Pratt signalled to him to raise the rod three feet, but when this was done, the rod was still too low for Pratt to take a reading, and he directed appellee to "boot" the rod five feet, and while attempting to obey this order, the level rod came in contact with the high power wire overhead resulting in the injury complained of.

Appellee testified: "Q. How high was the rod before you raised it at all? A. It is 13 feet and three-tenths tall when it is sitting on the ground and let out the full length—when you boot the rod, say boot it five, that makes the rod 18 feet tall; you add the boot on to the length of the rod, the rod I later learned showed it was burned there, the enamel and metal was burned at 11 feet and five-tenths; there was the five-foot boot to add to it, which made the line strike it at 16 and five-tenths feet from the ground. . . . Q. In doing this work, did you know that that line was above you in a dangerous proximity, so that you might run into it? A. No, sir. Q. Was there anything to call your attention to it, that if you raised it as told, you would strike the line? A. No, sir, we had been working in the field on that morning; the only stake out of all of them to fall directly under this power line was this one. . . . Q. Were you looking up at the time he gave the order to raise it five feet? A. No, sir, I was looking directly ahead of me. Q. You were looking ahead of you? A. Yes, sir, and at the rod.

Q. And from that gauged the distance? A. Yes, that would strike me about here; I first raised it three feet which wasn't enough and was about to raise it five feet—I know the mark. Q. Did you comply with Mr. Pratt's direction about the movement of the rod? A. Yes, sir."

On cross-examination, appellee testified: " Q. Did Mr. Pratt direct you to go or did you go to this point because you knew that was the next point? A. I believe he said, 'Get another station,' yes, he directed us to go. . . . Q. Mr. Pratt was the foreman? A. Yes, sir, he was in charge. . . . He didn't warn me. . . . Q. You were in a better position to see that line than he was? A. No, sir. Q. You were closer to it? A. Yes, sir, but my position was closer, but my line of sight wasn't."

Again, on redirect examination, appellee testified: "Q. You illustrated a while ago what you do in using this rod according to the directions of the instrument man; when you are doing that and looking at this stake and raising it here on your body, would you be looking at those things or would you be looking 16 feet up in the air? A. Looking to the point that you were going to raise it to. Q. Did you determine yourself anything about how high or low to raise or depend upon directions given by the instrument man? A. I wouldn't know how much to raise it unless he told me. Q. You relied on what you were told? A. Usually the instrument man can judge pretty close, he can see about what he needs. Q. Do you ever exercise any judgment or do you depend on him? A. I depend wholly on him; I wouldn't have any idea."

Witness Pratt testified: "Q. While in your party he (appellee) was under your direct supervision, is that correct? A. Yes, sir. Q. Did you know this stake was directly under the power line? A. I didn't give it a thought. Q. As you were operating your instrument, could you see this power line? A. I don't know—if it was where I was looking, I might have seen it. Q. You knew it was there? A. Yes, sir. . . . Q. You didn't warn him of the fact that the wires were there? A. No, sir. . . . Q. Do you know what voltage of electricity

this wire carried? A. I asked after Mr. Wacaster was injured, I asked an employee of the electric company what the voltage was. Q. What was it? A. 6,900 volts. Q. Was that a naked wire or was it insulated? A. I would say it was a naked wire. Q. Then the rodman (appellee) when he got there with his rod, it was his duty to handle it, to lower it and boost it in accordance with your orders and directions? A. Yes, sir. . . . Q. You told him indirectly to put it in the wire; when a man is down there using the rod, do you give all signals verbally or by motion of your hands? A. Both. . . . Q. You are up there on a hill 250 feet away? A. Yes, sir. Q. He is listening to you? A. Yes, sir. Q. And watching for your signals? A. Yes, sir."

When all of the testimony in this case is considered in the light most favorable to appellee and the jury's verdict, as we must do, *Missouri Pacific Railroad Company, Thompson, Trustee,* v. *Davis,* 208 Ark. 86, 186 S. W. 2d 20, we are unable to say that there was no substantial evidence, as a matter of law, to support a recovery. Appellee, at the time of his injury, was acting under the control of, and obeying orders direct from his foreman, Pratt, or superior, and in these circumstances, when all of the facts are considered, we think it was for the jury to say whether Pratt, appellant's employee, was guilty of negligence in failing to observe the dangerous wire and to warn appellee, and whether this was the proximate cause of appellee's injury.

(3)

Appellant next argues that instructions 2 and 6, given at appellee's request, were erroneous. These instructions are somewhat lengthy and no useful purpose would be served in setting them out here. Since we have concluded that the Federal Employers' Liability Act applied and that a case was made for the jury on the question of appellant's negligence, we think the instructions properly declared the applicable law.

As to instruction No. 2, appellant says: "There was no evidence to prove that defendant was negligent by

ordering and directing appellee to raise the rod." In effect, the instruction correctly told the jury that it must find such negligence from a preponderance of the evidence before a verdict could be returned against appellant.

Appellant further argues that there was no evidence that the foreman, Pratt, in the exercise of ordinary care should have known how close the rod was to the power line, in giving the order and having it obeyed. The instruction correctly told the jury that it must so find, from a preponderance of the testimony, before appellant could be charged with negligence. We find no error.

As to instruction No. 6, appellant says that this instruction "submitted the case to the jury as to whether the plaintiff was engaged in interstate commerce at the time of his injury," that the instruction was abstract and that appellee was not working in interstate commerce and that his cause of action was governed by the Missouri Compensation Act.

Since, under the construction placed upon the Employers' Liability Act, and the amendment thereto, by the above cited authorities, appellee's work at the time of his injury was such as to bring him within the protection of the act, no prejudice could have resulted to the appellant from the action of the court in submitting this question to the jury.

(4)

Finally, appellant argues that the verdict was excessive. On the facts presented, we are unwilling to say that the verdict was excessive. Appellee was knocked to the ground by the force of the current, was unconscious for several minutes, and removed to a hospital. Appellee testified: "A. My left hand and finger were burned and the base of my thumb, also my neck and the lower right hand ribs were hurt. Q. Your left hand—what happened to it? A. It was burned along here and across here, this finger was burned. . . . Q. Did these injuries that you received cause you any pain? A. Yes, sir, they did and do yet. Q. Just where and to what extent? A. My

neck and the back of my neck in here and my shoulder and my back, I have been having rheumatism lately from that and even in my jaw; I hardly eat and I don't sleep and I am a lot more nervous. Q. Were you nervous before the accident? A. No, sir. Q. Have you been nervous since the accident? A. Yes, sir. . . . Q. Do you know whether it is rheumatism or not? A. No, sir, the soreness is there and in my neck, after this accident, my neck was swollen down this way and this way, down to my chin and it pulled my head and back too. A. I hardly ever sleep five hours any night through though I am working nine hours a day and tired."

Appellee's left hand remains scarred from the burns.

Dr. Crider, a witness for appellant, testified that following the accident, he examined appellee, that he found "what I consider a second degree burn on the fourth and fifth fingers of his left hand; he also, at the base of his thumb, had a second degree burn." He continued to treat him until the 27th of July. He found appellee to be nervous following the injury and "his knee reflexes seemed to be exaggerated." On cross-examination, he testified: "Q. Doctor, what, on examination, day before yesterday, does exaggerated reflexes indicate? A. It indicated to me nervousness. Q. And from your examination, you did find him to be nervous? A. Yes, sir."

At the time of appellee's injury, he was earning $188 per month, and went to work for the Arkansas State Highway Department September 1, 1945, at $175 per month.

On these facts which show that appellee received a severe shock sufficient to knock him unconscious, requiring hospitalization, rather severe burns, leaving scars, and a nervous condition apparent at the date of the trial, resulting from the injury, we cannot say that the verdict is excessive.

Finding no error, the judgment is affirmed.

HAYNIE *v.* DICUS.

4-8041 199 S. W. 2d 954

Opinion delivered January 13, 1947.

Rehearing denied February 24, 1947.

[redacted]

Madison K. Moran, for appellant.

E. H. Bostic, for appellee.

ROBINS, J. The Chancery Court held, in a suit begun by the father of appellant, Thomas Haynie, Jr., a minor, as his next friend, to cancel a contract by which appellee sold to said minor appellant and said appellant bought from appellee a "milk route" and truck for $700 and to recover back from appellee said purchase money, that the properties sold were "necessaries" for appellant, and refused the relief prayed.

The decree appealed from recites that the trial below was had on oral testimony adduced in open court. This testimony was not preserved by bill of exceptions or otherwise; and no testimony whatever appears in the record. The transcript before us consists only of the pleadings and the exhibits thereto, docket entries and the decree.

The question as to whether the properties sold to appellant were "necessaries" so as to make the sale a valid one, and the question as to whether the price paid by appellant was not more than reasonable value were both questions of fact; and, since we do not have before

us the testimony on which the lower court based its decision, it must be conclusively presumed by us that there was adequate testimony to justify the lower court's findings. *Hershy* v. *Berman,* 45 Ark. 309; *Carpenter* v. *Ellenbrook,* 58 Ark. 134, 23 S. W. 792; *Dierks Lumber & Coal Company* v. *Cunningham,* 81 Ark. 427, 99 S. W. 693; *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373; *Young* v. *Vincent,* 94 Ark. 115, 125 S. W. 658; *Hicks* v. *Hicks,* 122 Ark. 612, 184 S. W. 416; *Tedford* v. *Chick,* 114 Ark. 167, 169 S. W. 769; *London* v. *McGehee, Trustee,* 126 Ark. 469, 191 S. W. 10; *McConnell* v. *McCord,* 172 Ark. 21, 287 S. W. 757; *Alger* v. *Beasley,* 180 Ark. 46, 20 S. W. 2d 317; *Dent* v. *Adkisson,* 184 Ark. 869, 43 S. W. 2d 739; *McCarson* v. *Hankins,* 207 Ark. 294, 180 S. W. 2d 830.

The decree of the lower court is accordingly affirmed.

WILSON *v.* PINKERT.

4-8038 198 S. W. 2d 723

Opinion delivered January 20, 1947.

M. A. Matlock, for appellant.

Wm. J. Kirby, for appellee.

SMITH, J. Appellees, Pinkert and Makrue, filed suit against Claude A. Rankin, State Land Commissioner of the State of Arkansas, containing the following allegations: Plaintiffs are the owners of town lots in Pulaski county, which are described. These lots were forfeited to the State for the nonpayment of the general, state, county, city and school taxes due thereon, and in due course the forfeiture was certified to the State Land Commissioner. It was alleged that the defendant, Claude A. Rankin, as State Land Commissioner, "if not restrained and permanently enjoined by order of the court; would sell and convey the lots by deed of conveyance to third parties, thereby creating illegal clouds upon plaintiffs' title to the said lots." The sales were alleged to be void for the reason that a tax for city firemen and policemen was included in the total tax for which the lots were sold, this being an illegal tax, as was held in the case of *Adamson* v. *City of Little Rock,* 199 Ark. 435, 134 S. W. 2d 558.

It was prayed that "a temporary restraining order be issued restraining and enjoining the defendant, Claude A. Rankin, as State Land Commissioner of Arkansas, from selling or attempting to sell said real estate to third parties until a final hearing may be had hereon, and upon a final hearing hereof, that said restraining order be made permanent and for all other relief to which they may be entitled."

A temporary restraining order was issued as prayed.

A demurrer to the complaint was filed, which should have been sustained, for reasons presently to be stated.

An intervention was filed by W. P. Wilson, in which he alleged that he was the owner of the described lots. The plaintiffs did not allege how they acquired title, nor did the intervener. The intervener alleges that the described lots are not "listed in the office of the State Land Commissioner as state lands, subject to redemption or sale" and he prays the dissolution of the restraining order to the end that he may redeem the lots.

Plaintiffs filed an amendment to their complaint in which they asked the dissolution of the temporary restraining order and that "upon a final hearing that the sale and certification of said property to the State for the nonpayment of the general city, county and state taxes for the various years indicated hereinabove be set aside and canceled, and said forfeitures be declared to be void for the reasons set out hereinabove, and that the temporary restraining order issued herein by this court on November 15, 1943, be dissolved so that said property may be put back on the tax books without further delay, and for all other relief to which they may be entitled."

Upon these pleadings the court entered the decree from which is this appeal in which the court "finds that all of the lots and parcels of land described in the list attached to the complaint herein sold to the State of Arkansas for an illegal and excessive levy of taxes for the years set out in said list, said levy for each of said years including an illegal charge against said property for the Policemen's and Firemen's Pension Fund for the City of Little Rock, Arkansas; and the court further finds that because of such illegal and excessive levy the State lacked the power to sell said property, and the sale and certification thereof to the State for the nonpayment of the general city, county and state taxes wrongfully levied thereon for the years set out in the list attached to the complaint are void."

The temporary restraining order was dissolved and it was decreed that "the sale and certification to the State of Arkansas of the lots and parcels of land described in the list attached to the complaint herein for

the nonpayment of the general city, county and state taxes for the years set out in said list, be, and the same hereby are, canceled, set aside and held for naught, and that the State of Arkansas take no right, title or interest in and to said property by virtue of said void sale and certification."

The demurrer to the original complaint should have been sustained for the reason that the plaintiffs asked equitable relief, but do not offer to do equity. They have not offered to buy the lots or to redeem them from the State. They ask that the State's title, such as it is, be canceled without paying the taxes which were due on the lots. The parties cannot thus evade the payment of the taxes which were actually due.

Both the complaint and the intervention will be dismissed for the reason that each in effect is a suit against the State brought against its Land Commissioner. These are not suits to compel the Land Commissioner to perform a ministerial act. The intervener does offer to redeem, while the plaintiffs do not.

Certainly the plaintiff's suit is one against the State. They would cancel the State's title, such as it is, without paying or offering to pay such taxes as are due, and would deprive the State of the power to collect these taxes either through the sale of the land or the redemption thereof. In the case of *Page* v. *McKinley,* 196 Ark. 331, 118 S. W. 2d 235, we quoted and approved the following statement of the law taken from 57 C. J., p. 307, § 464, which reads as follows: "Accordingly it is well settled, as a general proposition, that, where a suit is brought against an officer or agency with relation to some matter in which defendant represents the State in action and liability, and the State, while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the State, will operate to control the action of the State or subject it to liability, the suit is in effect one against the State and cannot be maintained without its consent."

Here the Land Commissioner is the nominal party, but the State is the real party in interest against which relief is sought. The plaintiffs would cancel the State's title and escape the payment of such taxes as are due.

The decree will be reversed and the entire proceedings dismissed, with leave to the parties to determine in litigation between themselves which has the right to redeem the land pursuant to §§ 8666, 8667, and 8668, Pope's Digest.

RAMEY *v.* BASS.

4-8046 198 S. W. 2d 835

Opinion delivered January 20, 1947.

DuVal L. Purkins, Chas. F. Cole, Culbert L. Pearce and *Owen C. Pearce,* for appellant.

W. D. Murphy, Jr., for appellee.

HOLT, J. The only question presented by this appeal is whether, in a partition suit, the court should have allowed the attorney for plaintiffs an attorney's fee and taxed it as costs against all the interested parties to the action, as authorized under § 10531 of Pope's Digest. This section provides: "Hereafter in all suits in any of

the courts of this State for partition of lands when a judgment is rendered for partition, it shall be lawful for the court rendering such judgment or decree to allow a reasonable fee to the attorney bringing such suit, which attorney's fee shall be taxed as part of the costs in said cause, and shall 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. Act 386 of Acts of 1921, approved March 24, 1921."

The record reflects that George R. Case died intestate in 1934, leaving surviving his widow and ten children. Since his death, his widow and two sons have died, one son left a widow and the other, two children. At the time of his death, George R. Case owned certain real property. On behalf of some of these heirs, Mr. Culbert L. Pearce filed the original partition suit November 21, 1945, and on December 18, 1945, filed an amended and substituted complaint in which was alleged the interest of the various heirs to the property in question, that because of the diversity of interests and the nature of the property it could not be divided in kind without prejudice to the interests of all the owners, that it should be sold and the proceeds divided as the interest of the owners might appear, and there was a prayer accordingly, and "that plaintiffs have all other and proper equitable relief, both special and general."

At the time the original complaint was filed, attorney W. D. Murphy, Jr., a member of the Batesville bar, was designated and appointed attorney *ad litem* for certain nonresident defendants. He accepted the appointment, and following his appointment, Mr. Murphy was cooperative with plaintiffs' counsel, obtained the addresses of all resident and nonresident defendants, and obtained authority to enter their appearance as defendants in the partition suit.

On January 16, 1946, Mr. Murphy filed on behalf of defendants, "Entry of Appearance and Answer," the material parts of which were: "Comes, W. D. Murphy, Jr., attorney of record for all of the defendants in this

action, to-wit: (naming them) and enters the appearance of said defendants for all purposes, and expressly waives service of summons. Defendants admit that the interests of the various parties to this suit are as set out in page six of the amended complaint except for the following matters." He then alleges, in substance, that defendant Clara Case's interest in the property to be partitioned should be 14 of the 392 parts, that the interest of Robert C. Case, an interested party, an incompetent, should be 7 parts of the 392, and that the estate of George R. Case, deceased, should be 119 of the 392 parts, and his prayer was: "The defendants are not willing that the court tax as part of the court costs any attorney fee for Cul Pearce, attorney for the plaintiffs, in this action, and if motion is filed for said fee, defendants at this time ask that appropriate time be given for the response of the defendants to that motion."

On the same day this answer was filed, January 16, 1946, a decree was entered and filed in the partition suit in which Clara Case was allowed 14 of the 392 parts, the estate of George R. Case, 119 of the 392 parts, and Robert C. Case 7 of the 392 parts. Thereafter, in accordance with the terms of the decree, the commissioner, appointed to make the sale of the property, filed his report February 27, 1946, and on the same date, there was an order of the court approving the sale as made. The property sold for $9,350. The commissioner was ordered to make distribution of $8,353.52 under the terms of the decree (quoting from the decree): "And it appears that Cul. L. Pearce, attorney for the plaintiffs, has filed petition for the allowance of a fee to be paid out of the proceeds of the sale of said real property as part of the costs, under authority of § 10531 of Pope's Digest of the Statutes of Arkansas and that the defendants have filed a response, objecting to such allowance. It is therefore ordered that said commissioner shall set aside and hold the sum of $996.48 of said fund, until otherwise ordered by the court, and shall distribute the sum of $8,353.52, or $21.31 per part . . ."

February 25, 1946, appellants' attorney, Mr. Pearce, filed petition for attorney's fee, to be taxed as costs, and thereafter on May 15, 1946, the court denied the petition and dismissed same for want of equity. There were no findings of fact or conclusion of law. From this decree, this appeal is prosecuted.

As indicated, appellants' claim for attorney's fee is based upon the provisions of the above section which was enacted by the Legislature in 1921.

Appellees earnestly contend that the decree of the lower court should be upheld on the authority of *Lewis* v. *Crawford,* 175 Ark. 1012, 1 S. W. 2d 26, decided by this court in 1928. We cannot agree.

After a careful review of the record presented, we think the instant case is clearly distinguishable from the Lewis-Crawford case. In that case, this court announced with approval the general rule (30 Cyc. 299) as follows: "The general principle underlying the statutes authorizing allowances to be made in partition suits for the services of attorneys is that, irrespective of the person in fact employing the attorney, his services were necessary to the conduct of the proceeding and therefore were beneficial to all the parties; and, so far as they were such, are equitably chargeable against all. This is ordinarily true of the services of plaintiff's attorney, who, in bringing the action and in his antecedent investigations and in every step he takes, unless it be in the trial of contested issues as to title, works for the benefit of all the parties. If a defendant has, or in good faith believes he has, a good and substantial defense to the action, and employs an attorney to present it, such defendant is not answerable for any part of the fees of complainant's attorney."

The court further said in that opinion: "We are of the opinion that under a proper construction of the act the court was not warranted in requiring the defendants in an adversary proceeding, who were represented by their own counsel, to pay the fee of the attorney bringing

the suit for partition as costs of the litigation on the rendition of judgment for partition. . . . It might not be so in all adversary proceedings for partition, the court having the discretion to determine in which it should be done, but it is only in amicable suits for partition, or when the services of plaintiff's solicitor result in benefit to the whole subject-matter of the litigation, or is accepted and acquiesced in by the other parties, that the court can, as a matter of course, tax the reasonable attorney's fee of the party bringing the suit as costs in the case, to be paid *pro rata* as the other costs are paid, according to the respective interests of the parties to the suit in the lands partitioned."

As we interpret that opinion, it means that in a partition suit, where the proceedings are not adversary, but friendly and amicable, a reasonable attorney's fee for plaintiff's attorney should be assessed and taxed by the court as costs against all the parties, proportionate to the interest of each.

In the present case which comes here for trial *de novo,* defendants made no defense whatever to the partition suit, in fact, the effect of their actions was to admit a partition of the property involved was necessary and proper. The partition suit was in no sense an adversary proceeding but purely amicable. The answer of appellees, defendants below, was in effect but formal and set up no defense to the suit. Its primary purpose and effect was to contest the right of plaintiffs' attorney to have a fee taxed as costs. That this was its purpose seems apparent from the following statement from appellees' brief:

"The appellants mention that defendant's answer did not set up facts which the appellants claim would have made the suit an adversary proceeding, but there was no need to do that at that time because the mistakes complained of had been brought to the attention of the counsel for appellants and all that had been complied with," and in a stipulation filed by the parties: "It is agreed that Myrtle Weigart, one of the plaintiffs, if

called as a witness, would testify that in a conversation in Batesville, about December 10, 1945, defendant Robert Ella Case told her that 'we (meaning herself and other defendants) can't keep the property from selling, but we have hired a lawyer to file answer and keep your attorney from getting a fee out of our part of the money the property brings.' "

While the answer called attention to alleged errors in the amended complaint as to the amount of the interest of three of the defendants, these errors were promptly and agreeably corrected on the same day and the decree entered.

In 40 American Jurisprudence, p. 83, under subject "Partition," § 95, we find this language: "The plaintiff has been held entitled to the allowance and apportionment of the entire fee for services in the partition suit, notwithstanding the defendant called attention to omissions and inaccuracies, which were corrected, etc."

Insofar as the answer raises the issue of, and questions the attorneys' fee, this alone would not be sufficient to make the partition an adversary one. In *Johnson* v. *Emerick* (1905), 74 Neb. 303, 104 N. W. 169, 12 Ann. Cas. 851 (73 A. L. R. 26), the court there said: "No adverse action was ever taken in the case until the plaintiffs requested the payment of counsel's fees out of the proceeds of the sale of the premises. When that application was made, the proceedings at once became adversary on the question of the payment of attorneys' fees alone; but a contest over the payment of attorneys' fees would not of itself be sufficient to make the partition proceedings adversary."

We think on the record here that the services of plaintiffs' attorney resulted to the benefit of all the parties interested in the partition suit in question, that such services were accepted by, and acquiesced in, by all of them, that the suit was of a friendly and amicable nature and not adversary and therefore, that appellants' attorney was entitled to a reasonable fee which should have

been taxed as costs by the court below, for the able and efficient services rendered.

Accordingly, the decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

[redacted]